A FRAMEWORK FOR SEDIMENT MANAGEMENT IN THE NEW JERSEY ATLANTIC BACK BAYS Sediment Management In NJ Atlantic Back Bays State And Federal Regulations

Regional sediment management (RSM) refers to the use of littoral, estuarine, and riverine sediment resources in an environmentally beneficial and economical manner. RSM strives to maintain or enhance the natural exchange of sediment within the boundaries of the physical system.

STATE

What do we see as the main regulations for regional sediment management, and which ones directly impact our ability to implement a plan. What needs to be changed?

The New Jersey Department of Environmental Protection (NJDEP) Division of Land Resource Protection (DLRP) implements the Coastal Zone Management (CZM) rules which have historically required the analysis/ consideration of natural and hybrid shoreline stabilization approaches, demonstrating that this alternative is not practicable/feasible prior to consideration of the use of structural shore protection. However, in the past, if there was a proposal for the installation of a hybrid shoreline stabilization or habitat restoration project below the Mean High Water line (MHW), approval authorizations for these projects were difficult and mitigation for impacts would have been required. In 2013, NJDEP passed an Emergency Rule (ER) after Superstorm Sandy that, among other rule revisions, permanently revised and expanded a Coastal

General Permit for habitat restoration to also allow for the consideration of Living Shoreline projects. Under this ER, a Living Shoreline rule was also added to the Coastal Zone Management (CZM) rules for Coastal Area Facilities Review Act (CAFRA) and Waterfront Development Individual Permit reviews. These rule revisions allowed the authorization of these types of projects below MHW, not considering as an impact but rather considering the resulting benefits/ecological uplift without the need for mitigation.

Many of the projects that have received NJDEP permits since this 2013 rule change have involved material placement on marshes to elevate the marsh platform for resiliency/habitat creation, and for nearshore rock sill/wave break projects to allow sediment accretion in the intertidal zone. Additionally, the ER has also supported and allowed the authorization of other, more innovative types of projects that comply with our regulations.

One example of a NJDEP permit that was authorized under the current regulations was the nearshore strategic placement of sediment, without containment, acting as

a barrier wave/break and an offshore sediment source designed to allow the sediment to naturally be transported to the marsh edge and platform through hydrodynamic forces/tidal action. The Department also authorized a project that placed dredged material in an area adjacent to a shallow area adjacent to a bay island that was under the threat of subsidence from increased sea level rise. The intent of this project was to create an adjacent shallow area as a migration zone for important estuarine resources. It is possible that without the construction of this adjacent shallow area, the adjacent area would convert to deeper water habitat with sea level rise, and the existing functions would be lost. With the strategic placement of sediment to create a shallow water refuge for the migration of submerged aquatic vegetation and shellfish habitat, and invertebrate populations, these areas will be more important as habitats convert to continue to provide the valuable estuarine services for the sustenance of juvenile fish populations and for migratory bird habitat. Therefore, the current CZM rules support projects that are considered a component of regional sediment management (RSM) as long as they comply with/meet the requirements of the applicable rules.

Nature Based Solution/Living Shoreline Permitting

Coastal General Permit #24

The majority of nature based solution/living shoreline projects in New Jersey are applicable for review under the Coastal General Permit #24 (GP24) with the required demonstration of requirements listed with the CZM rules, specifically listed in N.J.A.C. 7:7-6.24. Authorizations under this Coastal General Permit cover statutory/regulatory jurisdiction above and below the Mean High Water line (MHW) and within wetlands regulated under the Freshwater Wetlands Protection Act and Coastal Wetlands Act of 1970. A license from the NJDEP Bureau of Tidelands Management is also necessary for these projects for the area below the MHWL for the occupation of State owned submerged lands. The current General Permit has different requirements for habitat creation, restoration, and enhancement projects and for living shoreline projects. For example, the rules for the authorization of a nearshore Living Shoreline project state that the placement of any fill associated with the project shall not exceed the footprint of the shoreline as it appears on the applicable Tidelands Map, with the exception of a structural component of the project that is intended to reduce wave energy. If the goal of the project is habitat creation, the placement of fill beyond this line for projects could be considered as long as it can be demonstrated that the project has been minimized/is necessary to meet the goal of the project and that the proposed work would result in a significant ecological uplift among meeting the other requirements of the GP24.

Under the GP, the applicant must demonstrate that the project will improve/maintain the values and functions of the ecosystem and that it will have a reasonable likelihood of success. There are some instances that the loss of the special area in an area for the strategic placement of sediment for the creation of a new special area can actually be beneficial to the resource as a whole. A "special area" is defined in the CZM rules as areas that are so naturally valuable, important for human use, hazardous, sensitive to impact or particular in their planning requirements, as to merit focused attention and special management rules (N.J.A.C. 7:7-9.1(a)). The Department may approve a reduction in the size of a particular special area in order to allow an increase in a different special area if the Department determines that the activities causing the reduction are sufficiently environmentally beneficial to outweigh the negative environmental effects of the reduction.

CAFRA/Waterfront Development Individual Permit/Federal Consistency

If the project does not qualify for the GP requirements, a CAFRA Individual Permit and a Waterfront Development Individual Permit (and possibly a Coastal Wetland permit) may be necessary. If a proposed project is to be conducted by a Federal Agency or has direct Federal funding, a Federal Consistency can also be submitted for these projects. The Federal Consistency application requirements are similar to what is required under the CAFRA/Waterfront Individual Permit. The below is a list of CZM Regulations that a project may have to comply with depending on the specific proposal during this permit review for a Nature Based Solution/Living Shoreline Permit review (compliance with additional rules may be required depending on proposed activity). Compliance with the requirements of these rules is critical to the NJDEP review of proposed projects, with specific emphasis on the requirement for ecological uplift to justify the conversion of existing habitat. A license from the NJDEP Bureau of Tidelands Management is also necessary in most situations for these projects for the area below the MHWL for the occupation of State owned submerged lands.

7:7-9.2 Shellfish Habitat

7:7-9.5 Finfish Migratory Pathways

7:7-9.6 Submerged Vegetation Habitat

- 7:7-9.15 Intertidal and Subtidal Shallows
- 7:7-9.27 Wetlands

7:7-9.34 Historic and Archaeological Resources

7:7-9.36 Endangered or Threatened Wildlife or Plant Species Habitats

7:7-9.37 Critical Wildlife Habitat

7:7-12.2 Shellfish Aquaculture (work within shellfish leases)

7:7-12.6 Maintenance Dredging

7:7-12.7 New Dredging

7:7-12.8 Environmental Dredging

7:7-12.9 Dredged Material Disposal (does not include the beneficial use of dredged material for the purposes of habitat creation, restoration or enhancement, artificial reef construction or the establishment of living shorelines)

7:7-12.11 Filling

(d) Filling to establish a living shoreline to protect, restore or enhance a habitat area is conditionally acceptable provided the living shoreline complies with NJAC 7:7-12.23 (no mitigation required)

7:7-12.23 Living Shorelines

7:7-15.11 Coastal Engineering

7:7-16.2 Marine Fish and Fisheries

7:7-16.3 Water Quality

7:7-16.9 Public Access

Information Required/Recommended for Permit Application Submittal

The Coastal Zone Management General Permit No. 24 checklist provides an itemized list of submissions required under the rules to be included in the application: <u>https://dep.nj.gov/wp-content/uploads/wlm/downloads/caf/cp_gp24.pdf</u>. Per the checklist, the application can be broken down into the following sections:

- Application Supporting Documentation (i.e. property owner certification form, public notices, site photos, etc.) – Items 1, 2, 4
- 2. Site Plans Item 3
- 3. Environmental Report/Compliance Statement Item 5

Items 5i and 5iii of the checklist requires that an environmental report/compliance statement be prepared to that includes information/materials demonstrating how the project satisfies the GP24 requirements and a description of the site characteristics and the location of all proposed regulated activities, potential impacts from the construction process, and from the operation of the development after completion.

List of Recommended Information to Submit to Support Project Description and Objectives

Existing Conditions

- Describe existing conditions (existing slope/nearshore and onshore depth, Special Areas (as defined at NJAC 7:7-9), habitat types.
- Define the problem onsite. For example, is the area eroding -what is the erosional history of the site? Is the marsh degraded, etc.
- Provide a hydrodynamic assessment of the site (i.e., fetch, currents, wakes, wave velocity, erosion rate) – complexity of this assessment would be appropriate to the design level of the project.
- Provide bio-benchmark data at the site or an adjacent site if more appropriate (similar vegetation/salinity).
- Provide an assessment of existing sediment dynamics/availability (how is sediment moving in the system, how is it being removed or added to the coastal system)

Design

- Please describe the overall goal of the project/specific design of the project including proposed habitat types/size.
- How will the project maintain/enhance ecosystem functions/services and that the project has a reasonable likelihood of success; demonstrate that disturbance to special areas will be minimized and/or be environmentally beneficial to outweigh the negative effects of the proposed decrease in special areas? Must include quantification of impacts to regulated areas and narrative to justify the proposed level of design. Discuss how potential end effect issues are being minimized/abated and how any issues with constructability are being addressed
- Description of proposed materials including specifications, orientation/configuration, length of project, vegetation species

- For dredged material projects: location of source material, volume, material composition (sand/silt/clay), target placement elevations, consolidation rate.
 Discussion of dredged material composition (sand/silt percentage, sediment sampling and analysis results). Where will the material be placed and to what elevations?
- How is the project designed considering existing surficial sediments, scour considerations, how will it ensure adequate tidal flushing?
- What Tidal datum is being utilized in the design? NOAA currently utilizes the 1983-2001 National Tidal Datum Epoch (NTDE). For design, consider using site-specific measurements and compare the offset. How much has sea level risen since the datum was measured and add that to the current measurements.
- Proposed Construction Techniques/Considerations: What machinery and methods/construction techniques will be used to place the material? Anticipated timing of the project. Location of the staging areas & describe how the site will be accessed (both land and water based).
- Monitoring/Adaptive Management

Additional Support Documents/Guidance

In 2015, NJDEP collaborated with the Stevens Institute of Technology to develop engineering guidelines for the design of these types of projects. These guidelines have recently been updated in 2024 based on emerging techniques/practices for these innovative projects. NJDEP has also collaborated with Stevens Institute of Technology to develop a report entitled "Recommendations for Determining the Appropriate Level of Assessment for Living Shorelines Projects" which is anticipated to be finalized by the end of 2024.

As always, during the preliminary design phase of the project, it is recommended that the applicant meet with DLRP and other NJDEP commenting agencies to present and discuss the proposed project. Guidance can be provided to the applicant that can support the future application and also make the applicant aware of any potential timing restrictions or issues that may affect the construction schedule that is being considered.

Consideration of Potential Future Rule Changes

While sediment is constantly moving through tidal systems, the NJDEP has recognized that the concept of "keeping sediment in the system" is important. Much of the material that has eroded from certain areas is typically not far from the source in the adjacent waterway/navigation channel. When material is removed from this "system" and potentially utilized elsewhere (upland placement), it leaves less available sediment that the adjacent wetlands and submerged tidal flats can use to sustain/gain elevation. The practice of regional sediment management can be considered important to maintain or enhance the natural exchange of sediment resources within the boundaries of a system in an environmentally beneficial manner. In recognition of this, NJDEP is considering additional rule changes which would require the consideration of the beneficial use of material within the system prior to the placement of the material into an upland Confined Disposal Facility (CDF).

NJDEP is considering proposing additional revisions to the CZM rules to provide more clarification that Nature Based Solution projects/innovative strategic material placement projects are supported by/in compliance with and can be authorized by the CZM rules. NJDEP is considering a rule revision that would consider providing some leniency for this historic construction line (Tidelands line) as some have stated that it can be difficult to build to this historic line when considering the current system dynamics. A potential definition of nature based solutions projects, for which living shorelines are a subset of, are being considered. Some other potential rule revisions being considered for RSM projects could be the prohibition of placement within a shellfish lease area. However, current draft rule changes are considering incorporating language regarding an accommodation for certain limited situations where the nature-based solution is deemed necessary by the Department to protect the public interest or to protect upland structure or resources, the Department, in consultation with the New Jersey Shellfisheries Council, may modify the boundaries of shellfish lease to accommodate a project. However, this would be a case-by-case basis and would be a stringent review by the Department.

FEDERAL

What do we see as the main regulations for regional sediment management, and which ones directly impact our ability to implement a plan. What needs to be changed?

The US Army Corps of Engineers (USACE) issues permits for sediment management projects that meet NEPA and the 404(b)(1) Guidelines and the federal Public Interest Review. The Corps Regulatory Program is neither a proponent nor opponent of any permit proposal. This comes from the regulations in 33 CFR 320(a)(4) and creates the philosophy that the Corps Regulatory Program strives to be the impartial reviewer for any proposal that comes its way.

Permit applicants must provide a clear purpose and need for their project; provide satisfactory responses to public notice comments; provide an alternatives analysis that meets NEPA and the 404(b)(1) Guidelines; complies with the 404(b)(1) Guidelines and federal Public Interest Review; addresses all forms of mitigation; complies with other laws, policies, and requirements (like ESA, EFH, 106, etc.); and other issues. Appendix A is a USACE-NAP Regulatory Program template decision document that lists the considerations for permit issuance.

The Framework for Sediment Management in the New Jersey Atlantic Back Bays should be robust for individual permit applicants to answer the questions raised within the guidelines, specifically purpose and need; 404(b) (1) Guidelines; and other laws (and what to do when agencies' recommendations are contradictory). Also, the framework should ensure that each project meets the 404(b)(1) guidelines or provides higher environmental benefit if the preferred alternative has more adverse effects.

Current Regulations that can potentially come into play during a permit review for a Standard Individual Permit Application (Section 404(b)(1)):

The main regulations can be found in 33 CFR 320-332, 40 CFR 121, and 40 CFR 230

Final Rules announcing the re-issuance of the Nationwide Permits in the Federal Register are 86 FR 2744 and 86 FR 73522

Pertinent regulations can be found at Parts 320, 322, 323, 325, 328, 329, 330, and 332; Parts 121 and 230; and 86 FR 73522

Changes are expected to 40 CFR 121. Changes to other regulations and/or rules are not expected at this time.

Department of the Army permit pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344) {sometimes Section 103 of the Marine Protection, Research & Sanctuaries Act of 1972, as amended (33 U.S.C. 1413)} and as part of Permit Issuance, the DOA Permit will coordinate/and show compliance with:

 Section 7 of the Endangered Species Act (16 U.S.C. 1531) - Consulting with the appropriate Federal agency (NMFS for marine and USFWS for placement areas)

- Magnuson-Stevens Fishery Conservation and Management Act, as amended by the Sustainable Fisheries Act (Public Law 104-267) - Consult with NMFS on all actions, or proposed actions, permitted, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH).
- Section 106 of the National Historic Preservation Act - review process is to ensure that effects or impacts on eligible or listed properties are considered and avoided or mitigated during the project planning process.
- Review of activities pursuant to Section 404 of the Clean Water Act will include application of the guidelines promulgated by the Administrator, U.S.
 Environmental Protection Agency, under authority of Section 404 (b) of the Clean Water Act. The applicant must request a water quality certificate from the New Jersey Department of Environmental Protection in accordance with Section 401 of the Clean Water Act.
- Section 307 (c) of the Coastal Zone Management Act of 1972 as amended [16 U.S.C. 1456 (c)], for activities under consideration that are located within the coastal zone of a state which has a federally approved coastal zone management program, the Permit applicant must certify in the permit application that the activity complies with, and will be conducted in a manner that is consistent with, the approved state coastal zone management program.
 - For activities within the coastal zone of New Jersey State, the applicant's certification and accompanying information is available from the New Jersey Department of Environmental Protection, Coastal Management Program, P.O. Box 418, 401 E. State Street, Trenton, NJ, 08625, Telephone (609) 633-2201.
- If material to be dredged is not 80-90%> sand: Complete representative cross-section of the proposed dredging prism and to provide requisite volume of sediments to perform the physical, chemical and

ecotoxicological testing in accordance with USACE-New York District and USEPA Region 2 requirements.

- <u>https://www.epa.gov/ocean-dumping/evaluation-</u> <u>dredged-material-proposed-ocean-disposal-green-</u> <u>book;</u>
- Further coordination with USACE regarding existing shore protection projects and sand borrow areas is necessary to ensure that ongoing and planned USACE projects are not adversely impacted OR can contribute and should include the NJDEP's Division of Coastal Engineering. The New Jersey Department of Transportation (NJDOT) Office of Maritime Resources should be consulted regarding potential impacts of cable installation to navigation projects, state channels, and other NJDOT managed infrastructure and projects.

Primary Concerns (Regarding Beneficial Use of Dredged Material for Ecological Restoration & Community Resiliency)

Steering Committee Federal and State agencies can speak to the other Federal laws that the Corps Regulatory Program must adhere to in its evaluation of a Corps permit application, this is specific to the Corps Regulatory Program's requirements. However, it's important to note that, unless there is other Federal agency involvement, the Corps will be the lead Federal agency when it comes to compliance with Section 7 of the Endangered Species Act, Magnuson-Stevens Fishery Conservation and Management Act, Section 106 of the National Historic Preservation Act, Tribal Trust Responsibilities, Section 401 of the Clean Water Act, Coastal Zone Management Act, Wild and Scenic Rivers Act, Section 14 of the Rivers and Harbors Act (Section 408), Corps Wetlands Policy, and other laws, policies, and requirements. For all projects, pre-application meetings are encouraged with the Corps, NJDEP, and agencies, and these meetings can streamline the permit process by alerting the applicant to potentially time-consuming concerns that are likely to arise during the evaluation of their project (e.g., dredging contaminated sediments, essential fish habitat, endangered species, historic properties, etc.). Note that applicants are not required to request a pre-application meeting; however, under the current EPA Water Quality Certification Rule, applicants are required to request a pre-filing meeting with the NJDEP.

Wetland delineations and jurisdictional determinations (JDs) are essential to timely and accurate processing of permit applications and evaluation of proposed activities in wetlands and other waters. Note that applicants are required to prepare a wetland delineation but that they are not required to request a JD. More information can be found in RGL 16-01.

For all applications, applicants must provide an applicant name; project location; project description describing the structures, work, and discharges in, over, or under waters of the U.S.; existing conditions and project history; and all other requirements from our pertinent regulations and/or rules listed above.

For all applications, applicants must include a statement on how impacts to waters of the United States have been avoided, minimized, or compensated. If compensation is proposed, then a compensatory mitigation plan needs to be submitted in accordance with 33 CFR 332. Otherwise, applicants must state why compensatory mitigation is not required.

For Individual Permit applications, applicants must provide a clear purpose and need, because of the Corps Regulatory premise that if there are other practicable alternatives that would not discharge into special aquatic sites (e.g., wetlands, mudflats, vegetated shallows, etc.), then they must be evaluated because they are presumed to be less damaging unless clearly demonstrated otherwise. For Individual Permit applications, applicants must analyze alternatives, because of the Corps Regulatory requirements under NEPA and Section 404(b)(1) Guidelines. This analysis needs to include a reasonable range of alternatives, including the no action alternative, and the effects of all alternatives. An evaluation of alternatives is required under the Section 404(b)(1) Guidelines for projects that include the discharge of dredged or fill material to waters of the United States. Under the Section 404(b)(1) Guidelines, practicability of alternatives is taken into consideration and no alternative may be permitted if there is a less environmentally damaging practicable alternative.

For Individual Permit applications, applicants must demonstrate that their project meets the Section 404(b) (1) Guidelines; that there are no practicable alternatives that do not involve special aquatic sites; and that the projects comply with the restrictions on discharges.

For Individual Permit applications, projects will be evaluated on the probable impacts, including cumulative impacts, of the proposed project and its intended use on the public interest. In addition to the public interest factors listed in 33 CFR 320, applicants must also include a discussion on climate change and environmental justice. Proposed projects cannot be contrary to the public interest.

For Individual Permit applications, applicants must assess the impact on the environment which results from the incremental changes of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such actions.

How do you see Federal regulations addressing stakeholder comments (e.g., timing restrictions, habitat tradeoffs, etc.)?

The above requirements are critical to the Corps review of proposed projects. "Timing restrictions" are normally a result of Corps coordination/consultation with other agencies, Tribes, and the public. "Habitat tradeoffs" are primarily evaluated by the Corps through our Public Interest Review process, as long as the project meets all of the other requirements. The Corps is the impartial reviewer, and their role is not to pull others along or to push others into agreeing to a proposal.

What is the pathway to a permit (federal regulatory process) for ecological restoration using dredged material?

The Corps seeks to avoid unnecessary regulatory controls. The general permit program escribed in 33 CFR 325 and 330 is the primary method of eliminating unnecessary federal control over activities that either do not justify individual control or are adequately regulated by another agency. Applicants should determine if their project meets the terms, general conditions, definitions, regional conditions, water quality certification conditions, and coastal zone management conditions for Nationwide Permit 27. If the project does not meet the terms and conditions of a Nationwide Permit 27, then they will have to apply for an Individual Permit.

General information needed when completing a permit:

- 1. Explain the need for, and purpose of, the proposed work.
- Provide the names and addresses of property owners adjacent to your work site (if not shown on the application form or project drawings). (Please note that depending upon the nature and extent of your project, you may be requested to provide the names and addresses of additional property owners proximate to your project site to ensure proper coordination.)
- 3. Photographs of the project site should be submitted. For projects in tidal areas, photographs of the waterway vicinity should be taken at low tide. Using a separate copy of your plan view, indicate the location and direction of each photograph as well as the date and time at which the photograph was taken. Provide a sufficient number of photographs so as to provide a clear understanding of conditions on and proximate to your project site.

- Provide a copy of any environmental impact statement, or any other environmental report which was prepared for your project.
- 5. Provide a thorough discussion of alternatives to your proposal. This discussion should include, but not necessarily be limited to, the "no action" alternative and alternative(s) resulting in less disturbance to waters of the United States. For filling projects in waters of the United States, including wetlands, your alternatives discussion should demonstrate that there are no practicable alternatives to your proposed filling and that your project meets with current mitigation policy (i.e., avoidance, minimization, and compensation).

Answer the following if your project involves dredging:

- Indicate the estimated volume of material to be dredged and the depth (below mean low water) to which dredging would occur. Would there be over-depth dredging?
- If you wish to apply for a ten-year permit for maintenance dredging, please provide the number of additional dredging events during the ten-year life of the permit and the amount of material to be removed during future events.
- 3. Indicate on your drawings the dewatering area (if applicable) and disposal site for the dredged material (except landfill sites). Submit a sufficient number of photographs of the dewatering and disposal sites as applicable so as to provide a clear indication of existing conditions. For ten-year maintenance dredging permits, indicate the dewatering/disposal sites for future dredging events, if known.
- Describe the method of dredging (i.e., clamshell, dragline, etc.) and the expected duration of dredging.
- Indicate the physical nature of the material to be dredged (i.e., sand, silt, clay, etc.) and provide estimated percentages of the various constituents if available.
 For beach nourishment projects, grain size analysis data is required.

6. Describe the method of dredged material containment (i.e., hay bales, embankment, bulkhead, etc.) and whether return flow from the dewatering/disposal site would reenter any waterway. Also indicate if there would be any barge overflow.

Answer the following if your project involves placement:

- Indicate the total volume of fill (including backfill behind a structure such as a bulkhead) as well as the volume of fill to be placed into waters of the United States. The amount of fill in waters of the United States can be determined by calculating the amount of fill to be placed below the plane of spring high tide in tidal areas and below ordinary high water in non-tidal areas.
- 2. Indicate the source(s) and type(s) of fill material.
- 3. Indicate the method of fill placement (i.e., by hand, bulldozer, crane, etc.). Would any temporary fills be required in waterways or wetlands to provide access for construction equipment? If so, please indicate the area of such waters and wetlands to be filled and show on the plan and sectional views.

From USACE Regulatory Program Requirements:

For all applications, applicants must provide an applicant name; project location; project description describing the structures, work, and discharges in, over, or under waters of the U.S.; existing conditions and project history; and all other requirements from our pertinent regulations and/or rules listed above.

For all projects, pre-application meetings are encouraged with the Corps, NJDEP, and agencies, and these meetings can streamline the permit process by alerting the applicant to potentially time-consuming concerns that are likely to arise during the evaluation of their project (e.g., dredging contaminated sediments, essential fish habitat, endangered species, historic properties, etc.). Note that applicants are not required to request a pre-application meeting; however, under the current EPA Water Quality Certification Rule, applicants are required to request a pre-filing meeting with the NJDEP.

Wetland delineations and jurisdictional determinations

(JDs) are essential to timely and accurate processing of permit applications and evaluation of proposed activities in wetlands and other waters. Note that applicants are required to prepare a wetland delineation but that they are not required to request a JD. More information can be found in RGL 16-01.

For all applications, applicants must include a statement on how impacts to waters of the United States have been avoided, minimized, or compensated. If compensation is proposed, then a compensatory mitigation plan needs to be submitted in accordance with 33 CFR 332. Otherwise, applicants must state why compensatory mitigation is not required.

For Individual Permit applications, applicants must analyze alternatives, because of the Corps Regulatory requirements under NEPA and Section 404(b)(1) Guidelines. This analysis needs to include a reasonable range of alternatives, including the no action alternative, and the effects of all alternatives. An evaluation of alternatives is required under the Section 404(b)(1) Guidelines for projects that include the discharge of dredged or fill material to waters of the United States. Under the Section 404(b)(1) Guidelines, practicability of alternatives is taken into consideration and no alternative may be permitted if there is a less environmentally damaging practicable alternative.

For Individual Permit applications, applicants must demonstrate that their project meets the Section 404(b) (1) Guidelines; that there are no practicable alternatives that do not involve special aquatic sites; and that the projects comply with the restrictions on discharges.

For Individual Permit applications, projects will be evaluated on the probable impacts, including cumulative impacts, of the proposed project and its intended use on the public interest. In addition to the public interest factors listed in 33 CFR 320, applicants must also include a discussion on climate change and environmental justice. Proposed projects cannot be contrary to the public interest.

For Individual Permit applications, applicants must assess the impact on the environment which results from

the incremental changes of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such actions.

From Federal Agencies who provide Consultations to USACE:

Unless there is other Federal agency involvement, the Corps will be the lead Federal agency when it comes to compliance with Section 7 of the Endangered Species Act, Magnuson-Stevens Fishery Conservation and Management Act, Section 106 of the National Historic Preservation Act, Tribal Trust Responsibilities, Section 401 of the Clean Water Act, Coastal Zone Management Act, Wild and Scenic Rivers Act, Section 14 of the Rivers and Harbors Act (Section 408), Corps Wetlands Policy, and other laws, policies, and requirements.

NOAA Fisheries

Magnuson-Stevens Fishery Conservation and Management Act

In the Magnuson-Stevens Fishery Conservation and Management Act (MSA), Congress recognized that one of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Congress also determined that habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States. As a result, one of the purposes of the MSA is to promote the conservation of EFH in the review of projects conducted under federal permits, licenses, or other authorities that affect or have the potential to affect such habitat. The MSA requires federal agencies to consult with the Secretary of Commerce, through NOAA Fisheries, with respect to "any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act," 16 U.S.C. § 1855(b)(2).

This process is guided by the requirements of our EFH regulation at 50 CFR 600.905, which mandates the preparation of EFH assessments and generally outlines

each agency's obligations in the consultation process. The EFH final rule published in the Federal Register on January 17, 2002, defines an adverse effect as "any impact which reduces the quality and/or quantity of EFH." The rule further states that:

An adverse effect may include direct or indirect physical, chemical or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH. Adverse effects to EFH may result from action occurring within EFH or outside EFH and may include site-specific or habitatwide impacts, including individual, cumulative, or synergistic consequences of actions.

The EFH final rule also states that the loss of prey may be an adverse effect on EFH and managed species. As a result, actions that reduce the availability of prey species, either through direct harm or capture, or through adverse impacts to the prey species' habitat, may also be considered adverse effects on EFH.

Additional information on the MSA and the EFH consultation process can be found on the NOAA Fisheries Greater Atlantic Regional Office's <u>Habitat and Ecosystem</u> <u>Services Division website</u>

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) provides authority for our involvement in evaluating impacts to fish and wildlife from proposed federal actions that may affect waters of the United States. The FWCA requires that wildlife conservation be given equal consideration to other features of water resource development programs through planning, development, maintenance and coordination of wildlife conservation and rehabilitation. The FWCA does this by requiring federal action agencies to consult with us "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development" (16 USC 662). One of the reasons that Congress amended and strengthened the FWCA in 1958 was that it recognized that "[c]ommercial fish are of major importance to our nation[,]" and that federal permitting agencies needed general authority to require "in project construction and operation plans the needed measures for fish and wildlife conservation" S.Rep. 85-1981 (1958). As a result, our FWCA recommendations must be given full consideration by federal action agencies. FWCA consultations are generally undertaken as part of the EFH consultation process or as part of any National Environmental Policy Act (NEPA) coordination.

Endangered Species Act

Under Section 7(a)(1) of the Endangered Species Act (ESA), federal agencies are directed to implement programs for the conservation of threatened and endangered species. NOAA Fisheries assists these agencies with the development of conservation programs for marine species, and NOAA Fisheries works with federal agencies, like the U.S. Army Corps of Engineers, on training and opportunities to implement proactive conservation actions that will benefit ESA-listed species and their habitats.

Under Section 7(a)(2) federal agencies must consult with NOAA Fisheries when any project or action they take might affect an <u>ESA-listed marine species</u> or designated <u>critical habitat</u>. The consultation process can vary depending on the complexity of the project or action. Threatened and endangered species under the jurisdiction of NOAA Fisheries occur in the coastal and estuarine waters of New Jersey. Federal action agencies are responsible for determining whether a proposed action may affect these species. Additional information on the ESA and Section 7 consultation process can be found on the Greater Atlantic Regional Office's <u>Protected Resources</u> <u>Division's Section 7 Consultation website</u>.

U.S. Fish and Wildlife Service

The U.S. Fish & Wildlife Service (Service) receives its authority through a number of laws, treaties, and regulations focused on conservation, such as the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA) and the Fish and Wildlife Coordination Act (FWCA).

The ESA establishes protections for fish, wildlife, and plants that are listed as threatened or endangered and provides for interagency cooperation to avoid, minimize, or mitigate adverse effects to those species or designated critical habitat, and for issuing permits. The MBTA is intended to ensure the sustainability of populations of all protected migratory bird species and prohibits the injury and killing of them (including nests, eggs, and chicks). A 2014 Memorandum of Understanding between the Corps and the Service provides additional requirements to consult on and promote the conservation of migratory birds. The FWCA requires Federal agencies to consider the effects of their actions that impact streams or waterbodies on fish and wildlife resources. Additionally, the FWCA directs the Service to investigate and report on those proposed Federal actions and to provide recommendations to avoid, minimize or mitigate for adverse impacts on fish and wildlife resources. These authorities require the Corps to consult with the Service on all proposed actions that may affect one or more listed species, designated critical habitat, or other trust resources.

In New Jersey, projects that may impact Service trust resources require consultation with the Service's <u>New</u> <u>Jersey Field Office</u> (NJFO). Sediment management projects in New Jersey may modify habitat for federally-listed species such as eastern black rail (*Laterallus jamaicensis jamaicensis*), piping plover (Charadrius melodus), and rufa red knot (Calidris canutusrufa), as well as the saltmarsh sparrow (Ammodramus caudacutus) that is being evaluated for possible listing. Habitat modification can be beneficial, adverse, or a mix of both. Species may also be directly affected (e.g., disturbance, displacement, injury or mortality) if present while project activities are taking place. These species generally use marshes, intertidal, and beach habitat from March 15th to November 30th. Other federally listed, proposed, or candidate species that may be impacted by coastal habitat restoration projects include seabeach amaranth (Amaranthus pumilus), northern longeared bat (Myotis septentrionalis), tricolored bat (Perimyotis subflavus), sensitive joint-vetch (Aeschynomene virginica), swamp pink (Helonias bullata), bog turtle (Glyptemys muhlenbergii), and monarch butterfly (Danaus plexippus), as well as various migratory bird species including at-risk shorebirds species. Conservation conditions of permits suggested by NJFO, including seasonal restrictions, are typically determined on an individual project basis; however, programmatic reviews can also be conducted for certain project categories or geographic areas.

Requirements for and step by step instructions regarding project reviews by the Service can be found at the NJFO <u>Project Review Guide</u>. Generally, once a project and its action area are defined, a project proponent will obtain a species list using the Service's Information, Planning and Conservation System (<u>IPaC</u>). After following the steps on this page, project proponents will submit new requests for project review to <u>NJFO_ProjectReview@fws.gov</u>.

Appendix A

USACE Regulatory Program Standard Individual Permit Decision Document Template - August 2021



Click on the icon for USACE Regulatory Program Standard Individual Permit Decision Document Template



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