



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930

February 18, 2025

Wade Chandler, Chief
Regulatory Branch
U.S. Army Corps of Engineers
Baltimore District
2 Hopkins Plaza
Baltimore, Maryland 21201

RE: SPN-24-38/ NAB-2024-00009/ Maryland State Programmatic General Permit 7

Dear Mr. Chandler:

We have reviewed the proposed Maryland State Programmatic General Permit-7 (MDSPGP-7) and associated essential fish habitat (EFH) assessment. The existing MDSPGP-6 is set to expire September 30, 2025. In accordance with 33 CFR 325.5(c), MDSPGP-7 would authorize various proposed activities in waters of the United States, within the State of Maryland, pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and/or Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344). The proposed MDSPGP-7 is designed to continue to authorize certain activities formerly covered by the Nationwide Permits (NWP).

The Magnuson Stevens Fishery Conservation and Management Act (MSA) requires federal agencies to consult us on any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect EFH. The consultation process is guided by the EFH regulatory requirements under 50 CFR 600.920, which mandates the preparation of EFH assessments and generally outlines your obligations in this consultation procedure.

In addition to the MSA, the Fish and Wildlife Coordination Act (FWCA) requires that all federal agencies consult with us whenever the waters of any stream or other body of water are proposed or authorized to be modified for any purpose. Activities proposed to be authorized under Section 404 of the CWA or Section 10 of the Rivers and Harbors Act generally require consultation with us under the FWCA and it is generally undertaken in conjunction with the EFH consultation.

Consultation History

In your September 4, 2024, letter you requested comments to inform the drafting of the forthcoming iteration of the MDSPGP. We responded to your request with a letter dated October 11, 2024, which outlined several recommended improvements to better protect NOAA trust resources under this GP. The draft MDSPGP-7 was later released on December 16, 2024, in conjunction with special public notice (SPN) 24-38, and included several of our previously recommended revisions along with additional changes relative to the MDSPGP-6.

We received your EFH assessment on December 18, 2024, which included an appendix detailing the number of permits issued and their relative cumulative impacts under the MDSPGP-6. This



level of detail was particularly helpful such that we could understand the nature and extent of impacts permitted under the MDSPGP-6. We support the continued cataloging of impacts by the Cowardin class to help resource agencies understand cumulative impacts authorized under MDSPGP-7 and refine our consultation processes. We also request annual reports indicating the number of permits issued within EFH by activity types so we may document permitting and consultation efficiencies and track impacts to EFH.

EFH General Concurrence

You have requested our general concurrence on Category A and Category B activities authorized by the MDSPGP-7. A general concurrence identifies specific types of federal actions that may adversely affect EFH, but for which no further consultation is required because we have determined, through an analysis of that type of action, that the action will likely result in no more than minimal adverse effects both individually and cumulatively. For actions to qualify for general concurrence, we must determine that the actions meet all of the following criteria pursuant to 50 CFR 600.920(9):

- (1) The actions must be similar in nature and similar in their impact on EFH;
- (2) The actions must not cause greater than minimal adverse effects on EFH when implemented individually, and;
- (3) The actions must not cause greater than minimal cumulative adverse effects on EFH.

Many of the specific activities listed in the MDSPGP-6 previously received our general concurrence and we have worked with you to ensure that most will also receive general concurrence under the proposed MDSPGP-7. We have also worked with your staff to address many of the initial concerns we raised regarding the changes proposed in the draft MDSPGP-7 and we revisit our comments and recommendations here for clarity. Furthermore, we have several remaining significant concerns about impacts permitted under MDSPGP-6 which we have discussed in previous meetings and we continue to highlight. The information and recommendations provided below reflect the culmination of our coordination efforts and should align with previously agreed upon adjustments and, in instances where differences remain, represent a reiteration of topics discussed previously.

In instances where general concurrence is indicated, we have reviewed the EFH assessment and concur with your determinations that the proposed activities and corresponding categories listed below would not have substantial adverse effects on EFH and managed species, both individually and cumulatively. These activities are listed below without accompanying recommendations and/or comments. Based on our analysis, certain activities only qualify for general concurrence for Category A, but not Category B. In general, Category A projects are those that require a state agency review but not a federal resource agency review. Category B projects require a federal resource agency review. While we may still have concerns regarding the cumulative impacts of certain activities (e.g., shoreline hardening) across multiple iterations of the MDPSPG, we will work with the District and State of Maryland to address these concerns from a policy perspective and will not require individual consultation. Those activities which we have determined are eligible for general concurrence, and require no further individual EFH consultation are:

- a(1) Channel and Harbor Navigation Aids (Category A and Category B)
- a(2) State Regulatory Markers (Category A and Category B)
- a(3) Piers (Category A, only)
- a(4) Marina/Community Piers Reconfiguration (Category A and Category B)
- a(5) Boat Ramp Construction, Repair (Category A, only)
- a(6) Mooring Buoys (Category A, only)
- a(7) Structures in Fleeting and Anchorage Areas (Category A and Category B)
- a(8) Temporary Recreational Structures (Category A and Category B)
- a(9) Maintenance Dredging of Previously Authorized Dredged Areas in Tidal Waters (Category A, only)
- a(10) New Minor Dredging in Tidal Waters (Category A, only)
- b(1) General Maintenance (Category A, only)
- b(2) Armoring Bridges, Causeways, and Culverts (Category A and Category B)
- b(3) Bulkhead Repair or Replacement Including Stone Toe Protection (Category A, only)
- b(4) Maintenance of Existing Drainage Ditches (Category A only)
- c(1) Utility Lines (Category A, only)
- c(2) Foundations for Overhead Utility Line Towers, Poles, and Anchors (Category A and Category B)
- c(3) Utility Access Roads (Category A, only)
- c(4) Utility Substations (Category A, only)
- e(1) Minor Nontidal Fills (Category A, only)
- e(2) Agricultural Activities (Category A and Category B)
- e(3) Soil Investigations, Scientific Measurement Devices, and Survey Activities (Category A and Category B)
- e(4) Dry Fire Hydrants (Category A and Category B)
- e(5) Clearing Debris and Windfalls (Category A and Category B)
- e(7) Temporary Construction Access, Stream Diversion, and Dewatering (Category A and Category B)
- e(8) Outfall Structures and Associated Intake Structures (Category A and Category B)
- e(9) Residential, Commercial, and Institutional Development Activities and Recreational Facilities (Category A, only)
- e(10) New Stormwater Management Facilities (Category A and Category B)
- e(11) Aquatic Habitat Restoration, Enhancement, and Establishment Activities associated with Compensatory Mitigation Requirements for Aquatic Resource Impacts Authorized under the MDSPGP-6 (Category A, only)
- f(1) New Tidal Revetments and Tidal Shoreline Erosion Control Structures (Category A, only)
- f(2) Living Shorelines/Beach Nourishment (Category A, only)
- f(3) New Bulkheads, including Stone Toe (Category A, only)
- f(4) Nontidal Bank Stabilization Activities (Category A, only)
- g. Return Water from Upland Contained Disposal (Category A and Category B)
- h. Private Landowner Oyster Gardening
- k(2) Nontidal Stream And Wetland Restoration And Enhancement Activities Associated With An Acceptable TMDL/MS4 Watershed Strategy (Category A, only)

EFH Programmatic Consultation

Programmatic consultation provides a means for us to consult with you regarding a potentially large number of individual actions that may adversely affect EFH. The goal of the programmatic consultation is to address a substantial portion of the adverse impacts through EFH conservation recommendations without information on a specific site or project. Programmatic conservation recommendations may be provided for actions that would normally cause an adverse impact but, if modified according to the recommendations, could avoid or minimize those impacts. We appreciate that you have maintained many conditions in the MDSPGP-7 that were the result of our EFH consultation and conservation recommendations on previous iterations of the MDSPGP; we do not repeat those recommendations here.

Recommendations applicable to multiple activities:

- Work with us to ensure annual reporting of the number of permits issued and the spatial extent of impacts permitted under this GP, as requested in our January 24, 2020, letter. This is limited to the number of permits issued by activity type for those activities that occur in EFH.
- Continue to categorize permitted impacts by Cowardin class and provide that data to us as part of the EFH consultation for the MDSPGP-8. Because the MDSPGP has changed substantially over its history, cataloging this additional information is critical to understanding the impacts permitted in this framework.
- Provide us with the grain-size analysis for any dredged material proposed to be reused as in-water fill. This will help us determine whether placement could adversely affect NOAA trust resources, based on site conditions.
- Continue to consider areas that have been mapped by the Virginia Institute of Marine Science (VIMS) to support submerged aquatic vegetation (SAV) in any of the past five years. Regardless of the density and frequency of cover, these areas have been recently shown to support SAV and should be provided the protections necessary to protect a special aquatic site.

Activities that Require Individual Coordination with NOAA Fisheries' HESD

The District has indicated that all activities permitted under the MDSPGP can have no more than minimal individual and cumulative impacts. Based on the impact figures provided for the MDSPGP-6 in your EFH assessment, we disagree with this conclusion. Because of their potential for causing more than minimal impacts, project specific coordination is necessary for the activities described below. Consultation is only required where these activities are proposed in EFH (i.e., tidal waters with salinity > 0.5 ppt) and/or mapped anadromous fish spawning habitat.

Additional detail is provided here regarding our recommendations for incorporation into the Standard Operating Procedures (SOP) that will define where individual consultation is necessary with NOAA Fisheries Habitat and Ecosystem Services Division (NMFS-HESD) for certain activities. This approach is intended to streamline our consultation processes while also ensuring that impacts to EFH and other aquatic resources are sufficiently avoided, minimized, mitigated, or otherwise offset.

Consultation is required when the following criteria are met:

- Consultation with us is required when the District Engineer waives conditions that limit the spatial extent of impacts. Where waivers are requested for conditions that do not have substantive bearing on the extent or nature of impacts to EFH (e.g., conditions intended to facilitate safe navigation), individual consultation is not required.
- The applicant requests a variance to the required Time of Year Restrictions (TOYR). These requests should be accompanied by justification regarding the circumstances for the request as well as best management practices that are proposed in lieu of this protective measure. We have included further refinements for certain activities below. Those TOYR variances include:
 - This includes the anadromous fish TOYR that is defined in General Condition 39.
 - When waivers are requested for TOYRs intended to protect SAV that are stipulated for certain activities below.
 - When waivers are requested for the TOYRs intended to protect summer flounder in the Delmarva coastal bays for dredging activities described below
- The site does not present suitable depths at all stages of the tide to prohibit construction vessels/equipment from impacting with benthic substrates outside of areas proposed for dredging/filling. We note that this will require the applicants to specify their intended access route(s) and encourage the District to require this information as part of their review for completeness

And/or consultation is required when the specified criteria are met for the following activities:

- a(3) Piers (Category B Only)
 - Consultation is only required for Category B activities when:
 - Impact pile driving is proposed in designated anadromous fish use areas. We recommend that, to the extent practicable, no pile driving occur in these areas during the anadromous fish spawning season (February 15 to June 15), in accordance with GC 39. If the District Engineer determines that pile driving during this time period is unavoidable, it should only be completed using a vibratory hammer. If impact hammer operations are proposed in these areas during the TOYR, consultation with NMFS-HESD is required.
 - Piers that are greater than 4' in width over areas mapped by VIMS to support SAV in the past 5 years
 - Floating platforms within, or adjacent to, areas of SAV mapped by VIMS in the past five years are proposed to be maintained as "grandfathered" structures. Please provide justification for the continued use of these structures with your consultation request.
 - Vessels are proposed to be moored in mapped SAV without the use of a boat lift.
 - Piers are proposed in or within 50 feet of mapped SAV and require a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts.
 - Creosote-treated piles are proposed. We note that this will require the applicants

to specify their building materials and encourage the District to require this information as part of their review for completeness.

- a(5) Boat Ramp Construction, Repair (Category B, only)

Consultation is required only when:

- Impacts to mapped SAV are proposed that are greater than 100 square feet (sf.) If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
- The intended use of a new boat ramp would require navigation of vessels across a mapped SAV bed. In these instances, information should be provided regarding why this cannot be avoided, including consideration of offsite (e.g., nearby marinas) alternatives.

- a(6) Mooring Buoys (Category B Only)

- Consultation with us is only required when mooring buoys are proposed in areas of mapped SAV.

- a(9) Maintenance Dredging of Previously Authorized Dredged Areas in Tidal Waters (Category B Only)

Consultation is only required for Category B activities when:

- The applicant cannot provide evidence (e.g., permit, post-dredge bathymetric surveys) of previous dredging dimensions (i.e., depths, widths)
- Requests any variance of special conditions required in the previous dredging permit.
- When impacts to mapped SAV are proposed that are greater than 500 sf. If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 5,000 sf.
- Areas of mapped SAV are proposed to be deepened (allowable over depth dredging inclusive) beyond -3.5 MLW.
- Dredging is proposed in or within 50 feet of mapped SAV and requires a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts (i.e., turbidity).
- Dredging is proposed in an oyster restoration area or aquaculture site
- Dredging is proposed within the boundaries of a legally designated Named Oyster Bar (NOB) and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (December 16 - March 14 and June 1 - September 30)
- Mechanical dredging is proposed within 500 yards of an NOB and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (December 16 - March 14 and June 1 - September 30)
- Hydraulic dredging is proposed within 500 yards of an NOB and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (June 1 - September 30)
- Dredging is proposed in the Maryland coastal bays and requires a variance of the typical TOYR we apply to protect juvenile summer flounder during peak abundance (April 1 to June 30).

- a(10) New Minor Dredging in Tidal Waters (Category B Only)

- When intertidal flats are proposed to be dredged. These may be identified as a

result of the applicant's bathymetric surveys and should be verified using field observations at low tide and/or aerial imagery.

- When impacts to mapped SAV are proposed that are greater than 100 sf. If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
- Dredging is proposed in or within 50 feet of mapped SAV and requires a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts (i.e., turbidity).
- Dredging is proposed in an oyster restoration area or aquaculture site
- Dredging is proposed within the boundaries of a legally designated Named Oyster Bar (NOB) and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (December 16 - March 14 and June 1 - September 30)
- Mechanical dredging is proposed within 500 yards of an NOB and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (December 16 - March 14 and June 1 - September 30)
- Hydraulic dredging is proposed within 500 yards of an NOB and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (June 1 - September 30)
- Dredging is proposed in the Maryland coastal bays and requires a variance of the typical TOYR we apply to protect juvenile summer flounder during peak abundance (April 1 to June 30).
- b(1) General Maintenance (Category B Only)
 - Consultation is only required for Category B activities when:
 - Culvert repair is proposed in designated anadromous fish spawning habitat
 - When impacts to mapped SAV are proposed that are greater than 100 sf. If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Construction activities, including dredging, is proposed in or within 50 feet of mapped SAV and requires a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts (i.e., turbidity).
 - Dredging is proposed in an oyster restoration area or aquaculture site
 - Dredging is proposed within the boundaries of a legally designated Named Oyster Bar (NOB) and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (December 16 - March 14 and June 1 - September 30)
 - Mechanical dredging is proposed within 500 yards of an NOB and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (December 16 - March 14 and June 1 - September 30)
 - Hydraulic dredging is proposed within 500 yards of an NOB and requires a variance of the typical TOYR we recommend to protect oyster habitat from indirect impacts related to turbidity (June 1 - September 30)
 - Dredging is proposed in the Maryland coastal bays and requires a variance of the

typical TOYR we apply to protect juvenile summer flounder during peak abundance (April 1 to June 30).

- Tide gate replacements are not proposed to be self-regulating.
- b(3) Bulkhead Repair or Replacement, Including Stone Toe Protection (Category B, only)
 - When impacts to mapped SAV are proposed that are greater than 100 sf. If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Impacts to mapped oyster restoration areas or aquaculture sites are proposed that are greater than 100 sf. If impacts to these areas are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Construction is proposed in or within 50 feet of mapped SAV and requires a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts (i.e., turbidity).
- b(4) Maintenance of Tidal Roadside Ditches (Category B only)

Consultation is only required for Category B activities when:

 - Applicants propose to place excavated material on tidal wetlands
 - When the ditch(es) in question are for the purpose of modifying the hydrology of the marsh platform (i.e., mosquito ditches). Maintenance of tidal ditches that drain water from an existing roadway do not require consultation.
- c(1) Utility Lines (Category B Only)
 - Projects that are proposed to cross applicable tidal waters and perennial streams via horizontal directional drill (HDD), involve no in-water work (i.e., drilling occurs from upland to upland), and include a frac-out contingency plan do not require consultation with us and may be allowed during the time of year restriction period stipulated for anadromous fish
 - Consultation is required when perennial stream crossings are proposed in designated anadromous fish use areas.
- c(3) Utility Access Roads
 - Consultation is only required when these projects are proposed to construct culverted crossings of streams that are designated anadromous fish spawning habitat.
- c(4) Utility Substations (Category B Only)
 - Consultation is required when Category B impacts are proposed in designated anadromous fish use areas.
- d. Linear Transportation Activities (Category B Only)
- e(1) Minor Nontidal Fills (Category B Only)
 - Consultation is only required when these projects are proposed in designated anadromous fish spawning habitat.
- e(9) Residential, Commercial, and Institutional Development Activities
- e(11) Aquatic Habitat Restoration, Enhancement, and Establishment Activities associated with Compensatory Mitigation Requirements for Aquatic Resource Impacts Authorized under the MDSPGP-6 (Category B Only)
- f(1) New Tidal Revetments and Tidal Shoreline Erosion Control Structures (Category B Only)
 - Consultation is required when Category B structures are proposed in low energy

- (i.e., max fetch < 0.5 miles) settings
 - When impacts to mapped SAV are proposed that are greater than 100 sf. If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Impacts to mapped oyster restoration areas or aquaculture sites are proposed that are greater than 100 sf. If impacts to these areas are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Construction is proposed in or within 50 feet of mapped SAV and requires a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts (i.e., turbidity).
- f(2) Living Shorelines/Beach Nourishment (Category B Only)
 - Consultation is only required for Category B projects where:
 - Stone structures (e.g., sills, breakwaters, cobble headlands) are proposed in low energy (i.e., max fetch < 0.5 miles) settings. Justification for the use of stone structures should be provided with this consultation request.
 - Impacts to mapped SAV are proposed that are greater than 100 sf. If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Impacts to mapped oyster restoration areas or aquaculture sites are proposed that are greater than 100 sf. If impacts to these areas are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Channelward encroachment from the MHWL is greater than 20 feet in low-energy environments (i.e., max fetch < 0.5 mi) and otherwise where encroachment is greater than 30 feet. Methods to minimize encroachment into tidal shallow waters should be detailed in your consultation request.
 - Stone is proposed to line sill gaps in low-energy (i.e., max fetch < 0.5 mi) settings.
 - Construction is proposed in or within 50 feet of mapped SAV and requires a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts (i.e., turbidity).
- f(3) New Bulkheads, Including Stone Toe Protection (Category B, Only)
 - Consultation is required when Category B structures are proposed in low energy (i.e., max fetch < 0.5 miles) settings
 - When impacts to mapped SAV are proposed that are greater than 100 sf. If impacts to SAV are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - When new bulkheads greater than 1,000 linear feet (lf) are proposed.
 - Impacts to mapped oyster restoration areas or aquaculture sites are proposed that are greater than 100 sf. If impacts to these areas are proposed to be offset through a federally-approved mitigation instrument, consultation is only required when impacts are greater than 1,000 sf.
 - Construction is proposed in or within 50 feet of mapped SAV and requires a variance of our typical time of year restriction (April 15 to October 15) intended to protect the remaining beds from construction related impacts (i.e., turbidity).

- f(4) Nontidal Bank Stabilization Activities (Category B, Only)
 - Consultation is only required when these projects are proposed in designated anadromous fish spawning habitat. In those instances, documentation should be required regarding the extent and causes of erosion.
- h. Emergency Situations (Category B, Only)
- k(2) Nontidal Stream And Wetland Restoration And Enhancement Activities Associated With An Acceptable TMDL/MS4 Watershed Strategy (Category B, only)
 - Consultation is only required when these projects are proposed in designated anadromous fish spawning habitat. In those instances, documentation should be required regarding how fish passage will be maintained in these areas.

NOAA Fisheries' Notification and Comment Period (Category B Actions)

A minimum 30-day comment period is required for us to review MDSPGP-6 Category B notifications under the MSA for EFH consultation procedures [50 CFR 600.920(h)(4)]. Because our EFH review extends into non-tidal rivers and streams supporting migratory fish runs (important prey for federal species), a 30-day review and comment period should be a standard operating procedure for all projects in the following areas:

- All tidal and non-tidal waters within the Maryland coastal plain
- Piedmont waters in Harford and Cecil counties where gentle fall lines allow migratory fish to extend their spawning range further inland.

A 15-day comment period (with option to extend to 30-days) is sufficient for projects occurring in the perennial streams of the Piedmont region located in the following counties: Montgomery, Howard, and Baltimore. Projects in these waters do not require EFH consultation.

Finally, as with procedures in past iterations of the MDSPGP, we do not need to review or be notified of activities in the following counties, which are not resource areas under our agency review protocol: Garrett, Allegheny, Washington, Frederick, Carroll, and Howard (with the exception of the Patapsco River mainstem, from Elkridge upstream to the confluence of the North and South Branches of the Patapsco River)

Outstanding Needs to Maintain and Enhance Estuarine Habitat Productivity

We have noted several concerning cumulative impacts that are highlighted in your EFH assessment. We have also noted recurring challenges toward seeking minimal projects during individual consultations completed under the MDSPGP-6. Below we outline several remaining needs to address these concerns in pursuit of minimal adverse impacts to NOAA trust resources.

Tidal Habitat Equivalencies to Inform Impact Assessment and Mitigation Requirements

We often recommend that impacts be minimized and offset based on our understanding of the proposed impacts and associated effects on local habitats. However, the District and the State of Maryland may waive these mitigation requirements in certain circumstances. This includes projects that fill shallow waters to create living shorelines, which have been described as “self-mitigating” by the regulatory agencies based on simple area calculations and equivalencies.

While we do agree that living shorelines provide several of the same functions as other tidal habitats, we note the need for additional refinement on these equivalencies to inform project design and the need to minimize and potentially offset unavoidable impacts. Similarly, maintenance dredging projects are typically exempted from this mitigation requirement due to the assumed likelihood that this vegetation will recover at some point in the future, provided the benthos still receives suitable photosynthetically-active radiation. However, the recovery trajectory and temporal loss of function is not well understood to assume no loss of function.

Over the life of the MDSPGP-7, we intend to work with the District and the State of Maryland to develop a more robust framework to assess impacts in pursuit of maintaining habitat functions for NOAA trust resources. The first step in this process is currently underway through the Engineer Research and Development Center's (ERDC) Wetlands Regulatory Assistance Program (WRAP) Eelgrass Functional Assessment. We will review the results of that exercise, assess their relevance to tidal habitats in the Mid-Atlantic region, and seek additional technical support as necessary to develop a framework. It may take the form of a Habitat Equivalency Analysis, similar to the [Puget Sound Nearshore Habitat Conservation Calculator](#). We look forward to working with you to address this assessment need.

Describing Functional Losses Associated with Maintenance Dredging

According to the information provided with your EFH assessment, the largest permitted impact to SAV, approximately 14 acres in the last three years, was associated with a(9) Maintenance Dredging of Previously Authorized Dredged Areas in Tidal Waters. The District did not require compensatory mitigation for these impacts, though the State of Maryland may have required payment into the Maryland Tidal Compensation Fund (MDTCF). The typical justification provided by the District when compensatory mitigation is not required largely rests on the assumption that SAV will recolonize the dredged area. However, there has not been sufficient study to determine the recovery time required for SAV colonization and the conditions under which it may or may not fully occur. While cursory studies were completed associated with Anne Arundel County dredging activities around 2002, those studies did not provide the level of detail to assess permanent and temporary impacts across a range of projects and associated site conditions. For this reason, additional study is necessary to define the compensatory mitigation requirements in pursuit of no net loss of function from this unique habitat type.

Guidance for Shoreline Stabilization Projects in Low-Energy Settings

One particular need that we have identified across projects permitted under the MDSPGP-6 was more formal guidance on shoreline stabilization approaches in low-energy settings. Due to their low-energy setting, these projects are more likely to impact sensitive biogenic habitats like SAV and existing fringing tidal marshes. We have repeatedly noted a paucity of guidance on assessing the causes and severity of shoreline erosion in these environments and the associated approaches to address them. As a result, we often raise concerns about projects that appear to be overly impactful to address the project purpose. Over the life of the MDSPGP-7, we will work to develop such a guidance document in collaboration with the District, State of Maryland, design professionals, and research community. This document would then serve as a training tool for District project managers to assist in their review of shoreline erosion control projects in these particular settings. We would welcome your partnership in this effort.

Demonstrated Need for Tidal Compensatory Mitigation Banks in Maryland

According to the USACE's 2008 Mitigation Rule, compensatory mitigation should be required when impacts to aquatic resources cannot be fully avoided or minimized. In your EFH assessment, you described impacts over the last three years of the MDSPGP-6 totaling to approximately 170 acres of impacts to tidal shallow waters, including approximately 25 acres of SAV. While many of the projects may propose impacts that are individually small, the cumulative nature of these impacts is significant and we are recommending that you work with us and the State of Maryland to develop measures to offset these cumulative impacts.

Impacts to SAV are of greatest concern, given their status as a Special Aquatic Site and a Habitat Area of Particular Concern. We appreciate your inclusion of compensatory mitigation requirements for larger impacts (i.e., those > 1 acre) that have been processed as Individual Permits. While many of these mitigation projects are still under development or early in the implementation phase, we expect to gain greater insight as to where and how these projects are most likely to be successful in offsetting unavoidable impacts to SAV. Nevertheless, the District has not typically required compensatory mitigation for those impacts permitted under the MDSPGP. This includes projects with several thousand square feet of permanent impacts (i.e. fills) to these habitats. We note that the USACE New England District requires compensatory mitigation for impacts to SAV greater than 25 sf. (see: <https://www.nae.usace.army.mil/Missions/Regulatory/State-General-Permits/>) and we would appreciate the District's attention to finding greater alignment across the North Atlantic Division.

This lack of compensation is due, in part, to challenges of scale associated with SAV bed restoration. Larger SAV restoration projects undertaken as permittee responsible mitigation realize greater efficiency in regulatory review, project implementation, and performance tracking. A mitigation banking mechanism is needed to achieve these efficiencies to offset individually small, but cumulatively significant impacts to SAV anticipated under the MDSPGP-7. This could include establishment of an in-lieu-fee program that is managed by the Maryland Department of Natural Resources (MDNR) or a non-governmental organization. Should MDNR set up such a program, it could likely be adapted from the existing MDTCF. We are committed to work with the District and the rest of the Maryland Interagency Review Team to develop a program that is federally-approved. In the interim, projects that are required to provide funding to the MDTCF by the state of Maryland for unavoidable losses to SAV may address our concerns, provided those funds are dedicated to SAV restoration. Because this is not a federally-approved compensation mechanism, we caution that this is not a long-term solution and that a federally approved mechanism should be obtained during the life of the MDSPGP-7. However, requiring any form of SAV restoration should help to build capacity for this work both in the context of compensatory mitigation space and in broader the effort to recover SAV coverage to meet restoration goals set in Maryland tidal waters.

Finally, while SAV has been a focus of many of our comments, we are concerned about impacts to other tidal habitats permitted under the MDSPGP without compensation. This includes intertidal flats, oyster habitat, intertidal wetlands, tidal creeks, and other tidal shallows that provide habitat for NOAA trust resources. Additional tidal compensation mechanisms would be useful to offset impacts permitted under the MDSPGP and other permitting pathways. These could include banking instruments that restore oyster reef habitat, remediate contaminated

sediments, or remove shoreline hardening (i.e., bulkhead/revetment) in low-energy environments with intertidal plantings and no additional channelward encroachment.

Conclusion

Thank you for the opportunity to review the draft MDSPGP-7 and the associated EFH assessment. Should you have questions about our comments, please contact Jonathan Watson in our Annapolis field office at Jonathan.Watson@noaa.gov or (978) 675-2180. The Protected Resources Division will provide comments separately through a programmatic consultation under the Endangered Species Act.

Sincerely,



Louis A. Chiarella
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cc:

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