



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

National Marine Fisheries Service

P.O. Box 21668

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February 28, 2003

Dr. Jan Stuart
U.S. Army Corps of Engineers
CEPOA-CO-R
P.O. Box 6898
Elmendorf Airforce Base
Anchorage, AK 99506

RE: Craig Tidelands Management Agreement

Dear Ms. Stuart:

This letter is in response to your request for the National Marine Fisheries Service (NMFS) to provide comments on a possible tidelands management agreement for the City of Craig (City). The request was made at a January 22, 2003 meeting held in Juneau by U.S. Army Corps of Engineers (Corps) and City staff. Several federal and state resource agencies participated.

A draft memorandum of agreement (MOA) was circulated to the Corps and resource agencies by the City prior to the meeting. The City's goal for this agreement is to allow for more efficient development of tidelands, including some eelgrass beds, in areas around Craig. The City wishes to craft a final agreement that would provide some level of predictability and streamlining of the permit process in return for long-term preservation by the City of a portion of the eelgrass beds now existing. The draft MOA proposes to preserve about half the eelgrass beds under City tidelands jurisdiction.

The concept of a management agreement that met these goals and would be acceptable to all parties was discussed at the meeting, with a number of concerns raised by NMFS, as well as the other participants. In response, the Corps and City requested that participants provide a detailed list of their concerns, knowledge of available data and information gaps, and possible solutions to their concerns, in writing. Our comments to fulfill this task follow.

NMFS CONCERNS:

NMFS offers our concerns in three broad categories: legal, biological and process concerns. Each category is addressed separately as follows.



Legal:

NMFS is responsible for the management and protection of anadromous, estuarine, and marine living resources. The mandates under which NMFS consults and coordinates management of these resources is derived from the following Federal laws: Fish and Wildlife Coordination Act, Federal Power Act, Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), Marine Mammal Protection Act, and Endangered Species Act.

NMFS authority to comment on Clean Water Act, section 404, and Rivers and Harbors Act, section 10 permitting by the Corps derives from the listed statutes. Any agreement crafted for streamlining permitting activity in Craig tidelands would derive primarily from the authority of the Corps and the Environmental Protection Agency (EPA), which holds veto authority on Corps permits, and has issued guidelines for Clean Water Act permits under section 404(b)(1), (hereinafter referred to as the "guidelines").

The Corps is obligated to coordinate its review of section 10/404 permit applications per the guidelines. The Corps is further obligated to coordinate with NMFS under the MSFCMA essential fish habitat provisions and the Memorandum of Agreement Between the Department of Commerce and the Department of the Army governing elevation of permit decision disputes. Additionally the Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, outlines mitigation sequencing for permits.

NMFS is concerned that the draft MOA circulated for review, or similar negotiated agreement, could circumvent the principles and procedures mandated by the aforementioned statutes and guidelines. Specifically these concerns include the following:

- 1) The current agreement does not address impacts to habitats other than eelgrass. Any permit issued within the areas identified for development will have resource impacts regardless of the presence of eelgrass in that particular location. These impacts should also be addressed by the agreement.
- 2) Under the guidelines, discharge of fill material may not be permitted if a practicable alternative exists that would be less damaging to the aquatic environment. For non-water dependent projects in eelgrass and other "special aquatic sites," practicable alternatives that do not impact those special aquatic sites are presumed. The burden of proof for demonstrating the

lack of other alternatives is on the applicant. The draft MOA should reflect these requirements for alternatives analysis.

3) Mitigation sequencing requires aquatic resource impacts to be avoided first, then minimized to the extent practicable, then compensatory mitigation should be provided for any remaining unavoidable impacts. The current agreement does not address how permitted activities would be evaluated to ensure proper mitigation sequencing.

4) The Corps' regulatory processes call for evaluation of permit applications on a case by case basis to consider the wide range of factors that enter into a permit decision. Without this effort on the part of the Corps, in consultation with the resource agencies, pre-determined conditions of an agreement would have to be met to ensure consistency with permitting requirements and allow expedited review. No such provisions are included in the draft MOA.

5) EPA has veto authority for Corps permits and has issued the guidelines that govern permit issuance. EPA was not present at the meeting, but should be involved in any agreement for Craig tideland management.

6) Some lands adjacent to the eelgrass beds being considered for development or protection are privately owned, including ownership by Native corporations. Implications of this land ownership to a management agreement, and possible cooperation with private landowners, needs to be considered.

Biological:

Available Data:

Based on work conducted by NMFS Auke Bay Lab scientists in the late 1990s (Murphy et al., 2000), the following information on the biology of some eelgrass beds near Craig is available:

*Probable fish species (that are captured with a beach seine)

*Some semi-quantitative information about fish use (e.g. the number of species in an area swept by a seine net at a certain tide height and daylight hours)

*Some information regarding juvenile commercial species seasonal use of the beds

*Probable range of eelgrass biological parameters (shoot density,

mean maximum blade length, biomass)

*Probable substrate type

*Positive correlation between fish diversity and eelgrass biomass for the month of June

Information Gaps:

Information on the effects of various types of developments on eelgrass beds and some possible remedies is available for numerous areas worldwide, although few studies are specific to Alaska. A good overview of research outside Alaska is provided in Fonseca et al. (1998). Additional studies regarding the impacts of light attenuation from docks and designs to minimize those impacts may be found in Burdick and Short (1999) and the enclosed "Evaluation of Methods to Increase Light Under Large Overwater Structures: Improving Salmon Habitat Functions", by Sargeant et al. of Battelle.

For Alaska, indirect evidence of the effects of the Auk Nu Cove ferry terminal to the observed continuous shrinkage of the Auk Nu Cove eelgrass bed have been outlined in the enclosed memorandum (from Linda Shaw, Habitat Conservation Division to Teri Camery, City and Borough of Juneau). An eelgrass mitigation project in Craig was required by the Corps for North Cove Harbor 1 and may be useful in understanding harbor impacts from shading and propellor wash. However, no additional information is available, to our knowledge, that documents the effects of various types of development on eelgrass beds in southeast Alaska.

Other specific information gaps include:

- 1) The relative value of the beds to be protected versus those where development may occur. Function should be a consideration in addition to acreage.
- 2) Indirect effects development adjacent to eelgrass beds may have due to changes in turbidity, water quality, depth and current alteration, nutrient input and light transmission through the water column.
- 3) How the eelgrass beds in the Craig area may change in distribution over time, and to what extent they recede and colonize other areas by natural processes. The map provided by the City which shows eelgrass distribution is from 1998 data and may be somewhat inaccurate now.

Mitigation:

The proposed compensation of 50% protection of the eelgrass beds within the Craig area in return for potential development of the remaining beds is problematic. Compensation based on preservation will result in a net loss of the resource, and so ratios considerably higher than 1:1 are justified. The use of a functional index (Hoffman, 1991, copy enclosed), as has been used to develop restoration ratios in the southern California eelgrass mitigation policy (copy enclosed) need to be explored as a possible model for determining an appropriate compensation ratio for this agreement.

Process:

A number of potential process mechanisms could be used to achieve the respective goals of the City, Corps and resource agencies for tideland management in Craig. In addition to the draft MOA currently being contemplated, a General Permit, Alternate Permit Processing agreement, Special Area Management Plan or other agreement may best meet the needs of the parties. A programmatic EFH consultation may be appropriate as well. NMFS recommends that the parties work together to develop a process that meets the needs of the applicant and resource concerns. All process alternatives and their respective advantages and disadvantages should be fully investigated before one is chosen as the vehicle for an agreement.

The use of preservation as mitigation is considered prudent if the areas to be preserved are under development pressure. As previously discussed, this issue needs to be further investigated, such that preservation is meaningful to compensate for potential habitat losses. Any areas already accepted as mitigation (preserved area "D", was mitigation for Klawock Inlet 103), and currently protected under a coastal management plan should not be "double-counted" as mitigation for future development.

POSSIBLE SOLUTIONS:

Projects to be authorized would have to meet certain criteria to ensure that legal and biological concerns are addressed appropriately. NMFS is willing to work on this concept, but we caution that such a process may not actually streamline permitting, but simply shift the review work currently done by the Corps to the applicant. Perhaps education for applicants, or the City as a willing assistant to applicants, could speed the permitting process to the City's satisfaction, without a

management agreement.

NMFS is hopeful that a process or management agreement can be developed to verify clearly pre-defined types of development that are allowable, and could function somewhat like a zoning or building code. For example, sites without eelgrass or other sensitive habitats should be given incentive/preference for development. Residential and other non-water dependent projects should not be covered by the agreement. Minimization should be required in the form of the use of pilings, dock designs that minimize shading, measures to control contamination of nearby waters, and efficient usage of fill space, to be demonstrated up front by the applicant according to pre-determined criteria.

For any management agreement to be acceptable to NMFS, all impacts to eelgrass beds must be mitigated up front by preservation of the remaining eelgrass beds at a ratio to be determined based on functionality. Preservation of those eelgrass beds would need to be couched in a high level of certainty, possibly including a third party, such as a land trust, that would hold conservation easement title to the beds that were identified for preservation, in perpetuity.

A monitoring program to track the long-term fate of adjacent and preserved eelgrass beds is appropriate to allow for all parties to learn the value of the agreement and apply adaptive management to unforeseen impacts. A monitoring program could also be of benefit to the Corps and resource agencies to apply to other communities with similar development and resource issues. NMFS is willing to discuss long-term monitoring as a component of mitigation in addition to preservation of existing eelgrass beds.

Funding:

The issue of funding sources was raised at the meeting. Addressing many of NMFS concerns would require conducting research and monitoring projects. Involved parties should seek funding opportunities.

Conclusion:

NMFS is committed to working with the Corps, City and other resource agencies to seek resolution of the challenges presented by the City's proposal. NMFS has a number of concerns, but believes they may be overcome to the mutual benefit of all parties. Thank you for the opportunity to comment and please contact Linda Shaw at (907)586-7510 or linda.shaw@noaa.gov if you have any questions regarding these comments.

Sincerely,



James W. Balsiger
Administrator, Alaska Region

cc:

Sandy Harbanauk, ADGC, Juneau
Sylvia Kreel, ADGC, Juneau
Mark Minnillo, ADF&G, Klawock
Jim Powell, ADEC, Juneau
Jim Anderson, ADNR, Juneau
Chris Meade, EPA, Juneau
Steve Brockmann, USFWS, Juneau

Enclosures:

Southern California Eelgrass Mitigation Policy
(Adopted July 31, 1991, February 2, 1999 version)

"Relative Fisheries Values of Natural Versus Transplanted
Eelgrass Beds (Zostera marina) in Southern California" by R.S.
Hoffman. 1991. Coastal Wetlands Coastal Zone '91 Conference-ASCE,
Long Beach, California.

"Evaluation of Methods to Increase Light under Large Overwater
Structures: Improving Salmon Habitat Functions" by S. Sargeant,
Battelle, with attached reference list.

"The Effects of Boat Docks on Eelgrass Beds in Coastal Waters of
Massachusetts" by D.M. Burdick and F.T Short

NMFS Memorandum to CBJ regarding Auk Nu Cove Processing Facility

Literature Cited

Fonseca, M.S., W. J. Kenworthy, and G.W. Thayer. 1998. Guidelines for the Conservation and Restoration of Seagrasses in the United States and Adjacent Waters. NOAA Coastal Ocean Program Decision Analysis Series No. 12. NOAA Coastal Ocean Office, Silver Spring, MD. 222pp.

Murphy, M.L., S.W. Johnson, and D.J. Csepp. 2000. A Comparison of Fish Assemblages in Eelgrass and Adjacent Subtidal Habitats near Craig, Alaska. Alaska Fishery Research Bulletin 7:11-21.