

REGULATOR'S PERSPECTIVE — NATIONAL MARINE FISHERIES SERVICE

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I am pleased to be able to share the views of the National Marine Fisheries Service (NMFS) on issues related to the regulatory process for maintaining the nation's ports and waterways. Most of you are probably familiar with NMFS and know that it is part of the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA). As the nation's lead agency for the conservation and management of fishery resources in the U. S. Exclusive Economic Zone, NMFS must seek to balance the importance of economically viable fishing industry with the need to use the marine environment for a number of equally important, but at times conflicting, or threatening, uses. We also have responsibilities for protecting marine mammals, certain endangered species, and habitats for all living marine resources. From our standpoint, an effective regulatory process is critical to the long-term health of living marine resources, their associated habitats and other NOAA trust resources. Today I want to briefly outline MFS' regulatory responsibilities, describe some actions we are taking, and offer a few recommendations for improvements to the existing system.

Over the last two decades NMFS has changed its focus from almost exclusively one of assessment and optimum utilization of fishery stocks to that of steward for living marine resources and their habitats. As the human population in general, and coastal populations in particular, continues to expand, the effects of human activities on coastal and oceanic resources have escalated dramatically. For example, landings in a number of key species have fallen to such an extent that those fisheries are no longer economically viable, coastal wetlands losses continue to mount, marine mammal populations are declining, nearshore pollution has become a chronic problem in many areas, and more and more marine, coastal and anadromous fish species are being considered for listing as endangered or threatened.

Dredging and dredged material disposal are not the only uses of the marine environment that affect NMFS trust resources, and they certainly cannot be identified as the sole cause of the serious declines in many living marine resource populations we have seen, and expect to continue. Yet increasingly greater attention is being focused on dredging projects by NMFS and other federal, state and local governmental agencies. In part,

this is because of their highly visible nature, which can engender a great amount of controversy. Even more so it is because of the increasingly more rigorous levels of regulatory oversight and management required, as thresholds used for determining sediment contamination change due to improvements in analytical methods and a better understanding of environmental effects on marine species and habitats.

The regulatory process can provide for increased environmental protection, but often it seems to many in the debate that it results only in further polarization, lengthy delays, and increased costs for individual projects. NMFS recognizes the importance of functioning, well-maintained, modern ports both for national economic security as well as for the benefit of the fishing industry itself. We believe that the environmental regulatory process can be improved considerably, for both those regulated and for the environment. Improvements in a number of areas would result in more predictable, environmentally-sound decision-making and would allow NMFS to contribute more effectively and efficiently.

Statutory Responsibilities

NOAA operates under several consultative and regulatory legislative authorities to address human activities that may affect its trust resources. These laws are not specific to port and waterway dredging and associated dredged material disposal. They allow NMFS to review numerous individual proposals, including dredge and fill permits, hydroelectric projects, offshore oil, gas and mineral development, ocean dumping, water diversion and impoundments, energy facility siting, effluent discharges, and alteration of wetlands to name a few. The authorities that allow NMFS involvement in the review of dredging or disposal projects are described below.

NMFS is most often recognized for its fisheries mission, which is the largest element of all our living marine resource programs. The United States commercial fishing industry provides well over 100,000 jobs and in 1992 produced a record 9.6 billion pounds of commercial landings at U. S. ports, a harvest valued at \$3.7 billion. The commercial marine fishery industry

contributed \$18.5 billion in value added to the gross national product. In addition, 17 million anglers enjoy saltwater fishing each year. The economic activity, including multiplier impacts, associated with marine recreational fishing in 1985 was estimated at \$13.5 billion. Understandably, the effects of dredging and disposal activities on the long-term preservation of fishery resources is of great concern to us.

The Magnuson Fishery Conservation and Management Act, in addition to the development and implementation of fishery management regulations, provides for the involvement of regional fishery management councils in habitat matters. These councils are becoming more concerned about conserving fishery habitats to help ensure the optimum sustained use of these resources. While under the present Magnuson Act each council can comment on and make recommendations concerning activities affecting habitats of fishery resources under its jurisdiction, this reactive capability is seldom used. A more forward-looking approach is needed. We are working with the councils and others to augment the habitat protection provisions of the Magnuson Act during its reauthorization in this Congress. In testimony before the Senate Committee on Commerce, Science and Transportation, NOAA proposed that the regional fishery management councils formally identify marine and estuarine fish habitats that are essential to obtaining optimum fishery yields. This would allow other Federal agencies to consider these important areas in permitting and Federal water resource project decisions. The strengthening of existing fishery habitat protection provisions are also being proposed by industry and environmental groups involved in the reauthorization process.

NMFS also has specific regulatory authority to protect living marine resources and habitats under the Endangered Species Act (ESA) and the Marine Mammal Protection Act. Both of these statutes recognize the importance of maintaining healthy ecosystems for these resources. The latter states that marine mammals are resources of great international significance, aesthetically, recreationally, as well as economically, and should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management, and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.

The ESA provides protection to species that are listed under it as threatened or endangered. As part of this protection, ESA §7 requires federal agencies to use their authorities in furtherance of its purposes by carrying out programs for the conservation of listed

species. This section also requires federal agencies to consult with NMFS on activities they permit, fund or conduct that may affect marine species listed as threatened or endangered. For major projects, the action agency submits a biological assessment that describes the activity and discusses all potential effects to endangered and threatened species and their habitats. NMFS reviews the biological assessment and the best available scientific and commercial data and prepares a biological opinion on the effects of the proposed activity. Biological opinions represent our position regarding whether proposed actions are likely to jeopardize the continued existence of listed species. The opinion usually includes conservation recommendations reduce the impacts of the action agency's activities and promote the recovery of listed species as guided by recovery plans when available. The §7 consultation process is open-ended and can be reinitiated if new information becomes available on the project or listed species that changes the basis for the original consultation.

Unfortunately, the ESA has become the final line of defense in the preservation of more and more species in both the terrestrial and aquatic environments. I say this is unfortunate because species receive its protection only after all other conservation and management efforts have failed to protect individual species and their habitats. In NMFS, and we are not unique, the requirements of more endangered species actions demands that fixed resources be reallocated, usually at the expense of longer-ranged, and ultimately less-disruptive, protective methods. With the establishment of the NMFS Office of Habitat Protection in 1992, we have placed even greater emphasis on broader protection efforts to avoid relegating species and habitat to the "last chance" of ESA.

NMFS primary habitat protection authorities are derived from the Fish and Wildlife Coordination Act and the National Environmental Policy Act. These laws charge NMFS with protecting the habitats of all living marine resources and provide a formal advisory role to assist Federal agencies in decisions regarding licenses, permits and other actions involving dredging, including those made under §404 of the Clean Water Act and §10 of the Rivers and Harbors Act. While permitting and federal water resource project constructing agencies are not required to adopt NMFS recommendations, I believe we have achieved a measure of success through our involvement in the regulatory process. By working with potential applicants and federal constructing agencies early in the federal process, NMFS staff have been able to have key habitat concerns identified and addressed sooner, thereby saving the applicant or federal constructing agency time and expense. Our ability to

provide high-quality scientific advice for habitat conservation has led to an increased awareness of living marine resources within state and federal permitting and water resource constructing agencies, as well as other stakeholders in the regulatory process.

These species and habitat protection authorities are exercised primarily through the five NMFS regional offices. Under the habitat protection authority there are provisions for elevating specific permits or proposed Federal water resource projects to headquarters in cases where NMFS recommendations are not accepted at the field level, but the preferred avenue is to have our recommendations incorporated into the federal decision-making process at the field level.

In addition to the authorities specific to NMFS, NOAA has other statutory responsibilities that may affect dredging and dredged material disposal activities. Under the Coastal Zone Management Act, NOAA reviews and approves state coastal management plans. The twenty-nine states with federally-approved plans have the authority to determine whether a proposed federal activity is consistent with its coastal plan. Title III of the Marine Protection, Research and Sanctuaries Act authorizes NOAA to designate manage marine sanctuaries for the long-term protection of nationally significant marine areas. In recent years both the number and the size of individual sanctuaries has grown considerably, in recognition of that program's potential to protect marine areas on an ecosystem basis. Finally, under the Comprehensive Environmental Response, Compensation, and Liability Act, NOAA is authorized to provide scientific support for the response to and assessment of injuries from discharges of hazardous materials to the marine environment. NOAA can also seek damages for these injuries to its trust resources and use recovered funds for restoration purposes.

General Dredging Recommendations

I believe improvements to the current environmental regulatory process alone will not eliminate the friction identified with dredging and dredged material disposal activities. A more comprehensive examination of all the issues associated with these activities must be undertaken. The following recommendations encompass broad areas that look at issues beyond the purview of NMFS, or the other regulatory and resource agencies represented here today. In addition to addressing dredging and disposal activity, some would also benefit our involvement in other activities affecting the marine environment.

- We must bring the assessment and management of dredging and dredged material disposal activities into the nineties and take advantage of the thinking that has been done to address other environmental issues. Concepts such as the "ecosystem approach" and "advanced planning," articulated in the Administration's recent wetlands policy, need to be used in the development of new dredging programs and the evaluation of existing projects.

- We must ensure that there is adequate information on which to base decisions. Appropriate studies should be undertaken where there is insufficient scientific information.

- We must consider the development of stricter regional and national criteria for the economic analysis of the necessity for port and waterway dredging to differentiate between real and perceived needs. This is an area where I believe the ongoing interagency effort Maritime Administration (MARAD) is conducting should play a major role.

- We must place greater emphasis on prevention of sedimentation and contamination at their sources.

- We must develop mechanisms to improve coordination, particularly in the early stages of a proposed project, between governmental and non-governmental parties involved in dredging. Again, I see the MARAD interagency effort as important here.

- We must support the additional research needed to increase knowledge of the function of undisturbed ecosystems and habitats, the response of living marine resources to dredging and disposal activities, and the refinement of models to predict short- and long-term outcomes of habitat alterations and other effects of dredging operations.

- We must accelerate the development and adoption of standard testing guidelines and recognize that agreement on criteria for defining sediment contamination is essential to provide predictability in the permitting process. This must be a priority in any efforts to improve the regulatory process. The work of the joint EPA/COE task group on management of dioxin contaminated dredged material should contribute significantly in this regard.

- We must ensure that analysis of disposal alternatives look beyond the short-term economic considerations of project costs and include less environmentally-damaging and even beneficial options, such as restoration. Changes to the existing cost sharing or funding policies should be examined to encourage these options. Demonstration projects to determine the feasibility of emerging technologies for dredged material treatment and disposal should be considered for incorporation into new dredging permits.

- We must see that resources to meet the requirements of the regulatory process are commensurate with the expectations of the regulated industries, as well as other parties affected by dredging operations. Since this is even more unrealistic today than in previous budgetary times, the common goal of all these recommendations should be to reduce the demands on the regulatory process and avoid the time required to carry it out.

In closing, I would like to emphasize that the overriding NMFS mission to provide for the long-term, sustainable use of our nation's living marine resources requires that we must continually look for new approaches to deal with the increasing pressures human activities are placing on these resources. I believe this session is a good example of how groups representing different interests can come together to address common needs. Thank you for the opportunity to present our views.