

Regional Oyster Restoration Regulatory Discussion
November 17, 2016 - 9:30 am to 10:30 am
U.S. Army Corps of Engineers, 1520 Royal Palm Square #360, Fort Myers, FL

FINAL AGENDA

Meeting Purpose: To continue discussions between the resource managers and regulatory staff regarding alternative options for regional permitting of oyster restoration projects within the CHNEP estuaries.

Desired Outcomes:

- Consensus on the most appropriate regulatory process to use for regional oyster habitat restoration permitting within CHNEP estuaries.
- List of data needed to develop regional oyster habitat restoration permitting, with responsibilities and due dates.

Attachments:

- Project summary document
- Google Earth KMZ file of CHNEP Priority Oyster Restoration Sites & Rankings:



OystRestMar2015.kmz

- Excel table of Priority Oyster Restoration Sites & Rankings developed by the SWFOWG Subcommittee.

Topics:

- Welcome, Introductions & Meeting Purpose – Judy Ott, CHNEP
- Project Overview – Andrea Graves, TNC
- CHNEP Priority Restoration Sites & Acres – Judy Ott, CHNEP
- Regulatory Options - All
- Additional Information Needed – All
- Next Steps– All



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MEETING NOTES

Attendees:

Marie Huber, USACE

Brianne McGuffie, USACE

Cynthia Ovdenk, USACE

Robert Tewis, USACE

Andrea Graves, TNC

Melynda Brown, FDEP

Judy Ott, CHNEP

Adam Brame, NOAA – via phone

Carla Reece, NOAA – via phone

Chuck Kelso, FWS – via phone

Jennifer Hecker, CHNEP – via phone

Meeting Purpose: To continue discussions between the resource managers and regulatory staff regarding alternative options for regional permitting of oyster restoration projects within the Charlotte Harbor National Estuary Program (CHNEP) estuaries.

Desired Outcomes:

- Consensus on the most appropriate regulatory process to use for regional oyster habitat restoration permitting within CHNEP estuaries.
- List of data needed to develop regional oyster habitat restoration permitting, with responsibilities and due dates.

Attachments Provided:

- Project summary document.
- Google Earth KMZ file of CHNEP Priority Oyster Restoration Sites & Rankings.
- Excel table of Priority Oyster Restoration Sites & Rankings developed by the SWFOWG Subcommittee.

Topics and Discussions:

1. Welcome, Introductions and Meeting Purpose – Judy Ott, CHNEP

The meeting began at 9:30 am. Brianne McGuffie welcomed participants and participants introduced themselves. Judy Ott explained that the purpose of the meeting was to continue discussions between resource managers and regulatory staff regarding options for regional permitting of oyster restoration projects within the CHNEP estuaries. Additional discussion included:

- It might be possible to use Nationwide Permit 27 if no submerged aquatic vegetation (SAV) is found in the project location.
- It might be possible to get a Programmatic biological opinion (BO).

2. Project Overview – Andrea Graves, The Nature Conservancy (TNC)

Andrea Graves provided context for the meeting discussions by reviewing progress to date towards restoring oyster habitat within the CHNEP estuaries and tidal rivers. The project goal is to enhance and restore self-sustaining oyster habitat and related ecosystem services throughout CHNEP. To achieve that goal, it is necessary to find a permitting instrument that can encompass multiple oyster restoration sites, implemented by multiple partners, with liability assumed by each entity for only the projects they implement. Several meetings were held in the past between regulatory agency, TNC and CHNEP staff and the Southwest FL Oyster Working Group (SWFOWG) to identify appropriate permitting instruments and processes. Accomplishments to date and additional discussions included:

- 2011 CHNEP/TNCE Shellfish Restoration Workshop conducted.
- 2012 CHNEP Oyster Habitat Restoration Plan adopted.
- State General Permit (GP) for Restoration, Establishment and Enhancement of Low Profile Oyster Habitat (62.330.632 FAC) adopted.



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- 2012 large scale oyster restoration proposal for SW FL, including CHNEP, was submitted for RESTORE funding by TNC, FL Gulf Coast University (FGCU) and Sanibel Captiva Conservation Foundation (SCCF).
- 2012 pilot oyster restoration project permit application was initiated by TNC in the Peace River in Punta Gorda at the Trabue Boardwalk for .25 acres.
- 2013 meeting between TNC, CHNEP and NOAA National Marine Fisheries Service (NOAA-NMFS) staff to discuss proposed number of small oyster restoration projects totaling 20 acres within the CHNEP and potential impacts to critical habitat for endangered smalltooth sawfish.
- 2013 NOAA-NMFS suggested reviewing 1 permit for large scale oyster restoration would be preferable over reviewing multiple small project applications for potential impacts to critical smalltooth sawfish habitat.
- 2015 field inspections and priority site identification for oyster restoration with CHNEP were conducted by SWFOWG members, leading to a priority list of 53 potential restoration sites totaling 28 acres. The priority list was approved by the SWFOWG and CHNEP Technical Advisory Committee (TAC).
- 2015 discussions were held between TNC and the US Army Corps of Engineers (USACE) staff regarding the most appropriate type of permit application for large scale, multi-partner oyster restoration. A Regional General Permit (RGP) was agreed to be the best option.
- 2015 follow-up discussions indicated that adequate USACE staff time was not available to develop the RGP and that 1 Long Term Individual Permit (LIP) with 1 permit holder might be a more viable.
- 2015 discussions with the SWFOWG members indicated that it was not feasible for 1 member to be the permit holder for a number of restoration projects implemented by different partners, due to liability concerns.
- 2015 deployment of the pilot oyster restoration project at the Punta Gorda Trabue site was completed.
- 2015 development and implementation of a Volunteer Oyster Habitat Monitoring program was initiated by TNC and CHNEP at the Trabue pilot oyster restoration site.

3. CHNEP Priority Restoration Sites and Acres – Judy Ott, CHNEP Representatives

Judy reviewed materials provided to group about CHNEP oyster restoration plan and priority sites, including:

- CHNEP boundary.
- CHNEP oyster restoration plan maps.
- Priority restoration site locations and totals = 53 sites and 28 total acres.
- Trabue permit application and NOAA BO.
- NEPA and EPA permitting guidelines.

4. Regulatory Options – Meeting Participants

Discussions about regulatory options ensued, including:

- An RGP might be most appropriate and TNC, CHNEP and SWFOWG can help provide information needed to develop RGP.
- It would be a USACE management decision to re-evaluate the appropriateness and feasibility of developing an RGP. Staff prefer that an existing permitting process be used if possible.
- If each of the priority restoration sites were permitted separately it would create too many LIPs. Instead, could we consider having each partner planning to implement projects, identify the group of oyster restoration sites and acres for which they would be responsible.



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- Need to look at past SWFOWG maps and create polygons of grouped priority sites – estimate size and cubic yards
- Permit holder is considered liable under the NWP; if different entity constructs project at later date, a separate agreement could be used (e.g., a sub-contract) that re-assigns the liability
- Could assign liability to different parties with verification letter.
- Would USFWS consider other species (ie. Manatees)? Yes, but manatee impacts would be minor.
- For the critical smalltooth sawfish evaluation, NOAA still feels that a Programmatic consultation would be better and faster.
- For smalltooth sawfish, need to identify adverse effects, estimate loss and identify cumulative effects.
- If NMFS does a Programmatic BO, USACE has to provide them with the application first.
- Could do an initial LIP with list of areas and use that to initiate the Programmatic BO based on the total sites; would need acres within smalltooth sawfish habitat and SAV.
- Could a package of LIPs be used to initiate a Programmatic BO for all sites? Yes.
- Could do an Activity Based Programmatic BO for oyster restoration in the CHNEP estuaries.
- For an Activity Based Programmatic BO, would need to define the extent of the loss of an essential feature; this determination would need to be made separately for USACE permit and Programmatic BO depending on how each agency interprets the rule
- Need to focus on effects to essential habitat, including nursery, juvenile and adult populations; restoring oyster habitat would provide prey for juveniles and adults.
- What would be the difference between a batch consultation vs. Programmatic BO?
- The time period for the oyster restoration permit would be 5 years.
- Does the 50 foot buffer from mangroves still apply? This was a state not USACE requirement and wouldn't be required by USACE.
- What are the differences and/or benefits of a batch Consultation vs. Programmatic BO? The projects listed in a batch would be the maximum allowed under the permit. A programmatic could be expanded in the future. Programmatic requires specific design criteria and has more flexibility.
- Would we be considering additional sites? Not within the next 5 – 10 years.
- Nationwide Permit 27 is for aquatic habitat restoration, establishment and enhancement activities. It expires in March 2017 and is currently being updated.
- Could incorporate oyster restoration into USACE JaxBO as it is updated.
- Nationwide permits are good for 5 year and current one expires in March 2017.
- JaxBO is the pending Jacksonville Biological Opinion which will replace the current Statewide Programmatic Biological Opinion in March 2017.
- Timeframe for Batch and Programmatic BO would be about the same.
- How does the process work to identify needed information for a Programmatic BO? Work directly with USACE and NOAA staff.
- NWP might be easier to process than LIP.
- The most efficient process might be to avoid SAV and submit a group of \pm 6 NWPs, including specific sites and project managers.
- NWPs last 5 years – from March 2017 – 2022.
- Construction window expires but liability continues after permit expires.
- Programmatic BO is good indefinitely.
- Would need to include project design criteria within limitations for rule.
- Could use Statewide Programmatic BO if there are not affects to essential features.
- Need to include monitoring.
- Need to consider coconut mats vs. aquaculture mesh; consider living shoreline designs.
- Need to define success criteria.



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- NWP requires net benefit; need to include public interest.
- NWP requires project design to include “patches” <20 feet long X 20 feet wide, with 3 foot corridors between.
- Project can’t impede navigation; might need signs; FWC Uniform Waterway Markers/Coast Guard would permit signs. Similar projects that might have relevant information regarding permitting. For example, Chesapeake Bay conducted large scale oyster restoration using an Individual Permit; could contact them for details. And, St. Lucie oyster restoration could be a template for a RGP or Nationwide Permit (NWP); need to contact Martin County for details; this was 16 years ago through the USACE office in West Palm Beach.
- **Bottom Line:** Submit group of NW27 permits to USACE and initiate NOAA Activity Based Programmatic BO.

5. Additional Information Needed – Meeting Participants

- Identify which sites would be included in each NWP and who permit holder would be.

6. Next Steps – Meeting Participants

- Define Essential Feature for both USACE and NOAA.
- Contact FDEP re: type of permit and 50 foot setback requirement from mangroves.
- Group priority sites into potential areas for each NWP permit.
- Identify who permit holder for each group would be.
- Identify design criteria including site locations, lat/longs for corners of site boundaries, depths, methods, acres, cubic yards, square area, lead implementers, profile, intent to restore not mitigate, etc.
- Incorporate design criteria into template NWP and draft applications for each group of sites.
- Get agreements between partners about who would be permit holder for each group of sites.
- Submit group of NW27 applications to USACE who will submit them to NOAA for Activity Based Programmatic BO.

Note: Following the meeting Melynda Brown, FDEP discussed the project with Patricia Clune from FDEP. The 50 foot setback from mangroves would not likely be required, but some monitoring likely would be required for up to 3 years.