ANNEX 5: Endangered Species Act Consultation

USACE is updating its ESA consultation to account for project design changes since the 2017 Draft GRR/SEIS. That consultation will be included in the Final GRR/SEIS.



DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, NEW ORLEANS DISTRICT 7400 LEAKE AVENUE NEW ORLEANS, LOUISIANA 70118

REPLY TO ATTENTION OF:

Regional Planning and Environment Division, South Environmental Compliance Branch January 23, 2017

Mr. Joe Ranson Field Supervisor U.S. Fish and Wildlife Service 646 Cajundome Blvd, Suite 400 Lafayette, LA 70506

Attn: Mr. David Walther

under our jurisdiction and currently protected by the Endangered Species Act of 1973 (Act). The project, as proposed, () Will have no effect on those resources (r) is not likely to adversely affect those resources. This finding fulfills the requirements under Section 7(a)(2) of the Act.

This project has been reviewed for effects to Federal trust resources

onion & Supervisor Louisiana Field Office manatee U.S. Fish and Wildlife Service

pallid sturgeon

Dear Mr. Ranson:

The U.S. Army Corps of Engineers, New Orleans District (CEMVN) is reinitiating consultation with your office for threatened or endangered species per Section 7 of the Endangered Species Act (ESA) for replacing the navigation lock on the Inner Harbor Navigation Canal, also known as the IHNC and Industrial Canal, in New Orleans, Louisiana. The CEMVN is preparing a general reevaluation report with an integrated environmental impact statement titled Mississippi River, Baton Rouge to the Gulf of Mexico Mississippi River-Gulf Outlet (MRGO), Louisiana, New Industrial Canal Lock and Connecting Channels. Prior ESA consultation for a plan to replace the IHNC Lock. was completed during preparation of a Supplemental Environmental Impact Statement (SEIS), titled, "Inner Harbor Navigation Canal Lock Replacement Project, Orleans Parish, Louisiana." That consulation resulted in the USFWS concurring with CEMVN's determination, by correspondence dated September 19, 2008, that the proposed action may affect, but is not likely to adversely affect, any threatened or endangered species. As you may be aware, this project has a long history and is now in a reevaluation phase. This updated ESA assessment and determination summarizes current efforts to evaluate the feasibility of constructing a new navigation lock, and provides an assessment of potential effects on several threatened or endangered species under USFWS purview.

Study History

The original 1997 Evaluation Report and EIS for this project was finalized in March 1998. A Record of Decision was signed in December 1998, selecting the location for a replacement lock within the IHNC, north of the Claiborne Avenue Bridge. Other project features were replacement of the St. Claude Avenue Bridge, modification of the Claiborne Avenue Bridge, extension of the Mississippi River flood protection levees and floodwalls, a community impact mitigation plan, and a fish and wildlife mitigation plan. Via FAX dated October 9, 1996, your office agreed with our determination that the proposed action would not likely adversely affect listed or proposed threatened or endangered species. The National Marine Fisheries Service also agreed similarly to our not likely to adversely affect determination via letter dated October 17, 1996.

In 2007, the Corps began preparing a SEIS for the IHNC Lock Replacement Project to address changes in existing conditions after Hurricane Katrina, further analyze anticipated impacts associated with construction of a lock, and determine if any significant changes to the previously-recommended plan were necessary. CEMVN began informal consultation as per Section 7(a)(2) of the Endangered Species Act with your office through a letter dated February 20, 2008. CEMVN determined that the proposed project would not likely adversely affect any threatened or endangered species in the project area. Your office requested continuation of consultation to acknowledge the possible occurrence of pallid sturgeon within the IHNC and possible interaction with the lock structure and associated culverts. CEMVN reinitiated consultation with your office by a letter dated August 15, 2008. Your office concurred with CEMVN's determination that the proposed action may affect, but is not likely to adversely affect, any threatened or endangered species in the project area on September 19, 2008. The final SEIS was completed in March 2009. In May 2009, a Record of Decision was signed, recommending the float-in-place plan for lock construction for a new lock within the IHNC, the hydraulic dredging method for excavation of sediment from the canal, a detailed plan for dredged material disposal, and bridge replacement and modifications. These features were similar to the plan recommended in the 1997 Evaluation Report and EIS.

Study Purpose and Need

This current reevaluation study addresses the feasibility of improving navigation efficiencies for traffic on the GIWW and the Mississippi River via the IHNC in New Orleans, Louisiana. A General Reevaluation Report (GRR) of the lock replacement is required to analyze shallow draft lock alternatives.

Study Area

The study area is located in Orleans Parish in southeastern Louisiana. The area is generally bounded by the Mississippi River Gulf Outlet (MRGO) and Gulf Intracoastal Waterway (GIWW) on the north, the Mississippi River on the south, Louisiana Highway 47/Paris Road on the east, and the hurricane protection floodwalls on the west bank of the IHNC on the west.

Tentatively Selected Plan and Plans Description

The current study addresses four lock replacement plans in the final array of alternatives, as well as a no-action plan. Under the no-action plan, the proposed construction of a replacement lock or an additional lock would not occur and the Federal

government would continue to operate and maintain the existing lock. Plan 3 is the tentatively selected plan (TSP). The main feature of this plan is a new lock with dimensions of 900 feet long by 110 feet wide by 22 feet deep to be located within the IHNC, north of Claiborne Avenue (Figure 1). Plans 2, 4 and 5 would have similar environmental effects as compared to the tentatively selected plan. All plans include replacement of the St. Claude Avenue Bridge and demolition and removal of the existing IHNC Lock. The site of the new lock, major construction activities, and project features for Plans 2, 4 and 5 would all be comparable to the TSP with the only variation being the dimensions of the locks (Plan 2 - 900 feet long x 75 feet wide x 22 feet deep; Plan 4 - 1,200 feet long x 75 feet wide x 22 feet deep).



Figure 1. Vicinity Map of IHNC Project.

The most significant difference between previous lock replacement plans and the plans currently being studied is the method by which dredged material is disposed. Previous lock replacement plans, which were deep-draft locks with a sill depth of 36 feet, included the disposal of dredged material in confined disposal facilities and in the Mississippi River. The currently studied plans eliminate the use of confined disposal facilities and in commercial landfills and disposal of material suitable for open water and disposal in commercial landfills and disposal of material suitable for open water disposal into the main channel of the Mississippi River.

Construction of the new lock would require a complex sequence of tasks (see Figure 2). It is anticipated that the entire construction process could take up to 13 years to complete, if adequate funding is provided. The following bullets describe the major tasks in sequence:

 A cofferdam around the new lock construction site is required so that the site can be unwatered. Foundational support is required for the cofferdam, therefore jet grouting of the canal bottom sediments utilizing barge-mounted equipment would be performed to strengthen the sediments. The soil improvements



Figure 2. Location of Replacement Lock, Bypass Channel, and Cofferdam

would occur prior to placement of sheeting for the cofferdam. The required sheet pile tip elevation for the cofferdam is elevation -90 feet North American Vertical Datum 1988 (NAVD88). The sheet pilings would be placed using a barge-mounted vibratory hammer to form cell walls, and the interior of the cofferdam cells would be filled with sand to an elevation of +3.5 feet (NAVD 88).

- The north-south section (eastern wall) of the cofferdam would be constructed within the IHNC as the first actual construction feature of the project. Construction of this part of the cofferdam in the navigation channel would separate two distinct dredging areas, namely the new lock construction site on the west side and the north bypass channel on the east side. The lock construction site and the north bypass channel require excavation to significantly different depths. The dredging depth required for the new lock site is elevation -33 feet (NAVD 88). For the north bypass channel, the required elevation is -17 feet (NAVD 88).
- A temporary bypass channel would be excavated between the north-south cofferdam section and the floodwall located along the east bank of the IHNC. Some of the existing east bank of the IHNC may need to be removed. The north bypass channel would accommodate vessel traffic around the new lock

construction site. To protect the east bank of the IHNC and cofferdam, and the vessels transiting the bypass channel, tugboats would be permanently stationed to assist vessels transiting the area. In addition, protection cells would be placed along the west side of the bypass channel to protect the cofferdam. All vessel traffic would be rerouted through the north bypass channel while the new lock is being constructed.

- Approximately 106,000 cubic yards of sediment would need to be dredged to construct the north bypass channel. The majority of this dredged material approximately 70,000 cubic yards from Dredged Material Management Unit (DMMU) 6 is suitable for open water placement and would be discharged into the Mississippi River. See Figure 4 for locations of DMMUs. The remaining dredged material, about 36,000 cubic yards from DMMU 7, is not suitable for discharge into the Mississippi River and would be bucket dredged and disposed of in a solid waste landfill (Refer to *Dredged Material Disposal Plans* section for detailed soils and sediment excavation and discharge discussion).
- Once the north bypass channel is operational, the new lock site would be dredged by a combination of hydraulic and bucket dredges. Approximately 69,000 cubic yards of dredged material from DMMU 5 is unsuitable for discharge into the aquatic environment and would be bucket dredged and disposed of in a solid waste landfill. An additional 278,000 cubic yards of dredged material would be removed from the new lock site (DMMUs 3 and 4) by hydraulic dredging. That material is suitable for disposal in the freshwater aquatic environment and would be discharged into the Mississippi River.
- After completing the dredging work at the new lock site, the east-west sections (northern and southern walls) of the cofferdam would be constructed to close the cofferdam for unwatering. Unwatering of the cofferdam would be accomplished with a combination of pumps, sumps, and wells, including pressure relief wells. All water collected within the cofferdam would be pumped into the IHNC.
- Foundation pilings would be driven within the unwatered cofferdam to support the concrete pours of the lock module. Foundation pilings would consist of 24-inch x 24-inch precast, pre-stressed concrete pilings spaced on approximately 10-foot centers with tighter spacing under lock module walls. A total of 1,386 vertical pilings would be driven to a depth of 136 feet below grade. Either a vibratory or impact hammer, or a combination of both, would be used for pile driving. Concrete pours for the lock modules would begin at the gates and work inward to the chambers. Alternate sections of the module would be poured, and some concrete pours may need to occur at night with the use of lighting due to concrete technical restrictions. Machinery, valves, electrical, and mechanical connections would all be installed after completion of concrete placement. An on-site concrete batch plant would be necessary, and nearby staging areas for construction materials and parking areas for construction workers would be required.
- Following completion of the lock modules, the cofferdams would be removed and the area re-watered. Areas around the lock modules would be backfilled with

excess sand from the cofferdams and earthen fill material from off-site sources. The west side of the lock would be backfilled first, prior to opening the lock, so that administration buildings can be constructed in that area and to avoid working on the west side of the lock while traffic is passing through the lock. The lock would then be opened to navigation traffic in a pass-through mode and the bypass channel backfilled with earthen fill material from an offsite source. Completion of tie-ins to existing floodwalls on both sides of the IHNC would be achieved after construction of the new lock, while the new lock remains in the pass-through mode (all gates open). During this time, the existing lock would continue normal operation.

- A temporary bridge (see Figure 3) would be constructed adjacent to the St. Claude Avenue Bridge to provide a comparable level of traffic flow while the St. Claude Avenue Bridge is replaced with a low-level double bascule bridge.
- Replacement storm and flood risk reduction measures (see Figure 3) would be constructed to at least inkind and up to current design standards.
- Once the new lock becomes operational and all new levees and floodwalls are constructed, the old lock would be put into pass-through



Figure 3. Project Features near the St. Claude Avenue Bridge

mode. During this time a south bypass channel around the east side of the old lock would be constructed to allow for continued vessel traffic while the old lock is demolished (see Figure 3). Hydraulic and/or mechanical dredges would remove approximately 85,000 cubic yards of sediment from DMMU 10 to construct the south bypass channel. This material is suitable for open water placement and would be discharged into the Mississippi River.

• Once the south bypass channel is operational, the old lock would be demolished and the structural material hauled away to be salvaged or scrapped. About 181,000 cubic yards of dredged material would then be removed from the lock demolition site (DMMU 9) with hydraulic and or mechanical dredges. This material is suitable for open water discharge into the Mississippi River. Upon completion, the new lock and connecting channels would be fully functional.

Dredged Material Disposal Plans

Soils and sediments that require excavation for project construction have been thoroughly evaluated under regulations and procedures developed under requirements of the Clean Water Act and may be divided into two categories. Approximately 614,000 cubic yards of dredged material that would be excavated from Dredged Material Management Units (DMMUs) 3, 4, 6, 9, and 10 is "suitable for open water discharge" (see Figure 4). This material is non-toxic to sensitive benthic organisms, does not contain contaminants at concentrations that would adversely bioaccumulate or biomagnify in aquatic food webs. and would not violate or exceed regulatory water guality criteria or drinking water standards upon discharge into the proposed Mississippi River open-water disposal site. The dredged material would mix with the river's normal suspended and bedload sediments and be carried downstream. Approximately 105,000 cubic yards of dredged material that would be



Figure 4. Location of IHNC Dredged Material Management Units.

excavated from DMMUs 5 and 7 is "unsuitable for open water discharge" because it is toxic to sensitive benthic organisms. This material would be excavated with an environmental bucket dredge to minimize on-site loss of material and turbidity, and would be hauled to and permanently disposed in a permitted solid waste landfill.

 Dredging depths and widths required for the this plan do not warrant vertical or lateral subdivision of DMMUs into "native layer" and "fill" categories as for previously-evaluated deep draft lock alternatives. However, results from chemical and biological testing of the material within these DMMUs were utilized in assessing current dredged material disposal alternatives in that contaminant maximums and worst-case toxicity determinations for overlapping units were considered to represent a dredging unit. As an example, testing results from the non-native or fill layer of DMMU 7 which contained higher levels of contaminants than the native layer were used to represent the entire unit, and were not averaged or weighted with native and fill layers.

 DMMUs previously evaluated for deeper lock alternatives that have sufficient depth and would not be dredged as part of this plan are DMMUs 1, 2, 8, and 11 (IHNC Channel).

The lock replacement alternatives evaluated in prior reports (1997 and 2009) would have required large areas for the disposal of dredged material generated from lock construction. In those reports, large quantities, up to 1,400,000 cubic yards, were to be excavated with hydraulic dredges and pumped as a slurry to confined disposal areas located along the south bank of the GIWW/MRGO east of the IHNC. Some dredged material would have also been placed into the deep channel of the Mississippi River.

A reevaluation of dredged material disposal alternatives was conducted for this report. It was determined that the required dredging guantities for all DMMUs were significantly reduced from the volumes described for all of the alternatives assessed previously. Two dredging and disposal alternatives were evaluated for the discharge of dredged material that has been determined to be unsuitable for aquatic disposal: 1) hydraulic dredging and disposal in an 81-acre confined disposal facility located along the south bank of the GIWW; and 2) environmental bucket dredging and placement into hopper barges and transported to a permitted solid waste landfill. Cost estimates associated with the use of an environmental bucket dredge and subsequent disposal of dredged material into a permitted solid waste landfill were determined to be less costly than hydraulic dredging and permanent confinement of dredged material in a confined disposal facility. Moreover, the use of an environmental bucket dredge and disposal into a permitted solid waste landfill would eliminate impacts to productive fish and wildlife habitats, including wetlands, as well as avoid and minimize potential adverse impacts to waters of the U.S. The dredged material determined to be suitable for aquatic disposal would be hydraulically dredged and disposed into the Mississippi River. Earthen fill material would also be needed for backfill at and around the new lock construction site, however this deposition of fill is not expected to cause impacts that warrant special construction conditions. Construction specifications would include measures to avoid and minimize impacts to threatened and endangered species, namely West Indian manatee and pallid sturgeon, if they are observed in or near the construction site, even though no such encounters are expected.

Occurrence of Threatened or Endangered Species within the Study Area

Three threatened, endangered, or candidate species under USFWS purview are either known to or may possibly/seasonally occur in Orleans Parish: West Indian

manatee (*Trichechus manatus*) (endangered); pallid sturgeon (*Scaphirhynchus albus*) (endangered); and Sprague's pipit (*Anthus spragueii*) (candidate). While the Sprague's pipit winter range sightings have been documented in the coastal prairies of Texas and Louisiana, it is not anticipated that this species would occupy any lands associated with the study area. The lock construction and demolition sites at the IHNC do not contain any representative habitat qualities that are conducive to this species. Therefore, the proposed project would have no effect on this species or its wintering habitat.

Gulf sturgeon (*Acipenser oxyrinchus desotoi*) are known to occur in nearby Lakes Pontchartrain and Borgne. In these lakes, the species is under the purview of the National Marine Fisheries Service (NMFS). CEMVN will consult with the NMFS under Section 7 of the ESA on the potential for the proposed action to affect Gulf sturgeon.

West Indian manatee

West Indian manatees can be found in shallow, slow-moving rivers, estuaries, saltwater bays, canals, and coastal areas (LDWF, 2012). West Indian manatees are typically found in waters with dense submerged aquatic beds or floating vegetation where the species grazes on a variety of aquatic plants. This species has been known to occasionally enter Lake Pontchartrain and associated coastal waters from June through September. Manatees have been reported in the Amite, Blind, Tchefuncte, and Tickfaw Rivers, and in canals within the adjacent coastal marshes of Louisiana. They have also been occasionally observed elsewhere along the Louisiana Gulf coast. The manatee has declined in numbers due to collisions with boats and barges, entrapment in flood control structures, poaching, habitat loss, and pollution. While manatees have previously been sighted in the Mississippi River, their occurrence is extremely rare since the main river has no adequate food source (i.e., aquatic vegetation). Historical data and data collected and analyzed for the previous IHNC maintenance dredging event reveal that certain contaminants such as PAHs, pesticides, and metals exist at elevated levels relative to sediment quality benchmarks in the top portions of the channel bottom. It is expected that impacts associated with either hydraulic cutterhead dredging or with an environmental bucket dredge within the IHNC would have no effect on the manatee due to the industrialized nature of the project, turbid water conditions, and lack of adequate food sources in and around the existing lock and navigation channel. It is expected that no manatees would be present in the Mississippi River near the discharge zones of dredged material. Therefore, there would be no effect to this species as a result of temporary increases in turbidity near the discharge sites. The discharged dredged material would disperse relatively quickly due to the swift moving currents of the river. However, as per standard requirements for CEMVN dredging contracts in coastal Louisiana, the following manatee protective measures would still be included in all dredging contracts awarded for construction of this project:

 All contract personnel associated with the project would be informed of the potential presence of manatees and the need to avoid collisions with manatees, which are protected under the Marine Mammal Protection Act of 1972 and the Endangered Species Act of 1973.

- All construction personnel will be responsible for observing water-related activities for the presence of manatee(s).
- Temporary signs would be posted prior to and during all construction/dredging activities to remind personnel to be observant for manatees during active construction/dredging operations or within vessel movement zones (*i.e.*, work area) and at least one sign would be placed where it is visible to the vessel operator.
- Siltation barriers, if used, would be made of material in which manatees could not become entangled, and would be properly secured and monitored.
- If a manatee is sighted within 100 yards of the active work zone, special operating conditions would be implemented, including: no operation of moving equipment within 50 feet of a manatee; all vessels would operate at no wake/idle speeds within 100 yards of the work area; and siltation barriers, if used, would be re-secured and monitored. Once the manatee has left the 100-yard buffer zone around the work area on its own accord, special operating conditions would no longer be necessary, but careful observations would be resumed.
- Any manatee sighting would be immediately reported to the Service's Lafayette, Louisiana Field Office (337/291-3100) and the Louisiana Department of Wildlife and Fisheries, Natural Heritage Program (225/765-2821).

In conclusion, it is expected that the proposed project have no effect on West Indian manatee.

Pallid sturgeon

In 2012, the U.S. Fish and Wildlife Service (USFWS), in collaboration with both the Corps Mississippi Valley Division (MVD) office and local Corps Districts (to include Memphis, Vicksburg and New Orleans), completed the final *Lower Mississippi Strategic Habitat Conservation Plan* that outlined the process by which components of the Mississippi River Channel Improvement Program would serve as conservation tools to maintain and improve habitat values of endangered species inhabiting the lower river channel. As part of that ongoing collaborative effort, in August 2013, the MVD office submitted the *Conservation Plan* for the Interior Least Tern, Pallid Sturgeon, and Fat Pocketbook Mussel, in the Lower Mississippi River, formally requesting USFWS' consideration of that plan as a biological assessment of the Channel Improvement Program and its potential for adverse effects on three endangered species; interior least tern (*Sterna antillarum*), pallid sturgeon (*Scaphirhynchus albus*), and fat pocketbook mussel (*Potamilus capax*), in the Lower Mississippi River (Killgore et. al 2014). In September 2013, the USFWS agreed to consider the systemic impacts of the continued implementation of the Channel Improvement Program on the three listed species as

projected 20 years into the future. On December 12, 2013, the USFWS issued their Biological Opinion detailing the various direct, indirect and cumulative effects of the action on the three listed species, as well as the various reasonable and prudent measures, terms and conditions and conservation recommendations to be implemented as part of the Corps' comprehensive conservation plan for the Channel Improvement Program.

While the proposed action is not associated with the annual maintenance work performed under the Channel Improvement Program, the New Orleans District acknowledges the location of the proposed discharge zone for dredged material in the Mississippi River may affect pallid sturgeon.

The pallid sturgeon only occurs in large rivers within the Mississippi and Missouri River Basins from Montana to Louisiana. This includes the Mississippi River and Atchafalaya River in south Louisiana. The pallid sturgeon tends to select main channel habitats in the Mississippi River. Aquatic habitats in the Mississippi River have been modified though the construction of flood control levees and channel modification through time, and some changes resulting from those modifications have likely been detrimental to pallid sturgeon. Although the river flows unobstructed for about 2,000 river miles from Gavins Point Dam in the middle Missouri River to the Gulf of Mexico, tributary impoundments, bendway cutoffs and dike and levee construction have each changed localized patterns of channel erosion and deposition in the Mississippi River. Collectively, they have resulted in a degradation trend throughout the system. Effects of these changes on pallid sturgeon are unknown, because there are no historical data for comparison. The Pallid Sturgeon Lower Basin Recovery Workgroup has identified information gaps essential to the consultation and recovery processes in the Lower Mississippi River Basin. These include: relative abundance of pallid sturgeon; demographics; feeding habits; habitat use; hybridization ratios; presence of fish diseases in the wild; population anomalies; and reliable separation and identification of pallid sturgeon, shovelnose sturgeon, and hybrids. While recent publications have contributed to filling some of these data gaps (e.g., Killgore et al., 2007a) incomplete knowledge of those areas remains.

Current information provided through previous collecting and sampling efforts (Killgore et al. 2007b), seems to indicate that the pallid sturgeon is widely distributed throughout the Lower Mississippi River, habitat is abundant and of high quality, and the species is reproducing and recruiting (USFWS, 2013). As noted in the November 2013 Entrainment Studies of Pallid Sturgeon Associated with Water Diversions in the Lower Mississippi River Study, field sampling of sturgeon in the lowermost reach of the Mississippi River between river miles 0 and 320 has been ongoing since 2001. Results of that study indicated that a total of 51 pallid sturgeon, 319 shovelnose sturgeon, and 84 young-of-year sturgeon were collected between 2001 and 2010 below river mile 320 (ERDC-EL, 2013). While Sturgeon were generally distributed from river mile 319 downstream to river mile 81, it was noted that only one pallid sturgeon was caught

between river miles 99 and 80. The specific area where this single pallid sturgeon was caught was around river mile 95.5 just downstream of the Crescent City Connection Bridge in New Orleans (ERDC-EL, 2013). The IHNC project is located near river mile 92, and based upon available capture data it is assumed that pallid sturgeon would seldom venture below New Orleans. It is anticipated that dredging activities, in-situ lock construction and modifications to the St. Claude and Claiborne Avenue Bridges would result in disturbance of substrates in the IHNC and would temporarily increase turbidity in the Mississippi River and shallow estuarine waters adjacent to the project area. Any pallid sturgeon potentially present in the main channel of the Mississippi River near the discharge zones of dredged material may be temporarily affected by increased turbidity, but would not likely be adversely affected as the dredged material would disperse relatively quickly due to the swift moving currents of the river. Additionally, due to the highly developed and industrialized nature of the project area, it is not expected that any pallid sturgeon would be present in the IHNC during dredging or lock construction activities.

Based on prior consultation efforts, previous studies, and our current investigations, it is our determination that the proposed project may affect, but is not likely to adversely affect pallid sturgeon, would have no effect on West Indian Manatee, and would not result in the destruction or adverse modification to critical habitat.

In accordance with Section 7 of the Endangered Species Act of 1973, as amended, the New Orleans District requests you review the information provided and advise us of your determination. Responses should be mailed to Mark Lahare at: U.S. Army Corps of Engineers, CEMVN-PDC-CEC, 7400 Leake Avenue, New Orleans, Louisiana, 70118. Responses may also be provided by: e-mail to <u>mark.h.lahare@usace.army.mil</u>; or by phone at (504) 862-1344.

Sincerely,

Edward P. Lambert

Edward P. Lambert Chief, Environmental Compliance Branch

REFERENCES:

- ERDC-EL. 2013. Entrainment Studies of Pallid Sturgeon Associated with Water Diversions in the Lower Mississippi River. Engineer Research and Development Center, Vicksburg, MS.
- Killgore, K. J., J. J. Hoover, S. G. George, B. R. Lewis, C. E. Murphy, and W. E. Lancaster. 2007a. Distribution, relative abundance and movements of pallid sturgeon in the free-flowing Mississippi River. Journal of Applied Ichthyology 23:476-483.
- Killgore, K. J., Kirk, J., J. J. Hoover, S. G. George, Br. R. Lewis, and C. E. Murphy. 2007b. Age and growth of pallid sturgeon in the Free-Flowing Mississippi River. Journal of Applied Ichthyology 23: 452-456.
- Killgore, K. J., P. Hartfield, T. Slack, R. Fischer, D. Biedenharn, B. Kleiss, J. Hoover, and A. Harrison. 2014. Conservation Plan for the Interior Least Tern, Pallid Sturgeon, and Fat Pocketbook Mussel in the Lower Mississippi River (Endangered Species Act, Section 7(a)(1)). MRG&P Report No. 4, Vicksburg, MS: U.S. Army Engineer Research and Development Center.
- Louisiana Department of Wildlife and Fisheries (LDWF). 2012. <u>Rare Animals of</u> Louisiana, Manatee (*Trichechus manatus*). Louisiana Natural Heritage Program.
- United States Fish and Wildlife Service (USFWS). 2013. Draft revised recovery plan for the Pallid Sturgeon (*Scaphirhynchus albus*). Northern Rockies Fish and Wildlife Conservation Office. Billings, Montana. Utterback, W. I. 1916. The naiades of Missouri, University Press.

Endangered Species Act Determination

13 January 2017

<u>Subject</u>: General reevaluation report with an integrated supplemental environmental impact statement titled, "Mississippi River, Baton Rouge to the Gulf of Mexico Mississippi River-Gulf Outlet (MRGO), Louisiana, New Industrial Canal Lock and Connecting Channels."

<u>Purpose</u>: The U.S. Army Corps of Engineers, New Orleans District (CEMVN) is reinitiating consultation with your office for threatened or endangered species per Section 7 of the Endangered Species Act (ESA) for replacing the navigation lock on the Inner Harbor Navigation Canal, also known as the IHNC and Industrial Canal, in New Orleans, Louisiana.

Project Area: The study area is located in Orleans Parish in southeastern Louisiana. The area is generally bounded by the Mississippi River Gulf Outlet (MRGO) and Gulf Intracoastal Waterway (GIWW) on the north, the Mississippi River on the south, Louisiana Highway 47/Paris Road on the east, and the hurricane protection floodwalls on the west bank of the IHNC on the west.

Tentatively Selected Plan and Plans Description: The current study addresses four lock replacement plans in the final array of alternatives, as well as a no-action plan. Under the no-action plan, the proposed construction of a replacement lock or an additional lock would not occur and the Federal government would continue to operate and maintain the existing lock. Plan 3 is the tentatively selected plan (TSP). The main feature of this plan is a new lock with dimensions of 900 feet long by 110 feet wide by 22 feet deep to be located within the IHNC, north of Claiborne Avenue (Figure 1). Plans 2, 4 and 5 would have similar environmental effects as compared to the tentatively selected plan. All plans include replacement of the St. Claude Avenue Bridge and demolition and removal of the existing IHNC Lock. The site of the new lock, major construction activities, and project features for Plans 2, 4 and 5 would all be comparable to the TSP with the only variation being the dimensions of the locks (Plan 2 - <u>900 feet long x 75 feet wide x 22 feet deep;</u> Plan 4 - <u>1,200 feet long x 75 feet wide x 22 feet deep;</u> and Plan 5 - <u>1,200 feet long x 110 feet wide x 22 feet deep</u>).



Figure 1. Vicinity Map of IHNC Project.

The most significant difference between previous lock replacement plans and the plans currently being studied is the method by which dredged material is disposed. Previous lock replacement plans, which were deep-draft locks with a sill depth of 36 feet,

included the disposal of dredged material in confined disposal facilities and in the Mississippi River. The currently studied plans eliminate the use of confined disposal facilities and include bucket-dredging of material that is unsuitable for open water and disposal in commercial landfills and disposal of material suitable for open water disposal into the main channel of the Mississippi River.

Construction of the new lock would require a complex sequence of tasks (see Figure 2). It is anticipated that the entire construction process could take up to 13 years to complete, if adequate funding is provided. The following



Figure 2. Location of Replacement Lock, Bypass Channel, and Cofferdam bullets describe the major tasks in sequence:

- A cofferdam around the new lock construction site is required so that the site can be unwatered. Foundational support is required for the cofferdam, therefore jet grouting of the canal bottom sediments utilizing barge-mounted equipment would be performed to strengthen the sediments. The soil improvements would occur prior to placement of sheeting for the cofferdam. The required sheet pile tip elevation for the cofferdam is elevation -90 feet North American Vertical Datum 1988 (NAVD88). The sheet pilings would be placed using a barge-mounted vibratory hammer to form cell walls, and the interior of the cofferdam cells would be filled with sand to an elevation of +3.5 feet (NAVD 88).
- The north-south section (eastern wall) of the cofferdam would be constructed within the IHNC as the first actual construction feature of the project. Construction of this part of the cofferdam in the navigation channel would separate two distinct dredging areas, namely the new lock construction site on the west side and the north bypass channel on the east side. The lock construction site and the north bypass channel require excavation to significantly different depths. The dredging depth required for the new lock site is elevation -33 feet (NAVD 88). For the north bypass channel, the required elevation is -17 feet (NAVD 88).
- A temporary bypass channel would be excavated between the north-south cofferdam section and the floodwall located along the east bank of the IHNC. Some of the existing east bank of the IHNC may need to be removed. The north bypass channel would accommodate vessel traffic around the new lock construction site. To protect the east bank of the IHNC and cofferdam, and the vessels transiting the bypass channel, tugboats would be permanently stationed to assist vessels transiting the area. In addition, protect the cofferdam. All vessel traffic would be rerouted through the north bypass channel while the new lock is being constructed.
- Approximately 106,000 cubic yards of sediment would need to be dredged to construct the north bypass channel. The majority of this dredged material approximately 70,000 cubic yards from Dredged Material Management Unit (DMMU) 6 is suitable for open water placement and would be discharged into the Mississippi River. See Figure 4 for locations of DMMUs. The remaining dredged material, about 36,000 cubic yards from DMMU 7, is not suitable for discharge into the Mississippi River and would be bucket dredged and disposed of in a solid waste landfill (Refer to *Dredged Material Disposal Plans* section for detailed soils and sediment excavation and discharge discussion).
- Once the north bypass channel is operational, the new lock site would be dredged by a combination of hydraulic and bucket dredges. Approximately 69,000 cubic yards of dredged material from DMMU 5 is unsuitable for discharge into the aquatic environment and would be bucket dredged and disposed of in a solid waste landfill. An additional 278,000 cubic yards of dredged material would be removed from the new lock site (DMMUs 3 and 4) by hydraulic dredging. That

material is suitable for disposal in the freshwater aquatic environment and would be discharged into the Mississippi River.

- After completing the dredging work at the new lock site, the east-west sections (northern and southern walls) of the cofferdam would be constructed to close the cofferdam for unwatering. Unwatering of the cofferdam would be accomplished with a combination of pumps, sumps, and wells, including pressure relief wells. All water collected within the cofferdam would be pumped into the IHNC.
- Foundation pilings would be driven within the unwatered cofferdam to support the concrete pours of the lock module. Foundation pilings would consist of 24inch x 24-inch precast, pre-stressed concrete pilings spaced on approximately 10foot centers with tighter spacing under lock module walls. A total of 1,386 vertical pilings would be driven to a depth of 136 feet below grade. Either a vibratory or impact hammer, or a combination of both, would be used for pile driving. Concrete pours for the lock modules would begin at the gates and work inward to the chambers. Alternate sections of the module would be poured, and some concrete pours may need to occur at night with the use of lighting due to concrete technical restrictions. Machinery, valves, electrical, and mechanical connections would all be installed after completion of concrete placement. An on-site concrete batch plant would be necessary, and nearby staging areas for construction materials and parking areas for construction workers would be required.
- Following completion of the lock modules, the cofferdams would be removed and the area re-watered. Areas around the lock modules would be backfilled with excess sand from the cofferdams and earthen fill material from off-site sources. The west side of the lock would be backfilled first, prior to opening the lock, so that administration buildings can be constructed in that area and to avoid working on the west side of the lock while traffic is passing through the lock. The lock would then be opened to navigation traffic in a pass-through mode and the bypass channel backfilled with earthen fill material from an offsite source. Completion of tie-ins to existing floodwalls on both sides of the IHNC would be achieved

after construction of the new lock, while the new lock remains in the passthrough mode (all gates open). During this time, the existing lock would continue normal operation.

- A temporary bridge (see Figure 3) would be constructed adjacent to the St. Claude Avenue Bridge to provide a comparable level of traffic flow while the St. Claude Avenue Bridge is replaced with a low-level double bascule bridge.
- Replacement storm and flood risk reduction measures (see Figure 3) would be constructed to at least in-kind and up to current design standards.



- Once the new lock becomes operational and all new levees and floodwalls are constructed, the old lock would be put into pass-through mode. During this time a south bypass channel around the east side of the old lock would be constructed to allow for continued vessel traffic while the old lock is demolished (see Figure 3). Hydraulic and/or mechanical dredges would remove approximately 85,000 cubic yards of sediment from DMMU 10 to construct the south bypass channel. This material is suitable for open water placement and would be discharged into the Mississippi River.
- Once the south bypass channel is operational, the old lock would be demolished and the structural material hauled away to be salvaged or scrapped. About 181,000 cubic yards of dredged material would then be removed from the lock demolition site (DMMU 9) with hydraulic and or mechanical dredges. This material is suitable for open water discharge into the Mississippi River. Upon

completion, the new lock and connecting channels would be fully functional.

Dredged Material Disposal Plans

Soils and sediments that require excavation for project construction have been thoroughly evaluated under regulations and procedures developed under requirements of the Clean Water Act and may be divided into two categories.

Approximately 614,000 cubic • yards of dredged material that would be excavated from Dredged Material Management Units (DMMUs) 3, 4, 6, 9, and 10 is "suitable for open water discharge" (see Figure 4). This material is non-toxic to sensitive benthic organisms, does not contain contaminants at concentrations that would adversely bioaccumulate or biomagnify in aquatic food webs, and would not violate or exceed regulatory water quality criteria or drinking water standards upon discharge into the proposed Mississippi River open-water disposal site. The dredged material would mix



Figure 4. Location of IHNC Dredged Material Management Units.

with the river's normal suspended and bedload sediments and be carried downstream. Approximately 105,000 cubic yards of dredged material that would be excavated from DMMUs 5 and 7 is "unsuitable for open water discharge" because it is toxic to sensitive benthic organisms. This material would be excavated with an environmental bucket dredge to minimize on-site loss of material and turbidity, and would be hauled to and permanently disposed in a permitted solid waste landfill.

- Dredging depths and widths required for the this plan do not warrant vertical or lateral subdivision of DMMUs into "native layer" and "fill" categories as for previously-evaluated deep draft lock alternatives. However, results from chemical and biological testing of the material within these DMMUs were utilized in assessing current dredged material disposal alternatives in that contaminant maximums and worst-case toxicity determinations for overlapping units were considered to represent a dredging unit. As an example, testing results from the non-native or fill layer of DMMU 7 which contained higher levels of contaminants than the native layer were used to represent the entire unit, and were not averaged or weighted with native and fill layers.
- DMMUs previously evaluated for deeper lock alternatives that have sufficient depth and would not be dredged as part of this plan are DMMUs 1, 2, 8, and 11 (IHNC Channel).

The lock replacement alternatives evaluated in prior reports (1997 and 2009) would have required large areas for the disposal of dredged material generated from lock construction. In those reports, large quantities, up to 1,400,000 cubic yards, were to be excavated with hydraulic dredges and pumped as a slurry to confined disposal areas located along the south bank of the GIWW/MRGO east of the IHNC. Some dredged material would have also been placed into the deep channel of the Mississippi River.

A reevaluation of dredged material disposal alternatives was conducted for this report. It was determined that the required dredging quantities for all DMMUs were significantly reduced from the volumes described for all of the alternatives assessed previously. Two dredging and disposal alternatives were evaluated for the discharge of dredged material that has been determined to be unsuitable for aquatic disposal: 1) hydraulic dredging and disposal in an 81-acre confined disposal facility located along the south bank of the GIWW; and 2) environmental bucket dredging and placement into hopper barges and transported to a permitted solid waste landfill. Cost estimates associated with the use of an environmental bucket dredge and subsequent disposal of dredged material into a permitted solid waste landfill were determined to be less costly than hydraulic dredging and permanent confinement of dredged material in a confined disposal facility. Moreover, the use of an environmental bucket dredge and disposal into a permitted solid waste landfill would eliminate impacts to productive fish and wildlife habitats, including wetlands, as well as avoid and minimize potential adverse impacts to waters of the U.S. The dredged material determined to be suitable for aquatic disposal would be hydraulically dredged and disposed into the Mississippi River. Earthen fill material would also be needed for backfill at and around the new lock construction site, however this deposition of fill is not expected to cause impacts that warrant special construction

conditions. Construction specifications would include measures to avoid and minimize impacts to threatened and endangered species, namely West Indian manatee and pallid sturgeon, if they are observed in or near the construction site, even though no such encounters are expected.

Occurrence of Threatened and Endangered Species: In a letter dated March 29, 1989, the NMFS supplied a list of endangered and threatened species which might occur in the vicinity of the proposed project. The list included the green (Chelonia mydas), hawksbill (*Eretmochelys imbricate*), Kemp's ridley (*Lepidochelys kempi*), leatherback (Dermochelys coriacea), and loggerhead (Caretta caretta) sea turtles and the finback (Balaenoptera physalus), sei (Balaenoptera borealis), blue (Balaenoptera musculus) and sperm whales (Physeter macrocephalus). A biological assessment (BA) was prepared for these species and submitted to the NMFS on May 9, 1989. The BA concluded that it would be unlikely for the proposed project to have an impact on any of the listed species. In a letter dated May 24, 1989, the NMFS concurred with the determination that populations of endangered/threatened species under their purview would not be adversely affected by the proposed project. A copy of the 1989 letter is included as an enclosure. In October 1996, CEMVN requested the NMFS update the endangered and threatened species consultation. Information concerning the plans under consideration was provided to the NMFS, including the proposed graving site. The NMFS responded that the proposed activities would not adversely affect listed or proposed threatened or endangered species. A copy of the 1996 letter is included as an enclosure.

Green sea turtles (*Chelonia mydas*) were listed as threatened on July 28, 1978 (43 FR 32800-32811). Green sea turtles occupy three habitat types: high energy oceanic beaches (nesting), convergence zones in pelagic habitat (juvenile foraging), and benthic feeding grounds in relatively shallow, protected waters (adult foraging) (USFWS 1993). Common adult foraging habitats are pastures of seagrasses and algae, but small green turtles can also be found over coral reefs, worm reefs, and rocky bottoms. In the southeastern U.S., green sea turtles nest primarily in Florida from June to September (LDWF 2007a).

The hawksbill sea turtle was listed as endangered on April 14, 1970 (35 FR 6069). Hawksbill sea turtle adults average about 2.5 feet in length and weigh between 95 to 165 pounds (USFWS 1993). Hawksbill sea turtles nest on low and high-energy beaches in tropical oceans of the world. Hawksbill sea turtles may occur offshore of Louisiana, but other than isolated strandings, beaches within Louisiana are not utilized by these turtles. In Louisiana and other coastal portions of the Gulf of Mexico, this is one of the most infrequently encountered sea turtles (LDWF 2007a).

Leatherback sea turtles were first listed as endangered on June 2, 1970 (35 FR 6069). The leatherback sea turtle nests on the shores of the Atlantic, Pacific, and Indian Oceans. The adult leatherback can reach 6.5 feet in length and 500 to 2,000 pounds in weight and is commonly found in cool, as well as in subtropical-tropical waters (NOAA Fisheries 2006a). Although it is generally a deep-diving oceanic species that forages on gelatinous planktonic animals, leatherbacks seasonally move into coastal waters, including estuaries

and coastal bays, to feed on large jellyfish associated with rivers and frontal boundaries. Small numbers of leatherback sea turtles nest on barrier islands and mainland beaches in the northeastern Gulf of Mexico (LDWF 2007a).

Loggerhead sea turtles were listed as threatened on July 28, 1978 (43 FR 32800-32811). Loggerhead sea turtles are found in temperate and tropical waters worldwide. Following a 1 to 2-year pelagic stage, adults inhabit nearshore continental shelf and estuarine environments in the Atlantic, Pacific, and Indian Oceans (NOAA Fisheries 2006b). Loggerhead sea turtles generally nest on high- to moderate-energy beaches and may favor steeply sloped beaches with gradually sloped offshore approaches. Loggerhead sea turtle nests are common on the northeastern Gulf of Mexico coasts of Alabama and Florida and the second-largest population of this species in the world nests on Florida's east coast. In Louisiana, loggerhead sea turtles are found throughout the coastal region but nesting has only been recorded on the Chandeleur Islands (LDWF 2007a).

The Kemp's ridley sea turtle was listed as endangered on December 2, 1970 (35 FR 18319) and is found only in the Gulf of Mexico and North Atlantic Ocean, north of the Caribbean Sea. This is the smallest species of Atlantic Ocean sea turtles and has a single primary nesting area along a 10-mile stretch of beach near Rancho Nuevo, on the Gulf of Mexico coast of Mexico where large aggregations of nesting females come ashore together. Occasional nesting has been reported along the Texas, Alabama, and Florida coasts. Crustaceans, especially crabs, are reported to be its preferred food, and both juveniles and adults are found in nearshore waters, including estuaries, tidal rivers, and sea grass beds throughout the northern Gulf of Mexico. The once critically small population of Kemp's ridley sea turtle has increased in recent years due to management programs of the USFWS and the NOAA Fisheries. Although it is not know to nest in Louisiana, the offshore waters may afford key feeding and development sites and the Kemp's ridley sea turtle is more frequently observed in Louisiana's inshore waters than other sea turtles (LDWF 2007a).

Finback whales are present in the Gulf of Mexico throughout the year which could suggest a somewhat isolated population. Four recorded strandings have occurred along the southeast coast of Louisiana. Sei whales have only been recorded four times in the Gulf of Mexico. Two of these recordings occurred in Louisiana; one near Fort Bayou in Plaquemines, Parish in 1956 and one from Marsh Island in 1990. There are two records of blue whales in the Gulf of Mexico; one occurred when a stranded individual was found near the mouth of Sabine Pass, Cameron Parish, Louisiana in December 1924. Sperm whales are generally found beyond the continental shelf in the Gulf of Mexico the majority of sightings occurred from beyond the 1,000 fathom line. Strandings of individuals have been recorded from Cameron, Terrebone, and Plaquemines Parishes (LDWF 2007b).

Potential for Project Impacts to Threatened and Endangered Species: According to the Louisiana Department of Wildlife and Fisheries, hawksbill sea turtles are rarely encountered in Louisiana or along the coasts of the Gulf of Mexico. Loggerhead sea turtles, the Kemp's ridley sea turtle, and the green sea turtle have been sighted in the

MRGO in the vicinity of the bar channel where the MRGO connects to the Gulf of Mexico. Construction in the project area would be conducted well above the bar channel and would have no effect on any listed threatened or endangered species or their critical habitat.

<u>Conclusion</u>: The CEMVN has determined that the proposed project will not affect any threatened or endangered species or critical habitat under the purview of the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries), Protected Species Division. Under the January 13, 2017 NMFS Procedural Instruction 02-110-20, the NOAA Fisheries reviewed its consultative responsibilities under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and associated regulations at 50 C.F.R. part 402 and determined it will not provide formal written responses to requests for concurrence with a federal action agency's determination that its actions will not affect any ESA-listed species or designated critical habitat ("no effect" determination) (<u>http://www.nmfs.noaa.gov/op/pds/index.html</u>) (January 6, 2017 IHNC GRR/SEIS Appendix A, Annex 5). As such, endangered species consultation with NOAA Fisheries is complete.

References:

LDWF 2007a. Rare Animals of Louisiana, Green Sea Turtle (*Chelonia mydas*); Hawksbill Sea Turtle (*Eretmochelys imbricata*); Kemp's Ridley Sea Turtle (*Lepidochelys kempii*); Leatherback Sea Turtle (*dermochelys coriacea*); and Loggerhead Sea Turtle (*Caretta caretta*). Louisiana Department of Wildlife and Fisheries, Louisiana National Heritage Program.

LDWF 2007b. Rare Animals of Louisiana, Blue Whale (*Balaenoptera musculus*); Finback Whale (*Balaenoptera* physalus); Sei Whale (*Balaenoptera borealis*); Sperm Whale (*Physeter macrocephalus*). Louisiana Department of Wildlife and Fisheries, Louisiana National Heritage Program.

NOAA Fisheries 2006a. Office of Protected Resources, Leatherback Sea Turtle Fact Sheet, <u>http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm</u>

NOAA Fisheries 2006b. Office of Protected Resources, Loggerhead Sea Turtle Fact Sheet, <u>http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm</u>

USFWS 1993. Working Draft, Region 4, Template for Biological Opinions on Beach Nourishment Activities that May Affect Sea Turtles.

	Iministration · National Marine Fisheries Service
NATIONAL MARINE FISHERIES SERVICE PROCEDURAL INSTRUCTION 02-110-20	
	January 13, 2017
Protected Resources Management	
Conservation of Threatened and Endangered Species 02-110	
"NO EFFECT" DETERMINATIONS	
NOTICE: This publication is available at: <u>http://www.nmfs.noaa.gov/op/pds/index.html</u>	
Author name: Cathy TortoriciCertifiOffice: Protected ResourcesOffice	ed by: Donna Wieting : Protected Resources
Type of Issuance: Initial	
SUMMARY OF REVISIONS:	
Signed Anna S Muiture 1/13/17 Donna Wieting Date Director, Office of Protected Resources	

1.0 <u>Introduction</u>. The National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NOAA Fisheries) reviewed its consultative responsibilities under section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and associated regulations at 50 C.F.R. part 402. Based on this review NOAA Fisheries will not provide formal written responses to requests for concurrence with a federal action agency's determination that its actions will not affect any ESA-listed species or designated critical habitat ("no effect" determination).

Under section 7 of the ESA, if a federal action agency determines that its action "may affect" ESA-listed species or designated critical habitat within NOAA Fisheries jurisdiction, the federal action agency must consult with NOAA Fisheries to ensure that its action is not likely to jeopardize the continued existence of those species or result in the destruction or adverse modification of such critical habitat. The term "may affect" is not defined in the ESA or by NOAA Fisheries/United States (U.S.) Fish and Wildlife Service's joint regulations governing section 7 consultation at 50 CFR, Chapter IV. However, the NOAA Fisheries/US Fish and Wildlife Service's *Final ESA Section 7 Consultation Handbook, March 1998*, (found in PD 02-110-09, hereinafter "*ESA Section 7 Handbook*") defines the term "may affect" as: "the appropriate conclusion when a proposed action may pose **any** effects on ESA-listed species or designated critical habitat." If the federal action agency determines that its activities "may affect" an ESA-listed marine or anadromous species or its designated critical habitat, it must

engage in consultation.

If, on the other hand, the federal action agency determines that its action will not affect any ESAlisted species or designated critical habitat within NOAA Fisheries' jurisdiction (i.e., it makes a "no effect" determination), there is no need to consult with NOAA Fisheries. As with "may affect," the term "no effect" is not defined in the joint regulations governing section 7 consultation, but it is defined in the Services' *ESA Section 7 Handbook* as: "the appropriate conclusion when the federal action agency determines its proposed action will not affect a listed species or designated critical habitat." Neither the ESA nor the NOAA Fisheries/U.S. Fish and Wildlife Service's joint consultation regulations mandate consultation when federal action agencies determine their proposed actions have "no effect" on any ESA-listed species or designated critical habitat.

Although not required to do so, action agencies sometimes request that NOAA Fisheries provide written concurrence with the agency's "no effect" determination per the guidance provided in the *ESA Section 7 Handbook*, (page 3-12). NOAA Fisheries has previously (though infrequently) provided such written concurrence with federal action agency "no effect" determinations. However, as directed herein, it shall be NOAA Fisheries' procedure not to provide a written response.

2.0 <u>Objective</u>. The purpose of this procedure is to promote effective, efficient, and consistent implementation of section 7 of the ESA by NOAA Fisheries personnel.

3.0 <u>Authorities and Responsibilities</u>. This directive establishes the following authorities and responsibilities:

Guidelines and Procedures: "No effect" determinations under section 7 of the ESA are the province of action agencies, which may make such findings without seeking the agreement of NOAA Fisheries. A U.S. District Court decision addressed this very issue and issued an opinion that wholly validates NOAA Fisheries' procedure.

The case in question, *Sierra Forest Legacy v. United States U.S. Forest Service*, 598 F. Supp. 2d 1058 (N.D. Cal. 2009), concerned the U.S. Forest Service's determination that an amendment to a "management indicator species" list would have "no effect" on any ESA-listed species and NOAA Fisheries and the U.S. Fish and Wildlife Service's concurrence with that determination. Plaintiffs, environmental groups, filed suit against the Forest Service, NOAA Fisheries, and the U.S. Fish and Wildlife Service arguing, among other things, that the Services violated the ESA in issuing the concurrences. In dismissing the case against the Services, the court declined to address the substantive correctness or incorrectness of the written concurrences. As the court explained, because the U.S. Forest Service never initiated formal consultation, there was no requirement [to issue concurrences] imposed on NOAA Fisheries and the U.S. Fish and Wildlife Service. Thus, the court found that the plaintiff could not challenge the concurrences. *See also id at 1067-69*. The court made clear that it would have reached the same conclusion even if NOAA Fisheries and the U.S. Fish and Wildlife Service had instead disagreed with the U.S. Forest Service's "no effect" finding and issued non-concurrences. *Id.* at 1067 ("Until an action agency requests consultation, [the Services] have no obligation to consult, and in fact cannot

engage in consultation, even if they believe the 'no effect' determination was erroneous.").

Furthermore, neither the ESA nor the joint regulations governing section 7 consultation contain any direction or process for NOAA Fisheries to provide its concurrence with such determinations. Although the *ESA Section 7 Handbook* indicates that a federal action agency may choose to request concurrence with its no effect determination, the handbook does not obligate NOAA Fisheries to acknowledge the request or to respond.¹ It is therefore NOAA Fisheries' procedure that it will not provide any written concurrence with a federal action agency's determination that its action will have "no effect" on any ESA-listed species or designated critical habitat.²

¹ If requested, NOAA Fisheries staff may provide technical information and assistance to the federal action agency as it decides whether to make a "no effect" determination. However, as provided herein, NOAA Fisheries shall decline to concur with any such final determination. In cases where NOAA Fisheries disagrees with the federal action agency's "no effect" determination, NOAA Fisheries may offer to provide the above-referenced technical assistance and may urge the federal action agency to engage in ESA section 7 consultation.

² This procedure is not intended to address, and is not applicable, when the federal action agency determines that its action "may affect" certain species and/or habitat but will have "no effect" on others (sometimes referred to as "mixed determinations").