

# 5 Public Outreach, Agency Coordination, and Consultation

## 5.1 PURPOSE, NEED, AND REQUIREMENTS FOR PUBLIC OUTREACH AND AGENCY COORDINATION

In 1977, the CEQ promulgated regulations associated with the implementation of NEPA, as enacted in 1970. These regulations and associated procedural requirements for compliance are stipulated in 40 CFR Part 1503 (<http://www.nepa.gov/nepa/regs/ceq/1503.htm#1503.3>) and include procedures for obtaining, submitting and responding to public comments for an EIS.

The USACE's policy and guidance requires work in addition to the minimum public outreach and agency coordination standards outlined in 40 CFR Part 1503, to include a pre-scoping or conceptual-level scoping phase and a public scoping phase before issuing the draft EIS. During these additional phases, the lead agencies provided opportunities to engage affected and interested parties in the planning and development stages of the EIS process, including the process of defining alternatives. The purposes of pre-scoping and public scoping phases are to

- introduce the public to the lead agencies and the planning process;
- inform the public and decision makers about the project;
- assess support for the project;
- gather information;
- coordinate with citizens, interest groups, and agencies;
- provide a mechanism for citizens to participate in the planning process; and
- provide for fiscal accountability.

The lead agencies for this Programmatic EIS (i.e., USACE, DNR, and VMRC) engaged various groups of stakeholders in the EIS process: watermen and industry representatives (recreational and commercial anglers, boaters, and aquaculture firms); local, regional, State, and Federal agencies; academic institutions; and environmental, historical, and biological resource protection organizations. Collectively, these groups have informed the lead agencies regarding the scientific, socioeconomic, cultural, legal, and policy factors of the project. The lead agencies involved the stakeholder groups early on and continuously throughout the course of the project and have accepted and carefully considered their feedback.

## **5.2 PUBLIC OUTREACH AND AGENCY COORDINATION PROCESS**

### **5.2.1 Participants**

#### ***5.2.1.1 Agency Coordination***

According to January 30, 2002, CEQ guidance to the heads of Federal agencies on implementing the procedural requirements of NEPA, lead agencies preparing a PEIS are required to determine if other Federal agencies are interested and appear to be capable of assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. § 1501.6. “Cooperating agency” as defined under this title includes any other Federal agency that has jurisdiction by law or that has special expertise with respect to any environmental issue that should be addressed in the PEIS.

The 2002 guidance states: “The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies’ ability to adopt environmental documents. It is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local government agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis.”

USACE is the lead Federal agency for preparing this PEIS. VMRC (on behalf of the Commonwealth of Virginia) and DNR (on behalf of the State of Maryland) are the lead State agencies. The U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), and National Oceanic and Atmospheric Administration (NOAA) are cooperating Federal agencies. Additional review and assistance was provided by the Maryland Environmental Service (MES), the Potomac River Fisheries Commission (PRFC), and the Atlantic States Marine Fisheries Commission (ASMFC). EPA will be responsible for rating the environmental impact of the proposed action and the adequacy of the PEIS document. The lead agencies established a project delivery team (PDT) to coordinate with State, Federal, and regional agencies whose goals, objectives, policies, and regulations are implicated in, or would be affected by the outcome of the process. The PDT includes representatives of USACE’s Norfolk and Baltimore Districts, DNR, VMRC, NOAA, EPA, FWS, and PRFC.

The PDT met monthly to discuss the schedule for the project, development of the alternatives, content of the Draft PEIS, the status of research and availability and findings, the status of the peer review process and findings, legal requirements, and other project-delivery issues. The goal of the PDT was to share information among the participating agencies and, to the extent possible, to ensure that affected agencies were comfortable with the findings and that potential legal and programmatic implications were addressed before completion of the Draft

PEIS. PDT meetings were open to the public and were listed on DNR's *Oyster In Focus* Web site. PDT members reviewed summaries of these meetings were for accuracy.

The lead agencies also established an Executive Committee that was responsible for the management of the PEIS project, including active collaboration with senior management from the Federal cooperating agencies and a Management Team that was responsible for executing the activities defined by the Executive Committee.

### ***5.2.1.2 Research Review Committees and Peer Review Groups***

Several research-review committees and peer-review groups were established to provide guidance regarding appropriate research projects and schedules, the accuracy of the findings of the research and assessment efforts, and suggestions for next steps, in order to support the scientific integrity of the PEIS. The following text describes the roles and membership of the research-review committees and peer-review groups, as well as the roles of other groups of stakeholders in completing one of the major assessments for this PEIS: the Cultural and Socioeconomic Assessment.

***Cultural and Socioeconomic Assessment*** – A cultural and socioeconomic assessment, which assessed the cultural value of oyster restoration and the socioeconomic importance of different approaches for restoring oysters to a diverse range of stakeholders, was completed as part of the supporting documentation for the PEIS. This study involved informal and structured interviews with and two cumulative surveys of stakeholders, including commercial watermen, oyster aquaculturists, shellfish processors and shippers, scientists investigating oysters and marine-estuary ecosystems, environmentalists who are active in efforts to restore Chesapeake Bay, recreational fishers, and owners of seafood restaurants in the region.

A report entitled *Oyster Restoration in the Chesapeake Bay: A Cultural & Socioeconomic Assessment* (Paolisso and Dery 2008) reports findings about the cultural value of oyster restoration and the socioeconomic importance of different approaches for restoring oysters in the Bay for a diverse range of stakeholders within the Chesapeake region. The PEIS includes an analysis of this information.

***Review Committees and Peer Review Groups*** – In addition to providing information and opportunities to comment on the content of the PEIS, the lead agencies established research-review committees and peer-review groups to provide scientific and technical insight to inform the project and associated research and assessment efforts. Each advisory group or committee included stakeholders from the research community who are experts in their respective fields:

- Scientific Advisory Committee (SAC) – This group was composed of all of the principal investigators involved with the Oyster PEIS research effort designed to satisfy the critical gaps in knowledge identified in the 2000 NRC report.
- Ecological Risk Assessment Advisory Group (ERAAG) – This group was composed of Federal agency risk assessment specialists and was established to assist in the development of the ERA framework and advise on the technical content of the ERA.

- OAP – This group was established to provide peer review and to provide technical guidance on suitable data sources/input parameters for the modeling and assessment projects in support of the PEIS, including determining the adequacy of available information to inform a decision and the degree of risk associated with each alternative.
- Peer Review Groups (PRGs) – These groups provided independent review of research results to be incorporated into the PEIS assessments; specifically, research that was funded for the PEIS, but was not published in a scientific peer reviewed journal. Each PRG was composed of two to five nationally recognized members of the scientific community. The peer review effort was divided among PRGs according to research and assessment subject matter and expertise (e.g. larvae transport, natural resource economics, etc.). Each PRG’s review included an evaluation of: the clarity of the hypotheses, if applicable; the validity of the research design; the quality of data collection procedures; the robustness of methods employed; the appropriateness of the methods for the hypotheses being tested; the extent to which the conclusions follow from the analysis; and the strengths and limitations of each research project. The PRG’s comments and/or peer review reports were provided to the research or assessment project principal investigators. Responses from the principal investigators on how the peer review comments would be addressed in continued research efforts and/or final research project documentation were requested.
- The ASMFC, Interstate Shellfish Transport Committee (ISTC) – This committee is comprised of shellfish technical representatives from each of the Atlantic coastal states from Maine through Florida, the District of Columbia, the PRFC, the National Marine Fisheries Service (NMFS), and the FWS. This group provided technical input from a coastal perspective. They reviewed and developed consensus statements on issues related to the methodology and analytical results of research, modeling and assessment projects being completed to support the PEIS, and forwarded the consensus statements to the PDT.

The lead agencies and principal investigators of research projects and assessments periodically updated the advisory groups, as well as the Executive Committee and Management Committee, on project and research advancements as appropriate throughout the course of the Oyster PEIS project.

### ***5.2.1.3 Other Stakeholder Groups***

In addition to soliciting Cooperating Agency input through the PDT process and technical guidance through the establishment of advisory groups, the lead agencies initiated and/or accepted written correspondence from the following interested agencies, organizations, industry representatives, and academic institutions:

- FWS
- Virginia Department of Historic Resources
- NMFS Habitat Conservation Division
- National Park Service

- EPA
- Maryland Historic Trust
- Virginia Department of Conservation and Recreation's Division of Natural Heritage
- NOAA
- Florida Fish & Wildlife Conservation Commission
- South Carolina Department of Natural Resources
- Virginia Office of the Governor
- Harris Seafood
- Delaware River Keeper
- State of Rhode Island
- Anne Arundel County Watermen's Association
- Coastal Conservation Association (CCA)
- The Nature Conservancy (TNC)
- Virginia Seafood Council (VSC)
- National Wildlife Federation
- Defenders of Wildlife
- International Council for Exploration of the Seas (ICES)
- Maryland Department of the Environment (MDE)
- Audubon Society of Maryland – D.C.
- ASMFC
- Maryland House of Delegates - Del. Dan Morhaim
- Maryland Department of Natural Resources
- Virginia Institute of Marine Science (VIMS)

Additional information on the content of the correspondence can be found in Appendix G: Agency Coordination.

### **5.2.2 Communication Methods**

Communication methods used by the lead agencies to distribute information included: television, radio, newspapers, fliers, electronic mail, postal mail and Web sites.

Public presentations of the project proposal, and research and assessment findings provided at public meetings, conferences, trade shows and fairs, were advertised with fliers and newspaper postings, as well as in radio and television announcements.

Maryland Public Television recorded interviews with representatives from the lead and Cooperating Agencies on the progress of the PEIS. PEIS briefings were also provided in numerous newspaper articles throughout the course of the project, available in hardcopy and electronic format including via the Chesapeake Bay Program's *Bay News* electronic mail list server distribution.

Information sharing was geared toward electronic and internet submissions due to its potential for immediate mass distribution, high accessibility, low cost and low environmental impact. The lead agencies maintained a continuously updated postal and electronic mail server

interest list used to coordinate advisory group reviews and provide project updates to interested parties. Work group meetings were announced on Web sites and through electronic mail distributions.

A project Web site was established to facilitate public input within and outside the Chesapeake Bay region (DNR's Oyster *In Focus* Web site <http://www.dnr.state.md.us/dnrnews/infocus/oysters.asp>). The scheduling of public meetings and project accomplishments, including updates on key research components, were publicized in press releases available on the Web site. A calendar of meetings and events was also posted on the Oyster *In Focus* Web site throughout the course of the project, beginning with the first posting on April 21, 2003. A copy of the presentation given by the lead agencies at the January 28, 2004 and February 5, 2004 public scoping meetings was posted to the Oyster *In Focus* Web site, along with summaries of the meetings and written public comments provided during the public scoping period. The Oyster *In Focus* Web site also contains:

- Copies of the project Purpose and Need Statement and funding authorization;
- A list of the PEIS alternatives;
- Links to the PEIS press releases and progress reports;
- Overviews of the research, modeling and assessment frameworks, peer review plan and a list of research projects;
- A diagram of the peer review process and copy of the approved peer review plan (for compliance with the 2004 Office of Budget and Management bulletin);
- A link to the NRC Report on Nonnative Oysters in the Chesapeake Bay;
- A link to the STAC report *Identifying and Prioritizing Research Required to Evaluate Ecological Risks and Benefits of Introducing Diploid Crassostrea ariakensis to Restore Oysters to Chesapeake Bay*;
- A list of PEIS working group membership and responsibilities;
- Links to project Web sites created by NOAA and PEIS research institutions, including the University of Maryland (UMD) (containing contact information for the research Principal Investigators) and VIMS (including a timeline for VIMS involvement in the project and associated efforts and links to research work products and background documents); and
- A link to the ICES 1994 Code of Practice on the Introductions and Transfers of Marine Organisms.

Copies of Oyster PEIS "Progress Reports", news releases and a link to the *In Focus* Web site were provided on the USACE-Norfolk District Oyster PEIS homepage: <http://www.nao.usace.army.mil/OysterPEIS/homepage.asp>. Public notices and events related to the Oyster PEIS project were posted to the VMRC public information webpage: <http://www.mrc.state.va.us/public-info.shtm>.

Updates on the scientific and technical components of the project, including research and assessment findings, were presented at PDT meetings and NOAA (PEIS) Quarterly Research Review meetings. These review meetings were an opportunity for the Federal and State agencies and the research community to receive summaries of critical research findings directly from, and pose questions directly to, the research principal and/or associate investigator. Opportunities were provided for the public to participate in the research review meetings via internet webcast. NOAA posted summaries of the Quarterly Research Reviews to its Web site: <http://noaa.chesapeakebay.net/nonnativeoysterresearch.aspx> along with:

- A list of funded PEIS research;
- An explanation of the PEIS process;
- A summary of the findings of the NRC report *Nonnative Oysters in the Chesapeake Bay* and a link to purchase the report;
- Links to the STAC report and 2005 ICES code; and
- Work products and information distributed at scientific conferences.

### **5.2.3 Process**

#### ***5.2.3.1 Project Authorization and Funding***

Federal authorization for the USACE – Norfolk District to initiate the Oyster PEIS project was established by Section 510 of Water Resources Development Act of 1996, as amended by Title 1, Department of Defense – Civil, Department of the Army, Corps of Engineers – Civil, Construction General provisions of the Energy and Water Appropriations Act. Federal project funding was established by H.R.2754: *Making Appropriations for Fiscal Year Ending September 30, 2004*. <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02754>.

#### ***5.2.3.2 Scoping Meetings and Proposal Development Prior to Publication of the Notice of Intent***

A pre-scoping stakeholder workshop was held in October 2003 in Annapolis, Maryland to obtain perspectives from researchers and stakeholders with regard to their expectations of the PEIS proposal and process for its evaluation. The meeting screened the proposal for issues that needed to be addressed and identified critical research issues on which research plans were developed.

A pre-scoping planning meeting was called in November 2003 following the development of the Memorandum of Understanding (MOU) between the lead Federal and State agencies. In the meeting, a group of upper-level project managers from Federal and State lead agencies, later forming the Management Team, agreed to the development of a Scientific Advisory Committee (SAC) to guide research, a peer review panel to review the PEIS, and a Web site for sharing information on the PEIS.

On November 18, 2003, a pre-scoping research workshop was held to discuss the desired output and necessary inputs to the model of the dispersal of *C. ariakensis* larvae and potential impacts to water quality, as well as input data available and additional input data needed for the modeling effort. Following the meeting, the UMD submitted a proposal to the lead agencies for the hydrodynamic modeling of the larval transport of *C. ariakensis*.

In December 2003, an additional pre-scoping research workshop was held by the technical advisory committee, for the Chesapeake Bay Program (CBP; Chesapeake Bay Program STAC), in cooperation with the NRC, to identify and prioritize research required to evaluate ecological risks, benefits and alternatives related to the potential introduction of *C. ariakensis*. A timeline for research was developed in this meeting. It was recommended that the finalized STAC report, released in March 2004, be used as a foundation for further *C. ariakensis* research.

On December 4, 2003, a meeting was held to discuss the economic analysis requirements needed to evaluate alternatives in the PEIS. Shortly thereafter, the UMD submitted a proposal to the lead agencies for the economic assessment. Also in December 2003, the ASMFC became an active participant in the programmatic PEIS process.

On December 10, 2003, an additional pre-scoping planning meeting was held by representatives from the cooperating Federal and State agencies and the PRFC, who would become the initial members of the PDT. Discussion included the creation of a PDT with representatives from the cooperating Federal agencies; inclusion of representatives from the ASMFC on the PDT and in a research review work group; language specifications for the Notice of Intent (NOI); and the presentation of the proposal at the public meetings. The USACE – Norfolk District agreed to request that all of the Cooperating Agencies designate personnel for assignment to the PDT. Edits to the draft NOI were incorporated and publication of the NOI and the initiation of public meetings was set for to January 2004 to allow for additional PDT review.

On December 17, 2003, a pre-scoping meeting involving PDT members was held to discuss and clarify the language for the NOI. The USACE agreed to distribute briefing materials to non-governmental organizations.

Seven preliminary alternatives to the proposed action were developed at pre-scoping meetings and workshops, held with the prospective lead agencies, cooperating agencies, researchers, and other stakeholders. These alternatives were presented in the NOI, published in the Federal Register on January 5, 2004.

### **5.2.3.3 Public Scoping Process**

Project-specific outreach began in 2004 with the publication of the formal NOI in Volume 69, Number 2, pages 330 through 332 of the Federal Register, which is available via the internet as well as in hardcopy form. The lead agencies also published the NOI and summaries of the NOI in newspapers, including the following, and on the DNR Web site established for the



Oyster PEIS project (DNR Oyster *In Focus* Web site: [http://www.dnr.state.md.us/dnrnews/infocus/notice\\_of\\_intent2.asp](http://www.dnr.state.md.us/dnrnews/infocus/notice_of_intent2.asp)):

- Richmond Times Dispatch;
- The Daily Press;
- The Virginian Pilot;
- The Eastern Shore News;
- The Baltimore Sun;
- Evening Capital;
- Star Democrat; and
- Daily Banner.

The NOI was posted in about 150 locations in Virginia in tackle shops, marinas, post offices, courthouses and other public areas.

In addition, the lead agencies distributed copies of the NOI to interested parties, including the:

- MD Department of Agriculture;
- MD Seafood and Aquaculture Task Force;
- Maryland Oyster Roundtable Steering Committee and Interest List;
- Maryland Oyster Roundtable and Interest List;
- Maryland Sportfish Advisory Commission;
- Maryland Tidal Fish Advisory Commission;
- Maryland Coastal Bays Fishery Advisory Commission;
- Maryland Watermen's Association;
- Maryland County Oyster Committees;
- Maryland CBF;
- Maryland Coastal Bays Program;
- Maryland CCA;
- Maryland Saltwater Sportfishing Association; and
- PEIS research community (future SAC).

Copies of the NOI were subsequently posted to Web sites of interested parties, including the Maryland Watermen's Association Web site.

In addition to introducing the purpose and intent of the PEIS process, the preliminary alternatives, and providing a description of the scoping process, the NOI identified

- the lead and cooperating agencies;
- scheduled dates for public scoping meetings;
- a deadline for submittal of public comments (set at three weeks beyond the last public scoping meeting);

- names, affiliations, and contact information for submitting public comments;
- key issues for research and assessment; and
- applicable legislation and regulations for environmental review and consultation.

Public comment on the overall scope of the Oyster PEIS, including the purpose and need, list of alternatives to be evaluated, and project schedule were collected from the participants at the two public meetings held in both the Commonwealth of Virginia and State of Maryland on January 28, 2004 and February 5, 2004, respectively. Each public scoping meeting provided a briefing and presentation on the state of *C. virginica* in the Chesapeake Bay and its tributaries, the status of restoration efforts, preliminary programmatic PEIS alternatives, and the proposed action of the programmatic PEIS.

Participants at the public scoping meetings were organized into discussion groups and asked to identify the top five project priorities. Responses were used to further develop the PEIS alternatives, coordination process and research and assessment components.

In addition to hosting the January 28, 2004 and February 5, 2004 public meetings, the lead agencies provided an internet forum for individuals that were unable to attend the public meetings to provide comments: <http://www.dnr.state.md.us/dnrnews/infocus/oystercomments.html>. Approximately 36 posts were made. These internet postings included positions on the proposed action and alternatives and suggestions for research and management strategies.

#### ***5.2.3.4 Finalization of Alternatives***

Comments produced by the public as well as Federal agencies, and State and local governments, were used to assist the USACE, DNR, VMRC, NOAA, EPA, and FWS representatives in defining the issues that would be evaluated in the PEIS. All public scoping comments were collected, reviewed, and discussed at a PDT meeting on March 26, 2004. Workshops and meetings were held at the PRFC office in Colonial Beach, Virginia to further refine the alternatives. A workshop held on February 1, 2006, provided data specifically for the refinement of the aquaculture alternatives. The PDT and representative members of the research community, CBP, Oyster Recovery Partnership (ORP) and aquaculture community attended. A meeting on the harvest moratorium alternative was held Nov 15, 2006.

#### ***5.2.3.5 Briefings and Updates***

Over the course of the project, the lead agencies gave many briefings on the PEIS project including regular briefings to the ASMFC Policy Board. Briefings included updates on the research findings and project schedule and provided opportunities for public input. Venues at which project information was provided include fairs, trade shows, scientific conferences, and

local and regional government and advisory organization public meetings including, but not limited to the:

- 2004 Maryland Trade Association show;
- 2004 Maryland State Fair;
- 2005 and 2006 Interstate Shellfish Sanitation Conference (ISSC), Annual Interstate Seafood Seminars;
- October 18, 2004 ORP Board of Directors' meeting;
- 2006 Annual CBP Citizens Advisory Committee meeting;
- February 22, 2005 DNR Monitoring and Non-Tidal Assessment (MANTA) noon seminar series;
- April 16, 2005 annual Maryland Tributary Strategies Team meeting;
- NOAA noon seminars;
- October 15, 2005 Horn Point, Aquaculture and Restoration Ecology Laboratory public open house;
- CBP's Chesapeake Bay seminar series;
- January 12, 2006 Maryland Outdoor Caucus meeting;
- 32<sup>nd</sup> East Coast Commercial Fishermen's & Aquaculture Trade Exposition;
- 2006 Science & Seafood Seminar Series – *Savor the Bay*;
- March 15, 2006 CBP, Scientific and Technical Advisory Committee (STAC) meeting;
- April 13, 2006 Caroline County Health Department Tidewater Environmental Health Association meeting;
- May 12, 2006 Oyster CAC annual meeting;
- September 6, 2006 Blue Ribbon Oyster Panel meeting;
- September 14, 2006 PRFC meeting;
- May 14, 2007 Chesapeake Bay Commission meeting;
- December 6, 2006 NOAA, Fisheries Office of Policy Seminar on Policy Development and Analysis Techniques;
- March 18, 2004, April 20, 2006, July 20, 2006 and May 17, 2007 CBP Implementation Committee meetings;
- Estuarine Research Federation 2007 Biennial Conference;
- December 4-5, 2007 Oyster Management Workshop;

- March 10 and April 9, 2008 Briefings to the Oyster Advisory Commission; and
- April 23, 2008, Briefing to ASMFC, ISTC and the CBP, STAC.

#### **5.2.4 Public Outreach and Agency Coordination Following Publication of the Draft PEIS**

During the 60-day public comment period following the publication of this Draft PEIS, the lead agencies will coordinate a series of public meetings – three each in the State of Maryland and the Commonwealth of Virginia - to receive comments on the document. The dates and locations of the meetings will be advertised in newspapers, through electronic mail distributions, and on the lead agencies’ project Web sites. Responses to critical issues identified during the public comment period will be provided by the lead agencies and included in the appendix of the Final PEIS document.

### **5.3 REQUIRED CONSULTATIONS**

Federal jurisdiction over any action that might result from this PEIS process may be limited (NRC 2004; Section 1.1.3). Coordination with Federal agencies will be necessary if it is determined that compliance with one or more Federal statutes is required to implement a preferred alternative. Any future restoration programs designed to implement a preferred alternative will be likely to require permits from the USACE under Section 404 of the Clean Water Act, Section 10 of the River and Harbors Act, or both. The USACE will review applications for such permits to determine if the proposed actions are within its jurisdiction and if they would be covered under a Nationwide permit or would require individual permits. In some cases in which an individual permit is required, the applicant could be required to prepare an appropriate document in compliance with NEPA regulations to facilitate the permitting decision. As noted in Section 1.1.3, some uncertainty currently exists concerning whether and how some statutes might apply to actions involving the introduction of a nonnative species of shellfish into Chesapeake Bay. Those uncertainties would have to be resolved before implementing any plan that involves a nonnative species. Actions that require individual permits from the USACE also could require consultation with other Federal agencies as described in the following sections, regardless of the need for additional NEPA documentation.

#### **5.3.1 Endangered Species Act (ESA) Section 7 Consultation**

Section 7(a)(2) of the ESA [16 USC §1536(a)(12)] requires every Federal agency, in consultation with and with the assistance of the Secretaries of the Interior, Commerce, or both to ensure that any action it authorizes, funds, or carries out in the United States or upon the high seas is not likely to jeopardize the continued existence of any species listed as endangered or threatened, or result in destruction or adverse modification of critical habitats for listed species. This Draft PEIS focuses on describing a proposed action and alternative management strategies for attempting to restore the abundance and functions of oysters in Chesapeake Bay. It does not recommend or approve a particular strategy or a specific plan for implementing a strategy. Federal permits may be required later at the project or site-specific level after the lead agencies agree upon and approve a particular management strategy and develop specific, detailed plans

for implementing it. At that point, the appropriate permitting agencies will conduct further environmental review, including consultation under Section 7(a)(2) of the ESA, if necessary.

### **5.3.2 Essential Fish Habitat Consultation**

The Magnuson-Stevens Fishery Conservation and Management Act requires Federal agencies to consult with the Secretary of Commerce, through the NMFS, with respect to “any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken by such agency that may adversely affect any Essential Fish Habitat (EFH) identified under this Act” [16 USC § 1855(b)(2)]. When the responsible Federal agency determines that an action may adversely affect EFH, the agency must initiate consultation with NMFS [16 USC §1855(b)(2)]. To carry out this EFH consultation the responsible Federal agency must submit an EFH assessment containing “a description of the action; an analysis of the potential adverse effects of the action on EFH and the managed species; the Federal agency’s conclusions regarding the effects of the action on EFH; and proposed mitigation, if applicable” to the NMFS. NMFS may request the responsible Federal agency to include additional information in the EFH assessment, such as the results of on-site inspections, views of recognized experts, a review of pertinent literature, an analysis of alternatives, and any other relevant information [50 CFR § 600.920(e)(4)]. Depending on the kinds and magnitudes of effects on EFH, compensatory mitigation may be necessary to offset permanent and temporary effects of the project. If the project were expected to result in substantial adverse effects on EFH, an expanded EFH consultation could be necessary [50 CFR § 600.920(i)].

The implementation of a management strategy to restore the abundance and functions of oysters in Chesapeake Bay may result in future, site-specific projects that, if authorized by the USACE, could affect EFH and thereby trigger the requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The lead agencies are using this Draft PEIS to describe the general kinds of effects that could result from the kinds of site-specific projects for restoring oysters in Chesapeake Bay that might be associated with the proposed action or an alternative management strategy. The analysis provided in the PEIS will be used to guide the development of any EFH assessments required for future EFH consultations on site-specific proposals. For any future, site-specific project that requires an authorization from the USACE, the USACE will make a determination about whether the project would adversely affect any EFH in the project area. If adverse effects are possible, the USACE will initiate an EFH consultation by providing an EFH assessment to the NMFS’ Northeast regional office. The primary NMFS contact for the required EFH consultation is

NMFS Northeast Regional Habitat Conservation Division  
One Blackburn Drive  
Gloucester, Massachusetts 01930-2298  
Phone: (978) 281-9277

### **5.3.3 Fish and Wildlife Coordination Act Consultation**

The Fish and Wildlife Coordination Act of 1958 (FWCA), as amended (Pub. L. 85-624; 16 U.S.C., et seq.) requires equal consideration of fish and wildlife resources when evaluating

water resources development programs and projects. It provides authority for the involvement of FWS and NMFS in evaluating effects on fish and wildlife and requires Federal agencies that construct, license, or permit water resources development projects to first consult with the FWS or NMFS, as appropriate, regarding the potential effects on fish and wildlife resources and measures to mitigate those effects; therefore, in order to comply with the FWCA, the USACE will consult with the FWS and NMFS prior to making a permit decision or authorization required for future actions related to this PEIS.

#### **5.3.4 National Historic Preservation Act Section 106 Consultation**

Section 106 of the National Historic Preservation Act (NHPA) requires the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or Federally assisted undertaking to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places. The Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 set forth the procedures that Federal agencies must follow to comply with Section 106 of the NHPA. The Section 106 compliance process is undertaken in consultation with the State Historic Preservation Office (SHPO), Tribal Historic Preservation Office(s) (THPO), and other interested parties to identify historic properties that may be affected by the project, to assess the potential for adverse effects on those properties and, if the potential for an adverse effect is found, to seek ways to avoid, minimize, or mitigate the adverse effects. Section 36 CFR 800.8 of the ACHP regulations outlines the procedures for coordinating Section 106 compliance with the National Environmental Policy Act (NEPA) process. In that process, consulting parties provide information about specific historic properties that may be affected by the proposed project during the NEPA scoping phase. The NEPA document then provides an assessment of the potential for adverse effects on those properties and identifies proposed measures to mitigate the potential adverse effects. Prior to, or within the time allowed for public comment on the NEPA document, the SHPO, THPO, ACHP, or other consulting party may object that preparation of the NEPA document has not met the standards set forth in the ACHP regulations, or that the substantive resolution of the effects on historic properties proposed in the NEPA document is inadequate. If such an objection is received, the matter is referred to the ACHP, which has 30 days to provide an opinion on the objection. The responsible Federal agency must consider the opinion of the ACHP in reaching a final decision on the issue of the objection and must prepare a summary of the decision that contains the rationale for the decision and evidence of having considered the ACHP's opinion.

The lead agencies are using this Draft PEIS to describe the general kinds of effects on historic properties that could result from the kinds of site-specific projects for restoring oysters in Chesapeake Bay that might be associated with implementing the proposed action or an alternative management strategy. The analysis provided in the PEIS will be used to guide consultations on site-specific proposals. For any future, site-specific project, the appropriate responsible Federal agency will make a determination about whether the project would adversely affect any historic properties in the project area. If adverse effects are possible, the responsible

Federal agency will initiate a consultation by contacting the appropriate SHPO. The SHPOs for Maryland and Virginia are

J. Rodney Little, Director and SHPO  
Maryland Historical Trust  
Division of Historical and Cultural Programs  
100 Community Place  
Crownsville, Maryland 21031-2023

Kathleen Kilpatrick, Director  
Virginia Department of Historic Resources  
2801 Kensington Avenue  
Richmond, Virginia 23221

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