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F/SER31:SG  
SERO-2021-00141

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Ref.: SAJ-2020-03662 (LP-LOB), Francis J. Laird, Dock Replacement and Boat Lift Installation,  
Miami Beach, Miami-Dade County, Florida

Dear Ingrid Gilbert:

The enclosed Biological Opinion (Opinion) was prepared by the National Marine Fisheries Service (NMFS) pursuant to Section 7(a)(2) of the Endangered Species Act (ESA). The Opinion considers the effects of a proposal by the Jacksonville District of the United States Army Corps of Engineers to authorize a new L-shaped dock and riprap. NMFS concludes that the proposed action may affect, but is not likely to adversely affect, green sea turtle (North and South Atlantic distinct population segments [DPSs]), hawksbill sea turtle, Kemp's ridley sea turtle, loggerhead sea turtle (Northwest Atlantic DPS), giant manta ray, and smalltooth sawfish (United States DPS). NMFS also concludes that the proposed action is likely to adversely affect, but will not destroy or adversely modify, Johnson's seagrass critical habitat.

The project has been assigned the tracking number SERO-2021-00141 in our NMFS Environmental Consultation Organizer (ECO). Please refer to the ECO number in all future inquiries regarding this consultation. Please direct questions regarding this Opinion to Sarah Garvin, Consultation Biologist, by phone at (727) 631-7657, or by email at [Sarah.Garvin@noaa.gov](mailto:Sarah.Garvin@noaa.gov).

Sincerely,

Andrew J. Strelcheck  
Acting Regional Administrator

Enclosure: Biological Opinion  
File: 1514-22.f.4



**Endangered Species Act - Section 7 Consultation  
Biological Opinion**

**Action Agency:** U.S. Army Corps of Engineers, Jacksonville District

**Applicant:** Francis J. Laird

Permit Number SAJ-2020-03662 (LP-LOB)

**Activity:** Dock Replacement and Boat Lift Installation, Miami Beach,  
Miami-Dade County, Florida

**Consulting Agency:** National Oceanic and Atmospheric Administration, National  
Marine Fisheries Service, Southeast Regional Office, Protected  
Resources Division, St. Petersburg, Florida

Consultation Tracking Number SERO-2021-00141

**Approved By:**

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Andrew J. Strelcheck, Acting Regional Administrator  
NMFS, Southeast Regional Office  
St. Petersburg, Florida

**Date Issued:**

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**ACRONYMS AND ABBREVIATIONS**

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CFR	Code of Federal Regulations
DPS	Distinct Population Segment
ECO	NMFS Environmental Consultation Organizer
ESA	Endangered Species Act
JAXBO	USACE Jacksonville District’s Programmatic Biological Opinion
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
Opinion	Biological Opinion
PRD	NMFS Southeast Regional Office Protected Resources Division
U.S.	United States
USACE	U.S. Army Corps of Engineers

**UNITS OF MEASUREMENT**

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ac	acre(s)
ft	foot/feet
ft <sup>2</sup>	square foot/feet
in	inch(es)
km	kilometer(s)

## INTRODUCTION

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Section 7(a)(2) of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. § 1531 et seq.), requires that each federal agency ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. Section 7(a)(2) requires federal agencies to consult with the appropriate Secretary in carrying out these responsibilities. The National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service share responsibilities for administering the ESA.

Consultation is required when a federal action agency determines that a proposed action “may affect” listed species or designated critical habitat. Informal consultation is concluded after NMFS determines that the action is not likely to adversely affect listed species or critical habitat. Formal consultation is concluded after NMFS issues a Biological Opinion (“Opinion”) that identifies whether a proposed action is likely to jeopardize the continued existence of a listed species, or destroy or adversely modify critical habitat, in which case reasonable and prudent alternatives to the action as proposed must be identified to avoid these outcomes. The Opinion states the amount or extent of incidental take of the listed species that may occur, develops measures (i.e., reasonable and prudent measures) to reduce the effect of take, and recommends conservation measures to further the recovery of the species.

This document represents NMFS’s Opinion based on our review of impacts associated with the proposed action within Miami-Dade County, Florida. This Opinion analyzes the project’s effects on threatened and endangered species and designated critical habitat, in accordance with Section 7 of the ESA. We based our Opinion on project information provided by the Jacksonville District of the U.S. Army Corps of Engineers (USACE) and other sources of information, including the published literature cited herein.

## **1 CONSULTATION HISTORY**

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On January 6, 2021, NMFS received a request for formal consultation under Section 7 of the ESA from the USACE for construction permit application SAJ-2020-03662 (LP-LOB) in a letter dated January 4, 2021, and we initiated formal consultation the same day.

## **2 DESCRIPTION OF THE PROPOSED ACTION AND ACTION AREA**

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### **2.1 Proposed Action**

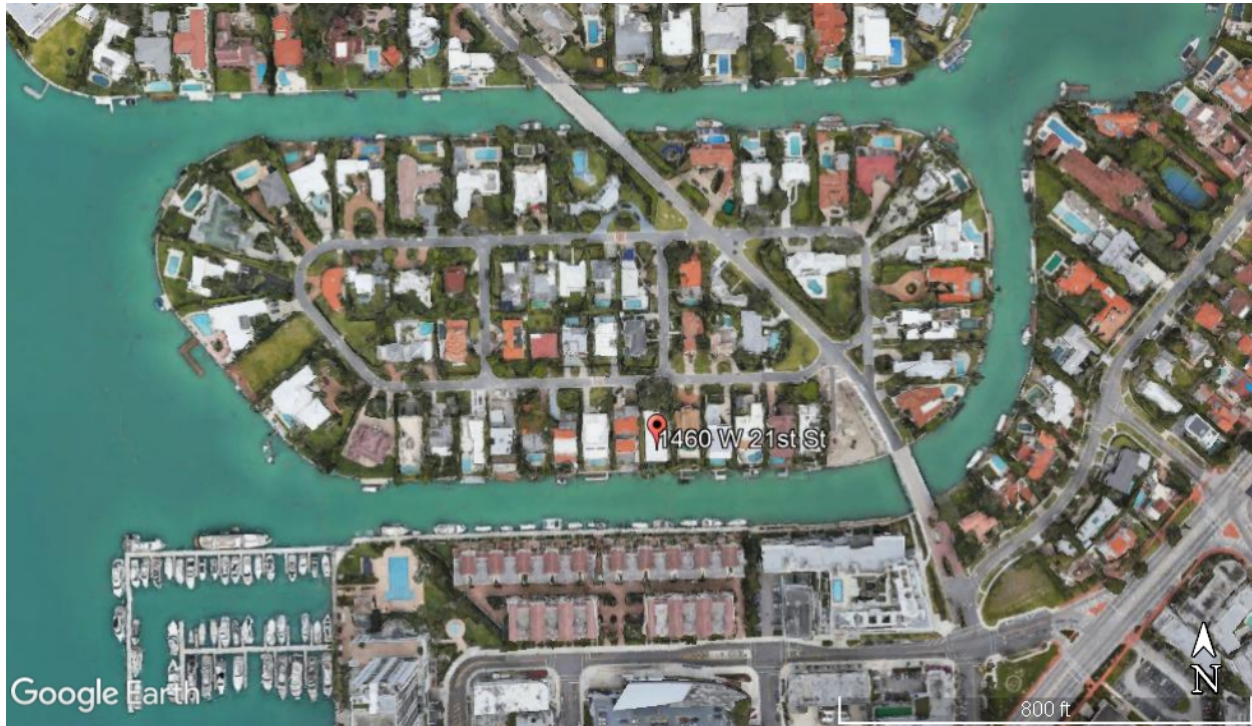
The USACE proposes to permit the applicant to: remove an existing 118.9 square foot (ft<sup>2</sup>) marginal wood dock supported by two 12-inch (in) piles; remove 2 existing 12-in diameter mooring piles; install a new 258.4 ft<sup>2</sup> dock supported by a total of seven 12-in diameter wood piles and four 12-in square concrete piles; and install a 120 ft<sup>2</sup> boatlift supported by 2 steel 12-in by 14-in I-beams. The proposed work will result in 1 new vessel slip. Piles will be installed via impact hammer with a cushion block, and no more than 10 piles will be installed per day. Total construction time is expected to be 4 weeks, during daylight hours only. The applicant will use turbidity curtains and comply with NMFS's *Sea Turtle and Smalltooth Sawfish Construction Conditions*.<sup>1</sup> Work will be completed from the uplands and a barge. The existing dock structure includes a concrete seawall and cap with king and batter piles, which will not be removed or replaced.

### **2.2 Action Area**

The proposed project site is located at 1460 West 21<sup>st</sup> Street, Miami Beach, Miami-Dade County, Florida (25.796535°N, 80.143279°W [North American Datum 1983] (Figure 1). The project site is located approximately 2.26 miles from Government Cut, the nearest inlet to the Atlantic Ocean.

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<sup>1</sup> NMFS. 2006. Sea Turtle and Smalltooth Sawfish Construction Conditions revised March 23, 2006. National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Regional Office, Protected Resources Division, Saint Petersburg, Florida. ([Sea Turtle and Smalltooth Sawfish Construction Conditions](#)).



**Figure 1. Image showing the project site (red pin) on Sunset Island Canal/Biscayne Bay at 1460 West 21<sup>st</sup> Street, Miami Beach, Miami-Dade County, Florida (©2021 Google)**

The project site is a residential property on Sunset Island Canal/Biscayne Bay with an existing seawall and marginal 118.9 ft<sup>2</sup> wood dock. A benthic assessment was performed by Miami-Dade County on June 16, 2020. The existing substrate in the project area was described as “silty” by the USACE with water depths ranging between -2.0 and -4.8 ft at mean low water (MLW). Macroalgae, sponges, and seagrasses are present in the project area. There are no mangroves, Johnson’s seagrass, or ESA-listed corals in the project area.

The action area is defined by regulation as all areas to be affected by the Federal action and not merely the immediate area involved in the action (50 Code of Federal Regulations [CFR] 402.02). As such, the action area includes the areas in which construction will take place, as well as the immediate surrounding areas that may be affected by the proposed action. Based on our noise analysis, the action area is equivalent to the radius of behavioral noise effects to ESA-listed fishes based on the proposed action’s installation of 2 metal boatlift I-beams using an impact hammer (i.e., 1,525-ft behavioral noise radius).

### **3 STATUS OF LISTED SPECIES AND CRITICAL HABITAT**

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Table 1 provides the effect determinations for ESA-listed species the USACE and/or NMFS believe may be affected by the proposed action.

**Table 1. Effects Determinations for Species the Action Agency and/or NMFS Believes May Be Affected by the Proposed Action<sup>2</sup>**

Species	ESA Listing Status	Action Agency Effect Determination	NMFS Effect Determination
<b>Sea Turtles</b>			
Green (North Atlantic [NA] distinct population segment [DPS])	T	NLAA	NLAA
Green (South Atlantic [SA] DPS)	T	NLAA	NLAA
Kemp's ridley	E	NLAA	NLAA
Leatherback	E	NLAA	NE
Loggerhead (Northwest Atlantic [NWA] DPS)	T	NLAA	NLAA
Hawksbill	E	NLAA	NLAA
<b>Fish</b>			
Smalltooth sawfish (U.S. DPS)	E	NLAA	NLAA
Giant manta ray	T	NE	NLAA

We believe the project will have no effect on the leatherback sea turtle due to the species' very specific life history strategy, which is not supported at the site. Leatherback sea turtles have a pelagic, deepwater life history, where they forage primarily on jellyfish.

Table 2 provides the effects determinations for designated critical habitat occurring in the action area that the USACE and/or NMFS believe may be affected by the proposed action.

**Table 2. Effects Determinations for Designated Critical Habitat the Action Agency and/or NMFS Believe May Be Affected by the Proposed Action**

Species	Unit	USACE Effect Determination	NMFS Effect Determination
Johnson's seagrass	Unit J	Likely to adversely affect	Likely to adversely affect, will not destroy or adversely modify

### 3.1 Potential Routes of Effect Not Likely to Adversely Affect Listed Species

Effects to sea turtles and ESA-listed fish species include the potential for injury from construction equipment or materials. We believe this effect is extremely unlikely to occur. Because these species are highly mobile, we expect them to move away from the project sites and into nearby suitable habitat, if disturbed. The applicant has also agreed to adhere to NMFS's *Sea Turtle and Smalltooth Sawfish Construction Conditions*, which will further reduce the risk by requiring all construction personnel to watch for sea turtles and smalltooth sawfish. Operation of any mechanical construction equipment will cease immediately if a sea turtle or smalltooth sawfish is seen within a 50-ft radius of the equipment. Activities will not resume until the protected species has departed the project area of its own volition.

<sup>2</sup> E = endangered; T = threatened; NLAA = may affect, not likely to adversely affect; NE = no effect.

The action area contains shallow water habitat that may be used by sea turtle species and ESA-listed fish species for foraging and refuge. These species may be affected by their inability to access the action area due to their avoidance of construction activities and due to their physical exclusion from the project area by the use of turbidity curtains. We believe temporary loss of habitat access for these species will be insignificant given the proposed action will be temporary and intermittent (i.e., proposed in-water work will take 4 weeks, and construction will occur during daylight hours only). In addition, because these species are mobile, we expect that they will move away from construction activities and to adjacent areas in Biscayne Bay with similar habitat.

Sea turtles, giant manta rays, and smalltooth sawfish may be affected by the permanent loss of seagrass habitat for foraging due to pile and dock placement at the project site where sparse seagrasses are present. Green sea turtles feed on seagrasses, and some of the prey species on which Kemp's ridley sea turtles, loggerhead sea turtles, hawksbill sea turtles, giant manta ray, and smalltooth sawfish feed can be found in seagrass beds. We expect the proposed work will affect 140.14 ft<sup>2</sup> of sparse seagrasses, including a portion of a 5 ft by 5 ft patch of *Halophila decipiens* with >40% coverage (258.4 ft<sup>2</sup> shading from proposed dock – 118.26 ft<sup>2</sup> area of existing wood dock). We believe the permanent loss of 140.14 ft<sup>2</sup> of seagrass will have an insignificant effect on sea turtles and ESA-listed fish species due to the availability of large areas of similar habitat nearby in Biscayne Bay.

An increase in vessel traffic in the area may result from the addition of a new vessel slip. Sea turtles and giant manta rays could be adversely affected by increased vessel traffic in the areas, as it may increase the risk of collision with these species. We believe the potential effect on sea turtles and giant manta rays resulting from increased vessel traffic associated with the proposed action is extremely unlikely to occur. Based on a recent NMFS analysis,<sup>3</sup> it would take an introduction of at least 200 new vessels to an area to result in a take of 1 sea turtle in any single year. While there is limited available information on the giant manta ray, we expect the circumstances and factors resulting in vessel strike injury are similar between sea turtles and the giant manta ray because sea turtles and giant manta rays are both found in nearshore waters (including in the vicinity of inlets where vessel traffic may also be concentrated) and may spend significant time at or near the surface, making them particularly vulnerable to vessel strikes. Stranding returns for sea turtles with vessel strike injuries, as well as numerous observations of giant manta rays with scarring on their dorsal surface that is likely a result of previous boat propeller injury, supports this conclusion. Therefore, we will rely on the more robust available data on sea turtle vessel strike injury to serve as a proxy for the giant manta ray. Because this project will result in far fewer than 200 new vessels, we believe it is extremely unlikely that sea turtles or giant manta rays will be killed or injured by new or increased vessel traffic. We believe there would be no effect on smalltooth sawfish associated with vessel traffic because smalltooth sawfish is primarily a demersal (i.e., bottom-dwelling) species.

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<sup>3</sup> Barnette, M. 2018. Threats and Effects Analysis for Protected Resources on Vessel Traffic Associated with Dock and Marina Construction. NMFS Southeast Regional Office Protected Resources Division Memorandum. October 31, 2018.



Effects to listed species as a result of noise created by construction activities can physically injure animals in the affected areas or change animal behavior in the affected areas. Injurious effects can occur in 2 ways. First, immediate adverse effects can occur to listed species if a single noise event exceeds the threshold for direct physical injury. Second, effects can result from prolonged exposure to noise levels that exceed the daily cumulative exposure threshold for the animals, and these can constitute adverse effects if animals are exposed to the noise levels for sufficient periods. Behavioral effects can be adverse if such effects interfere with animals migrating, feeding, resting, or reproducing, for example. Our evaluation of effects to listed species as a result of noise created by construction activities is based on recent NMFS analyses.<sup>4, 5</sup> The noise analyses in this consultations evaluate effects to ESA-listed fish species and sea turtles identified by NMFS as potentially affected in the table above. While we have no information regarding noise effects specific to giant manta rays, we believe that effects to giant manta rays from pile driving noise would be very similar to effects on smalltooth sawfish (which are considered in the biological opinions for SAJ-82 and JAXBO<sup>3, 4</sup>), because both species are elasmobranchs and lack swim bladders.

Based on our noise calculations, installation of 5 or fewer 12-in concrete piles by impact hammer per day will not cause single-strike or peak-pressure injury to sea turtles or ESA-listed fish. The cumulative sound exposure level (cSEL) of multiple pile strikes over the course of a day may cause injury to ESA-listed fishes and sea turtles at a radius of up to 50 ft (15 m). Due to the mobility of sea turtles and ESA-listed fish species, we expect them to move away from noise disturbances. Because we anticipate the animal will move away, we believe that an animal's suffering physical injury from noise is extremely unlikely to occur. Even in the unlikely event an animal does not vacate the daily cumulative injurious impact zone, the 50-ft radius of potential noise effects from the installation of concrete piles by impact hammer is the same as the 50-ft radius that will be visually monitored for listed species. Construction personnel will cease construction activities if a protected species is sighted within 50 ft of operations, per NMFS's *Sea Turtle and Smalltooth Sawfish Construction Conditions*. Thus, we believe injurious cSEL effects are extremely unlikely to occur. An animal's movement away from the injurious impact zone is a behavioral response, with the same effects discussed below.

Based on our noise calculations, impact hammer pile installation could result in behavioral responses at radii of 705 ft (215 m) for ESA-listed fishes and 151 ft (46 m) for sea turtles. Although we generally expect mobile species to move away from noise disturbances, a confined space may prevent them from leaving. Since installation will occur only during the day, these species will be able to resume normal activities during quiet periods between pile installations and at night. Additionally, because only a few piles (i.e., 4) will be installed, pile driving will be completed within a few days. Therefore, even if the animal remained within the behavioral impact zone, we anticipate any potential effects to it will be temporary and insignificant.

Based on our noise calculations, the installation of 2 metal boatlift I-beams by impact hammer will not cause single-strike or peak-pressure injury to sea turtles or ESA-listed fish. The daily

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<sup>4</sup> NMFS. Biological Opinion on Regional General Permit SAJ-82 (SAJ-2007-01590), Florida Keys, Monroe County, Florida. June 10, 2014.

<sup>5</sup> NMFS. USACE Jacksonville District's Programmatic Biological Opinion (JAXBO) (SER-2015-17616), November 20, 2017.

cumulative sound exposure level (cSEL) of multiple pile strikes over the course of a day may cause injury to ESA-listed fishes and sea turtles at a radius of up to 66 ft (20 m). We believe that this is an overestimate because the I-beams are installed by only penetrating the loose sediment until they reach the top of, or first few inches of, hard substrate to stabilize the structure on the hard substrate, whereas the highest noise levels associated with the 66 ft radius are generated from pile strikes necessary to penetrate hard substrates. Due to the mobility of sea turtles and ESA-listed fish species, we expect them to move away from noise disturbances before cumulative injury actually occurs. Even in the unlikely event an animal does not vacate the daily cumulative sound exposure level impact zone, NMFS's *Sea Turtle and Smalltooth Sawfish Construction Conditions* will provide an additional measure of protection by causing activities to stop if a sea turtle or smalltooth sawfish is spotted within 50 ft of operations. Thus, we believe that an animal's suffering physical injury from noise is extremely unlikely to occur. An animal's movement away from the injurious impact zone is a behavioral response, with the same effects discussed below.

Based on our noise calculations, impact hammer pile installation of 2 metal boatlift I-beams could also cause behavioral effects at radii of 328 ft (100 m) for sea turtles and 1,525 ft (465 m) for ESA-listed fishes. Again, we believe that this is likely an overestimate due to the unique installation method of these boatlift I-beams. Due to the mobility of sea turtles and ESA-listed fish species, we expect them to move away from noise disturbances before any injury actually occurs. If an individual chooses to remain within the behavioral response zone it could be exposed to behavioral noise impacts during pile installation. Since installation will occur intermittently (throughout the day and between days) and because only 2 metal boatlift I-beams will be installed, we anticipate any effects will be temporary and insignificant. These species will be able to resume normal activities during quiet periods between pile installations and at night. Therefore, installation of metal boatlift I-beams by impact hammer is not expected to result in any injurious noise effect and we anticipate any behavioral effects will be insignificant.

### **3.2 Status of Johnson's Seagrass Designated Critical Habitat Likely to be Adversely Affected**

The term "critical habitat" is defined in Section 3(5)(A) of the ESA as (i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (1) essential to the conservation of the species and (2) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" is defined in Section 3(3) of the ESA as the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which listing under the ESA is no longer necessary.

#### *Johnson's Seagrass Critical Habitat*

##### Description

NMFS designated Johnson’s seagrass critical habitat on April 5, 2000 (65 FR 17786; see also, 50 CFR 226.213). The specific areas occupied by Johnson’s seagrass and designated by NMFS as critical habitat are those with 1 or more of the following criteria:

1. Locations with populations that have persisted for 10 years
2. Locations with persistent flowering populations
3. Locations at the northern and southern range limits of the species
4. Locations with unique genetic diversity
5. Locations with a documented high abundance of Johnson’s seagrass compared to other areas in the species’ range

Ten areas (Units) within the range of Johnson’s seagrass (approximately 200 kilometers of coastline from Sebastian Inlet to northern Biscayne Bay, Florida) are designated as Johnson’s seagrass critical habitat (Table 3). The total range-wide acreage of critical habitat for Johnson’s seagrass is roughly 22,574 acres (ac) (NMFS 2002).

Table 3. Designated Critical Habitat Units for Johnson’s Seagrass

<b>Unit</b>	<b>Location/Area</b>
<b>A</b>	A portion of the Indian River, Florida, north of the Sebastian Inlet Channel
<b>B</b>	A portion of the Indian River, Florida, south of the Sebastian Inlet Channel
<b>C</b>	A portion of the Indian River Lagoon, Florida, in the vicinity of the Fort Pierce Inlet
<b>D</b>	A portion of the Indian River Lagoon, Florida, north of the St. Lucie Inlet
<b>E</b>	A portion of Hobe Sound, Florida, excluding the federally marked navigation channel of the Intracoastal Waterway
<b>F</b>	A portion of the south side of Jupiter Inlet, Florida
<b>G</b>	A portion of Lake Worth, Florida, north of Bingham Island
<b>H</b>	A portion of Lake Worth Lagoon, Florida, located just north of the Boynton Inlet
<b>I</b>	A portion of northeast Lake Wyman, Boca Raton, Florida, excluding the federally marked navigation channel of the Intracoastal Waterway
<b>J</b>	A portion of northern Biscayne Bay, Florida, including all parts of the Biscayne Bay Aquatic Preserve excluding the Oleta River, Miami River, and Little River beyond their mouths, the federally marked navigation channel of the Intracoastal Waterway, and all existing federally authorized navigation channels, basins, and berths at the Port of Miami to the currently documented southernmost range of Johnson’s seagrass, Central Key Biscayne

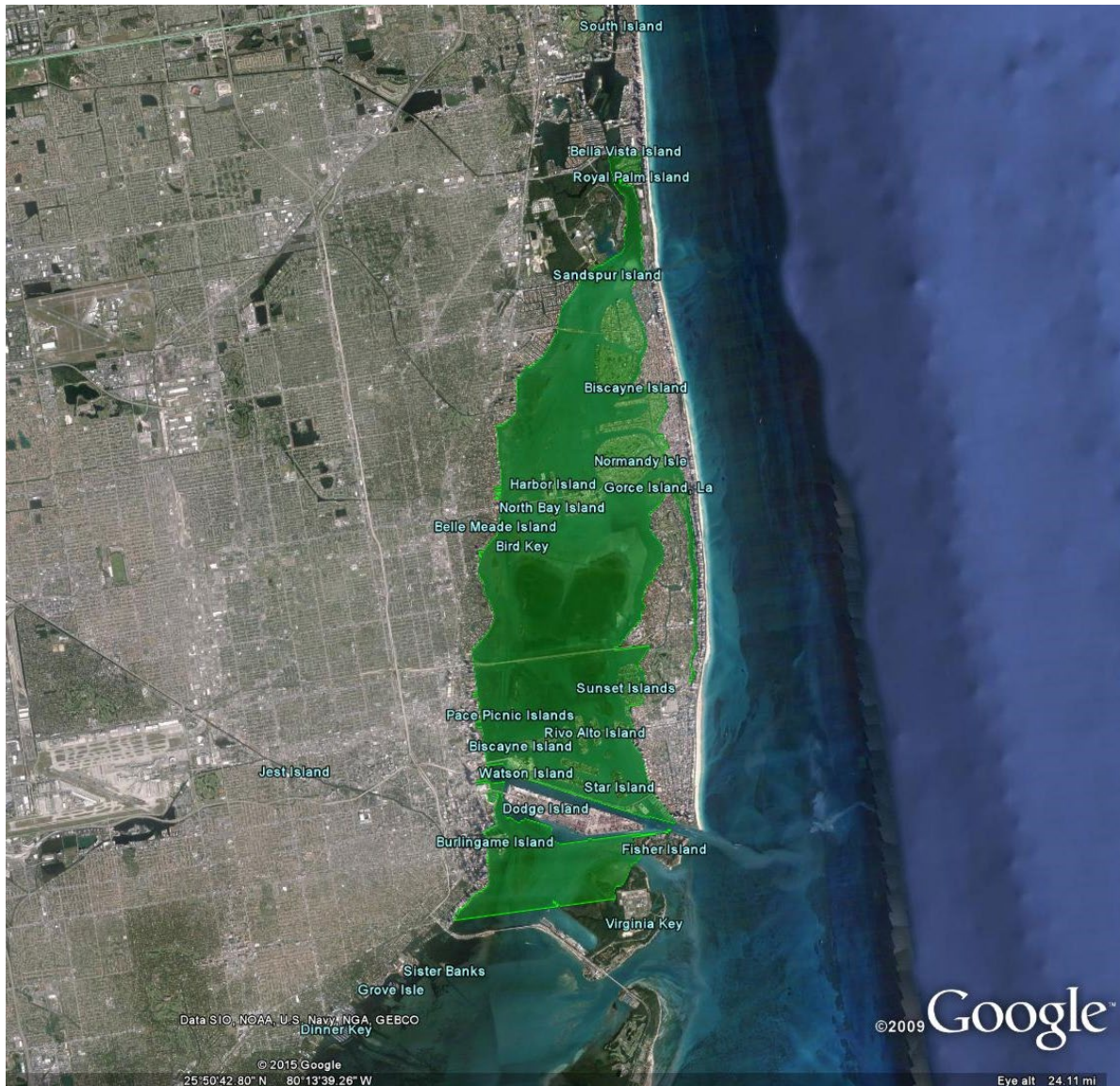
### **Essential Features of Critical Habitat**

NMFS identified 4 habitat features essential for the conservation of Johnson’s seagrass: (1) adequate water quality, defined as being free from nutrient over-enrichment by inorganic and organic nitrogen and phosphorous or other inputs that create low oxygen conditions; (2) adequate

salinity levels, indicating a lack of very frequent or constant discharges of fresh or low-salinity waters; (3) adequate water transparency, which would allow sunlight necessary for photosynthesis; and (4) stable, unconsolidated sediments that are free from physical disturbance. All 4 essential features must be present in an area for it to function as critical habitat for Johnson's seagrass.

#### Critical Habitat Unit Impacted by this Action

This consultation focuses on an activity that occurs in Unit J, which encompasses the northern portion of Biscayne Bay from Northeast 163<sup>rd</sup> Street south to Central Key Biscayne at 25°45'N (Figure 2). This portion of Biscayne Bay is bound by heavy residential and commercial development, though a few areas of mangrove shoreline remain. Dredge and fill projects have resulted in a number of spoil islands and channels too deep for seagrass growth. Biscayne Bay supports a diversity of biological communities including intertidal wetlands, seagrasses, hard bottom, assemblages, and open water. Unit J is wholly within the Biscayne Bay Aquatic Preserve.



**Figure 2. Johnson's seagrass critical habitat Unit J (©2015 Google, Data SIO, NOAA, U.S. Navy, NGA, GEBCO)**

### Status and Threats

A wide range of activities, many funded authorized or carried out by federal agencies, have and will continue to affect the essential habitat requirements of Johnson's seagrass. These are generally the same activities that may affect the species itself, and include: (1) vessel traffic and the resulting propeller dredging; (2) dredge and fill projects; (3) dock, marina, and bridge construction; (4) water pollution; and (5) land use practices (shoreline development, agriculture, and aquaculture).

Vessel traffic has the potential to affect Johnson's seagrass critical habitat by reducing water transparency. Operation of vessels in shallow water environments often leads to the suspension of sediments due to the spinning of propellers on or close to the bottom. Suspended sediments

reduce water transparency and the depth to which sunlight penetrates the water column. Populations of Johnson's seagrass that inhabit shallow water and water close to inlets where vessel traffic is concentrated, are likely to be most affected. This effect is expected to worsen with increases in boating activity.

The dredging of bottom sediments to maintain, or in some cases create, inlets, canals, and navigation channels can directly affect essential features of Johnson's seagrass critical habitat. Dredging results in turbidity through the suspension of sediments. As discussed previously, the suspension of sediments reduces water transparency and the depth to which sunlight can penetrate the water column. The suspension of sediments from dredging can also resuspend nutrients, which could result in over-enrichment and/or reduce dissolved oxygen levels. Further, dredging can destabilize sediments and alter both the shape and depth of the bottom within the dredged footprint. This may affect the ability of the critical habitat to function through the removal or modification of essential features.

Dock, marina, and bridge construction leads to loss of habitat via construction impacts (e.g., pile installation) and shading. Similar to dredging, installation of piles for docks or bridges can result in increased turbidity that can negatively impact water transparency over short durations. Additionally, installed piles also replace the stable, unconsolidated bottom sediments essential for the species. Completed structures can have long-term effects on critical habitat in the surrounding area because of the shade they produce. While shading does not affect water transparency directly, it does affect the amount and/or duration of sunlight that can reach the bottom. The threat posed by dock, marina, and bridge construction is especially apparent in coastal areas where Johnson's seagrass is found.

Other threats include inputs from adjacent land use. Johnson's seagrass critical habitat located in proximity to rivers, canal mouths, or other discharge structures is affected by land use within the watershed. Waters with low salinity that are highly colored and often polluted are discharged to the estuarine environment. This can impact salinity, water quality, and water transparency, all essential features of Johnson's seagrass critical habitat. Frequent pulses of freshwater discharge to an estuarine area may decrease salinity of the habitat and provoke physiological stress to the species. Nutrient over-enrichment, caused by inorganic and organic nitrogen and phosphorous loading via urban and agricultural land run-off, stimulates increased algal growth, decreased water transparency, and diminished oxygen content within the water. Low oxygen conditions have a demonstrated negative impact on seagrasses and associated communities. Discharges can also contain colored waters stained by upland vegetation or pollutants. Colored waters released into these areas reduce the amount of sunlight available for photosynthesis by rapidly reducing the amount of shorter wavelength light that reaches the bottom. In general, threats from adjacent land use will be ongoing, randomly occurring events that follow storm events.

#### **4 ENVIRONMENTAL BASELINE**

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By regulation, the environmental baseline for an Opinion refers to the condition of the designated critical habitat in the action area, without the consequences to the designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the

anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to the designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline (50 CFR 402.02).

#### 4.1 Status of Designated Critical Habitat within the Action Area

As discussed above, this Opinion focuses on an activity occurring in Unit J of Johnson’s seagrass designated critical habitat, which encompasses the northern portion of Biscayne Bay from North East 163<sup>rd</sup> Street south to Central Key Biscayne at 25°45’N. The project site is a residential property with an existing seawall and marginal dock. A biological assessment was performed on June 16, 2020. Johnson’s seagrass was not present within the survey area. Water depths within the action area range between 2.0 and 4.8 ft at MLW.

#### 4.2 Factors Affecting Johnson’s Seagrass Designated Critical Habitat within the Action Area

##### *Federal Actions*

A wide range of activities funded, authorized, or carried out by federal agencies may affect the essential features of designated critical habitat for Johnson’s seagrass. These include actions permitted or implemented by the USACE such as dredging, dock and marina construction, bridge and highway construction, residential construction, shoreline stabilization, breakwaters, and the installation of subaqueous lines or pipelines. Other federal activities that may affect Johnson’s seagrass critical habitat include actions by the Environmental Protection Agency and the USACE to manage freshwater discharges into waterways, management of Biscayne Bay Aquatic Preserve, regulation of vessel traffic to minimize propeller dredging and turbidity, and/or other activities by the U.S. Coast Guard and U.S. Navy. Although these actions have probably affected Johnson’s seagrass critical habitat, none of these past actions have destroyed or adversely modified Johnson’s seagrass critical habitat.

Previously, NMFS completed 3 ESA Section 7 consultations with USACE for projects within the action area (Table 4), which had the potential to adversely affect Johnson’s seagrass critical habitat.

**Table 4. Previously Conducted ESA Section 7 Consultations in the Action Area**

<b>SERO Tracking Number</b>	<b>Completion Date</b>	<b>Project Type</b>	<b>Amount of Critical Habitat Affected (ft<sup>2</sup>)</b>
SER-2013-11400	January, 14, 2014	New dock construction	1,006.4
SER-2013-11894	January 13, 2014	New dock construction	631
SER-2015-17035	November 17, 2016	New Dock Construction	1,006.4

These 3 previous actions adversely affected a combined total of 2,643.8 ft<sup>2</sup> of Johnson’s seagrass critical habitat.

### *Private Recreational Vessel Traffic*

Marina and dock construction increases recreational vessel traffic within areas of Johnson's seagrass critical habitat, which increases suspended sediments from propellers and could result in propeller dredging. As mentioned above, suspended sediments are known to adversely affect Johnson's seagrass critical habitat by reducing the water transparency essential feature. Shading from dock structures and vessel mooring also affects the water transparency essential feature of the designated critical habitat. Propeller dredging and installation of piles and dock support structures permanently removes the unconsolidated sediments essential feature of the critical habitat.

### *Marine Pollution and Environmental Contamination*

The project is located in highly developed coastal areas with extensive canal systems. This can lead to freshwater discharges and nutrient over-enrichment due to coastal runoff and canal discharges into the Bay. Freshwater discharge affects the salinity essential feature of the designated critical habitat while excess nutrients can lead to decreased water transparency and decreased dissolved oxygen content in the water.

### *Activities That May Benefit Johnson's Seagrass Critical Habitat in the Action Area*

State and federal conservation measures exist to protect Johnson's seagrass and its habitat under an umbrella of management and conservation programs that address seagrasses in general (Kenworthy et al. 2006). These conservation measures must be continually monitored and assessed to determine if they will ensure the long-term protection of the species and the maintenance of environmental conditions suitable for its continued existence throughout its geographic distribution.

## **5 EFFECTS OF THE ACTION ON CRITICAL HABITAT**

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Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action (50 CFR 402.02).

The proposed action is within the boundary of Johnson's seagrass critical habitat (Unit J), and all 4 essential features are present at the site. The 4 habitat features essential to the conservation of Johnson's seagrass are: (1) adequate water quality, defined as being free from nutrient over-enrichment by inorganic and organic nitrogen and phosphorous or other inputs that create low oxygen conditions; (2) adequate salinity levels, indicating a lack of very frequent or constant discharges of fresh or low-salinity waters; (3) adequate water transparency, which would allow sunlight necessary for photosynthesis; and (4) stable, unconsolidated sediments that are free from physical disturbance. All 4 essential features must be present in an area for it to function as critical habitat for Johnson's seagrass and the loss of 1 essential feature of Johnson's seagrass



critical habitat will result in a total loss in the conservation function of the critical habitat in that area.

We believe the proposed action will have no effect on the adequate salinity levels essential feature of Johnson's seagrass designated critical habitat because the proposed action lacks any potential to affect adequate salinity levels in the action area.

The adequate water quality and adequate water transparency essential features of Johnson's seagrass critical habitat may be affected by increased turbidity due to pile installation; however, we believe this effect will be insignificant because turbidity is expected to be temporary (i.e., 4 weeks) and contained to the immediate area by the use of turbidity curtains.

The adequate water transparency essential feature of Johnson's seagrass critical habitat may be affected by shading from the new dock and a new vessel. In addition, we believe the proposed work is likely to adversely affect the stable, unconsolidated sediments essential feature of Johnson's seagrass critical habitat due to the installation of 7 new 12-in diameter wood dock support piles, 4 new 12-in square concrete piles, and 2 metal 12-in by 14-in boatlift I-beams. These piles will cover or displace the essential feature. However, some of these piles will be 100% subsumed under the new dock. We do not consider effects to the stable, unconsolidated sediments essential feature from piles that are completely underneath a new structure when estimating the amount of critical habitat affected because, as discussed below, the area under the new dock will be affected by the loss of the adequate water transparency essential feature of Johnson's seagrass critical habitat, and all 4 essential features must be present for the critical habitat to be functional. Once a single feature is removed, the habitat is no longer functional as critical habitat and adverse effects to a different essential feature does not constitute additional adverse effects to the critical habitat.

Per the proposed project drawings, it appears that all 4 12-in square concrete piles and 2 of the 12-in diameter wood dock support piles would be 100% subsumed under the new dock. It appears that 5 of the 12-in diameter wood dock support piles would be 50% subsumed under the new dock and the 2 metal boatlift I-beams would not be subsumed by any portion of the proposed replacement dock. Effects to the stable, unconsolidated sediments essential feature from these piles are estimated below. We believe the 5 12-in diameter wood dock support piles will adversely affect 1.975 ft<sup>2</sup> of Johnson's seagrass critical habitat by displacing the stable, unconsolidated sediments essential feature.<sup>6</sup> We believe the 2 metal boatlift I-beams will affect 2.32 ft<sup>2</sup> of the stable, unconsolidated sediments essential feature.<sup>7</sup> In total, the installation of piles for the dock and boatlift will affect 4.295 ft<sup>2</sup> of the stable, unconsolidated sediments essential feature (1.975 ft<sup>2</sup> from wood pile placement + 2.32 ft<sup>2</sup> from metal boatlift pile placement = 4.295 ft<sup>2</sup> total displacement).

Finally, we consider effects to the adequate water transparency essential feature of Johnson's seagrass critical habitat. The adequate water transparency essential feature of Johnson's seagrass critical habitat is likely to be adversely affected by shading from the new structure, including the dock and a new vessel. We only expect adverse effects in the area immediately underneath this

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<sup>6</sup> A round 12-in diameter pile occupies  $0.79 \text{ ft}^2 \times 5 \text{ piles} / 2 = 1.975 \text{ ft}^2$ .

<sup>7</sup> A 12-in by 14-in metal boatlift pile occupies  $1.16 \text{ ft}^2 \times 2 \text{ piles} = 2.32 \text{ ft}^2$

structure, as any other shading to nearby areas will be temporary in nature (i.e., shading and light transmission will change over the course of the day) and therefore is insignificant.

In order to calculate adverse impacts to the adequate water transparency essential feature of Johnson's seagrass critical habitat, first we consider shading from the new dock (258.4 ft<sup>2</sup>), which will replace the existing dock (118 ft<sup>2</sup>). The portion of the new dock that overlaps with the footprint of the existing seawall cap (i.e., 38.5 ft<sup>2</sup>) is the same area that existing dock overlaps and is not included in the square footage of the new dock (258.4 ft<sup>2</sup>). Because, a portion of the area under the new dock is not currently functioning as critical habitat due to shading within the footprint of the existing dock, we subtract the area of the existing dock from our calculation. Therefore, we believe the new dock at the project site will adversely affect 140.4 ft<sup>2</sup> of Johnson's seagrass critical habitat through permanent removal of the adequate water transparency essential feature.

Next, we consider the potential impact of shading from the storage of 1 vessel. We believe that shading due to vessel storage will adversely affect the adequate water transparency essential feature of Johnson's seagrass designated critical habitat. When we do not know the size of the vessel, we estimate that vessel to be 176 ft<sup>2</sup>, based on the average vessel size in Florida used in the analysis for the Statewide Programmatic Biological Opinion (SWPBO).<sup>8</sup> Since the proposed action will result in 1 new vessel slip, total impact by shading from vessel storage will be 176 ft<sup>2</sup>. Thus, we believe the new dock and the vessels will adversely affect 316.4 ft<sup>2</sup> (140.4 ft<sup>2</sup> + 176 ft<sup>2</sup>) of Johnson's seagrass critical habitat through the permanent removal of the adequate water transparency essential feature.

Combining the total adverse effects to Johnson's seagrass critical habitat from the loss of the stable, unconsolidated sediments essential feature and the adequate water transparency essential feature, we believe the project will adversely affect 320.695 ft<sup>2</sup> (4.295 ft<sup>2</sup> [piles] + 316.4 ft<sup>2</sup> [shading] = 320.695 ft<sup>2</sup>) of Johnson's seagrass critical habitat.<sup>9</sup>

## **6 CUMULATIVE EFFECTS**

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Cumulative effects include the effects of future state, tribal, or local private actions that are reasonably certain to occur in the action areas considered in this Opinion. Future federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to Section 7 of the ESA.

No categories of effects beyond those already described are expected in the action area, and we did not identify any new future state, tribal or private actions reasonably certain to occur in the action area of the proposed action. Dock and marina construction will likely continue at current rates, with associated loss and degradation of seagrass habitat, including Johnson's seagrass

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<sup>8</sup> Florida Statewide Programmatic Biological Opinion (SWPBO) issued by NMFS on December 4, 2015 (SER-2013-12540).

<sup>9</sup> We calculated 4.295 ft<sup>2</sup> of adverse effects to Johnson's seagrass critical habitat from the loss of the stable, unconsolidated sediments essential feature + 316.4 ft<sup>2</sup> of impacts to Johnson's seagrass critical habitat from the loss of the adequate water transparency essential feature = 320.695 ft<sup>2</sup> of total adverse effects to Johnson's seagrass critical habitat.

critical habitat. Because these activities are subject to USACE permitting and thus, the ESA Section 7 consultation requirement, they do not lead to cumulative non-federal effects to be discussed in this section. NMFS and the USACE have developed protocols to encourage the use of light-transmitting materials in future construction of docks constructed in or over submerged aquatic vegetation, marsh or mangrove habitat.<sup>10,11,12</sup> Even if all new docks are constructed in full compliance with the NMFS and USACE's guidance, NMFS acknowledges that shading impacts, and thus, impacts to the water transparency essential feature, to Johnson's seagrass will continue via dock construction. As NMFS and the USACE continue to encourage permit applicants to design and construct new docks in full compliance with the construction guidelines discussed above, and the recommendations in Adam (2012), Landry et al. (2008b), and Shafer et al. (2008), NMFS believes that shading impacts to Johnson's seagrass will be reduced in the short- and long-term. Moreover, even with some shading from grated construction materials, researchers have found all 4 essential features necessary for Johnson's seagrass to persist under docks constructed of grated decking (Landry et al. 2008b).

Upland development and associated runoff will continue to degrade the water quality essential feature necessary for Johnson's seagrass critical habitat. Flood control and imprudent water management practices will continue to result in freshwater inputs into estuarine systems, thereby degrading and altering the water quality and salinity essential features of Johnson's seagrass critical habitat.

Increased recreational vessel traffic will continue to result in damage to Johnson's seagrass and its designated critical habitat by improper anchoring, propeller scarring, and accidental groundings. Nonetheless, we expect that ongoing boater education programs and posted signage about the dangers to seagrass habitat from propeller scarring and improper anchoring may reduce impacts to Johnson's seagrass designated critical habitat, including that in Unit J.

## **7 DESTRUCTION/ADVERSE MODIFICATION ANALYSIS**

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NMFS's regulations define *destruction or adverse modification* to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." (50 CFR 402.02). Alterations that may destroy or adversely modify critical habitat may include impacts to the area itself, such as those that would impede access to or use of the essential features. NMFS will generally conclude that a Federal action is likely to "destroy or adversely modify" designated critical habitat if the action results in an alteration of the quantity or quality of the essential physical or biological features of designated critical habitat, or that precludes or significantly delays the capacity of that habitat to develop those features over time, and if the effect of the alteration is to appreciably diminish the value of critical habitat for the conservation of the species. This analysis takes into account the geographic and temporal scope

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<sup>10</sup> Project Design Criteria A2.17 in U.S. Army Corps of Engineers Jacksonville District's Programmatic Biological Opinion (JAXBO) issued by NMFS on November 20, 2017 (SER-2015-17616)

<sup>11</sup> Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed in or over Submerged Aquatic Vegetation (SAV), Marsh or Mangrove Habitat U.S. Army Corps of Engineers/National Marine Fisheries Service, dated August 2001

<sup>12</sup> Key for Construction Conditions for Docks or Other Minor Structures Constructed in or Over Johnson's Seagrass (*Halophila johnsonii*) National Marine Fisheries Service/U.S. Army Corps of Engineers, dated October 2002

of the proposed actions, recognizing that “functionality” of critical habitat necessarily means that it must now and must continue in the future to support the conservation of the species and progress toward recovery. Destruction or adverse modification does not depend strictly on the size or proportion of the area adversely affected, but rather on the role the action area serves with regard to the function of the overall designation, and how that role is affected by the action.

Recovery for Johnson’s seagrass as set forth in the final recovery plan (NMFS 2002), will be achieved when the following recovery objectives are met:

- (1) The species’ present geographic range remains stable for at least 10 years, or increases.
- (2) Self-sustaining populations are present throughout the range at distances less than or equal to the maximum dispersal distance to allow for stable vegetative recruitment and genetic diversity.
- (3) Populations and supporting habitat in its geographic range have long-term protection (through regulatory action or purchase acquisition).

We evaluated the project’s expected effects on critical habitat to determine whether it will be able to continue to provide its intended functions in achieving these recovery objectives and supporting the conservation of the species.

The first recovery objective for Johnson’s seagrass is for the present range of the species to remain stable for 10 years or to increase during that time. In the 5-year review (2007) of the status of the species, NMFS concluded that the first recovery objective had been achieved as of 2007. In fact, the species range had increased slightly northward at that time. We have no information indicating range stability has decreased since then. We determined the proposed action will adversely affect a total of 320.695 ft<sup>2</sup> (0.007 ac)<sup>13</sup> of Johnson’s seagrass designated critical habitat. However, the project site is not at a boundary of the species’ range, the affected area is very small, and the loss of this area for potential colonization will not affect the stability of the species’ range now or in the future. Thus, we believe the proposed action’s effects will not affect the critical habitat’s ability to contribute to range stability for Johnson’s seagrass.

The second recovery objective for Johnson’s seagrass requires that self-sustaining populations be present throughout the range at distances less than or equal to the maximum dispersal distance for the species. Due to its asexual reproductive mode, self-sustaining populations are present throughout the range of the species. As discussed above in the Status of the Critical Habitat Likely to be Adversely Affected section, there are approximately 22,574 ac of Johnson’s seagrass critical habitat. The loss of 320.695 ft<sup>2</sup> (0.007 ac) of designated critical habitat for Johnson’s seagrass would equate to a loss of 0.000031% of Johnson’s seagrass critical habitat  $([0.007 \text{ ac} \times 100] \div 22,574 \text{ ac})$ . In addition, the loss of 2,643.8 ft<sup>2</sup> (0.061 ac) of designated critical habitat for Johnson’s seagrass from the previous dock installations in the action area would equate to a loss of 0.00027% of Johnson’s seagrass critical habitat  $([0.061 \text{ ac} \times 100] \div 22,574 \text{ ac})$ . Together, these actions would equate to a loss of 0.0003% of Johnson’s seagrass critical habitat (0.000031% + 0.00027%). The loss from this project, alone and in combination with the previous projects in the action area, will not affect the conservation value of available critical habitat to an extent that it would affect Johnson’s seagrass self-sustaining populations by

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<sup>13</sup> Conversion: 320.695 ft<sup>2</sup> ÷ 43,560 ft<sup>2</sup> per 1 acre = 0.007 acre.

adversely affecting the availability of suitable habitat in which the species can disperse in the future. Drifting fragments of Johnson's seagrass can remain viable in the water column for 4-8 days (Hall et al. 2006), and can travel several kilometers under the influence of wind, tides, and waves. Because of this, we believe that the permanent removal of critical habitat due to the proposed action, alone or in combination with the other projects in the baseline, will not appreciably diminish the conservation value of critical habitat as a whole in supporting self-sustaining populations.

The third, and final, recovery objective is for populations of Johnson's seagrass and supporting habitat in the geographic range of Johnson's seagrass to have long-term protection through regulatory action or purchase acquisition. Though the affected portions of the project site will not be available for the long-term, thousands of acres of designated critical habitat are still available for long-term protection, which would include areas surrounding the action area.

Based on the above analysis, we conclude that the adverse effects on Johnson's seagrass critical habitat due to the proposed action will not impede achieving the 3 recovery objectives listed above and, therefore will not appreciably diminish the value of critical habitat as a whole for the conservation of the species.

## **8 CONCLUSION**

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After reviewing the current status of Johnson's seagrass designated critical habitat, the environmental baseline, and the cumulative effects, it is our opinion that the loss of 320.695 ft<sup>2</sup> (0.007 ac) from the proposed action will not interfere with achieving the relevant habitat-based recovery objectives for Johnson's seagrass. It is our opinion that the proposed action will not impede the critical habitat's ability to support Johnson's seagrass conservation, despite permanent adverse effects. Therefore, we conclude that the action, as proposed, is likely to adversely affect, but is not likely to destroy or adversely modify, Johnson's seagrass designated critical habitat.

## **9 INCIDENTAL TAKE STATEMENT**

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NMFS does not anticipate that the proposed action will incidentally take any species and no take is authorized. Nonetheless, any take of any ESA-listed species shall be immediately reported to [takereport.nmfs@noaa.gov](mailto:takereport.nmfs@noaa.gov). Refer to the present Biological Opinion by title, Laird Dock Removal & Install, issuance date, NMFS ECO tracking number, SERO-2021-00141, and USACE permit number, SAJ-2020-03662 (LP-LOB). At that time, consultation must be reinitiated.

## **10 CONSERVATION RECOMMENDATIONS**

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Section 7(a)(1) of the ESA directs federal agencies to use their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

NMFS believes the following conservation recommendations are reasonable, necessary, and appropriate to conserve and recover Johnson's seagrass. NMFS strongly recommends that these measures be considered and adopted.

1. NMFS recommends that the USACE, in coordination with seagrass researchers and industry, support ongoing research on light requirements and transplanting techniques to preserve and restore Johnson's seagrass, and on collection of plants for genetics research, tissue culture, and tissue banking.
2. NMFS recommends that the USACE continue promoting the use of the October 2002 *Key for Construction Conditions for Docks or other Minor Structures Constructed in or over Johnson's Seagrass* as the standard construction methodology for proposed docks located in the range of Johnson's seagrass.
3. NMFS recommends that the USACE review and implement the recommendations in the July 2008 report, *The Effects of Docks on Seagrasses, With Particular Emphasis on the Threatened Seagrass, Halophila johnsonii* (Landry et al. 2008a).
4. NMFS recommends that the USACE review and implement the Conclusions and Recommendations in the October 2008 report, *Evaluation of Regulatory Guidelines to Minimize Impacts to Seagrasses from Single-family Residential Dock Structures in Florida and Puerto Rico* (Shafer et al. 2008).
5. NMFS recommends that a report of all current and proposed USACE projects in the range of Johnson's seagrass be prepared and used by the USACE to assess impacts on the species from these projects, to assess cumulative impacts, and to assist in early consultation that will avoid and/or minimize impacts to Johnson's seagrass and its critical habitat. Information in this report should include location and scope of each project and identify the federal lead agency for each project. The information should be made available to NMFS.
6. NMFS recommends that the USACE conduct and support research to assess trends in the distribution and abundance of Johnson's seagrass. Data collected should be contributed to the Florida Fish and Wildlife Conservation Commission's Florida Wildlife Research Institute to support ongoing geographic information system mapping of Johnson's seagrass and other seagrass distribution.
7. NMFS recommends that the USACE prepare an assessment of the effects of other actions under its purview on Johnson's seagrass for consideration in future consultations.

## **11 REINITIATION OF CONSULTATION**

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As provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of taking specified in the proposed action is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to listed species or critical habitat that

was not considered in the Biological Opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action.

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