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F/SER31:SG
SERO-2021-01332

Ingrid Gilbert, Chief
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Jacksonville District Corps of Engineers
Department of the Army
9900 Southwest 107th Avenue, Suite 203
Miami, Florida 33176

Ref.: SAJ-2021-00511, Eric Mendelson, Dock Replacement and Shoreline Stabilization, Miami Beach, Miami-Dade County, Florida

Dear Ingrid Gilbert:

The enclosed Biological Opinion (Opinion) responds to your request for consultation with us, 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 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-2021-01332 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 email at Sarah.Garvin@noaa.gov.

Sincerely,

Andrew J. Strelcheck
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: Eric Mendelson

Permit Number SAJ-SAJ-2021-00511 (LP-LOB)

Activity: Dock Replacement and Shoreline Stabilization, 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-2021-01332

Approved By:

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

Date Issued:

TABLE OF CONTENTS

1	CONSULTATION HISTORY	5
2	DESCRIPTION OF THE PROPOSED ACTION AND ACTION AREA.....	5
3	STATUS OF LISTED SPECIES AND CRITICAL HABITAT.....	7
4	ENVIRONMENTAL BASELINE.....	13
5	EFFECTS OF THE ACTION ON CRITICAL HABITAT	15
6	CUMULATIVE EFFECTS	17
7	DESTRUCTION/ADVERSE MODIFICATION ANALYSIS	18
8	CONCLUSION.....	21
9	INCIDENTAL TAKE STATEMENT	21
10	CONSERVATION RECOMMENDATIONS	21
11	REINITIATION OF CONSULTATION.....	22
12	LITERATURE CITED	23

LIST OF FIGURES

Figure 1. Image showing the project site (red pin) on Biscayne Bay at 6621 Allison Road, Miami-Dade County, Florida (©2021 Google)	6
Figure 2. Johnson’s seagrass critical habitat Unit J (©2015 Google, Data SIO, NOAA, U.S. Navy, NGA, GEBCO)	12

LIST OF TABLES

Table 1. Effects Determinations for Species the Action Agency and/or NMFS Believes May Be Affected by the Proposed Action.....	7
Table 2. Effects Determinations for Designated Critical Habitat the Action Agency and/or NMFS Believe May Be Affected by the Proposed Action.....	7
Table 3. Designated Critical Habitat Units for Johnson’s Seagrass	10

ACRONYMS AND ABBREVIATIONS

CFR	Code of Federal Regulations
DPS	Distinct Population Segment
ECO	NMFS Environmental Consultation Organizer
ESA	Endangered Species Act
JAXBOUSACE	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

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

INTRODUCTION

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 with NMFS (hereafter referred to as “we” or “us”) is concluded after we determine that the action is not likely to adversely affect listed species or critical habitat. Formal consultation is concluded after we issue a Biological Opinion (hereafter referred to as “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 our Opinion based on our review of impacts associated with USACE’s proposed action to issue a permit within Miami-Dade County, Florida. This Opinion analyzes the proposed action’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 USACE and other sources of information, including the published literature cited herein.

1 CONSULTATION HISTORY

On May 5, 2021, NMFS received a request for formal consultation under Section 7 of the ESA from the USACE for construction permit application SAJ-2021-00511 (LP-LOB) in a letter dated May 5, 2021. Additional information was requested on June 17 and 23, 2021. A final response was received on July 15, 2021, and we initiated consultation the same day.

2 DESCRIPTION OF THE PROPOSED ACTION AND ACTION AREA

2.1 Proposed Action

The USACE proposes to permit the applicant to:

1. Remove an existing 295.24 square foot (ft²) dock including the removal of 3 dock piles and 2 mooring piles;
2. Remove 89.5 linear foot (lin ft) of an existing 100 lin ft retaining wall;
3. Install a new 480 ft² dock with ½-inch (in) grated fiberglass decking supported by 12 new 12-in diameter wood piles;
4. Install a new 33,000 lbs-capacity boat lift supported by 8 new 12-in diameter wood piles;
5. Install a new 5,000 lbs-capacity boatlift;
6. Install 11 new 12 in square concrete batter piles;
7. Install 11 new 12 in square concrete king piles to support the existing seawall;
8. Install a new 100 ft² seawall within 12-in of the existing seawall wetface;
9. Install a new 333 ft² seawall cap; and,
10. Install 800 ft² of new coral rock boulders placed at a 2:1 slope not to exceed 8 feet (ft) waterward of the seawall cap.

Removal of the existing dock and piles will be done via a crane on a barge and disposal of all the existing structures will be at an approved Miami-Dade Facility in the uplands. All piles will be installed via a barge-mounted impact hammer. No more than four piles will be installed per day. A cushion block will be used for noise abatement.

The proposed overwater structure will not be built to the revised *Construction Guidelines for Docks or Other Minor Structures in Florida* outlined in the JAXBO (Project Design Criteria A2.17 in U.S. Army Corps of Engineers Jacksonville District's Programmatic Biological Opinion issued by NMFS on November 20, 2017 [SER-2015-17616]) or the dock design criteria developed by NMFS and the USACE Jacksonville District *Dock Construction Guidelines in Florida for Docks or Other Minor Structures Constructed in or over Submerged Aquatic Vegetation (SAV), Marsh or Mangrove Habitat*, dated August 2001; it will cover an overwater area of 480 ft² and will have an elevation of 5.6 ft above MHW.

The proposed work will result in one new, additional vessel slip at the project site. The completed project will accommodate two vessels at the project site.

Total construction time is expected to be 3 months, during daylight hours only. The applicant will use turbidity curtains and comply with NMFS Southeast Region *Protected Species Construction Conditions* (NMFS 2021). Work will be completed from the uplands and a barge.

2.2 Action Area

The proposed project site is located at 6621 Allison Road, Miami Beach, Miami-Dade County, Florida (25.849871°N, 80.124077°W [North American Datum 1983] (Figure 1). The project site is located approximately 3.53 miles north of Government Cut, the nearest inlet to the Atlantic Ocean.

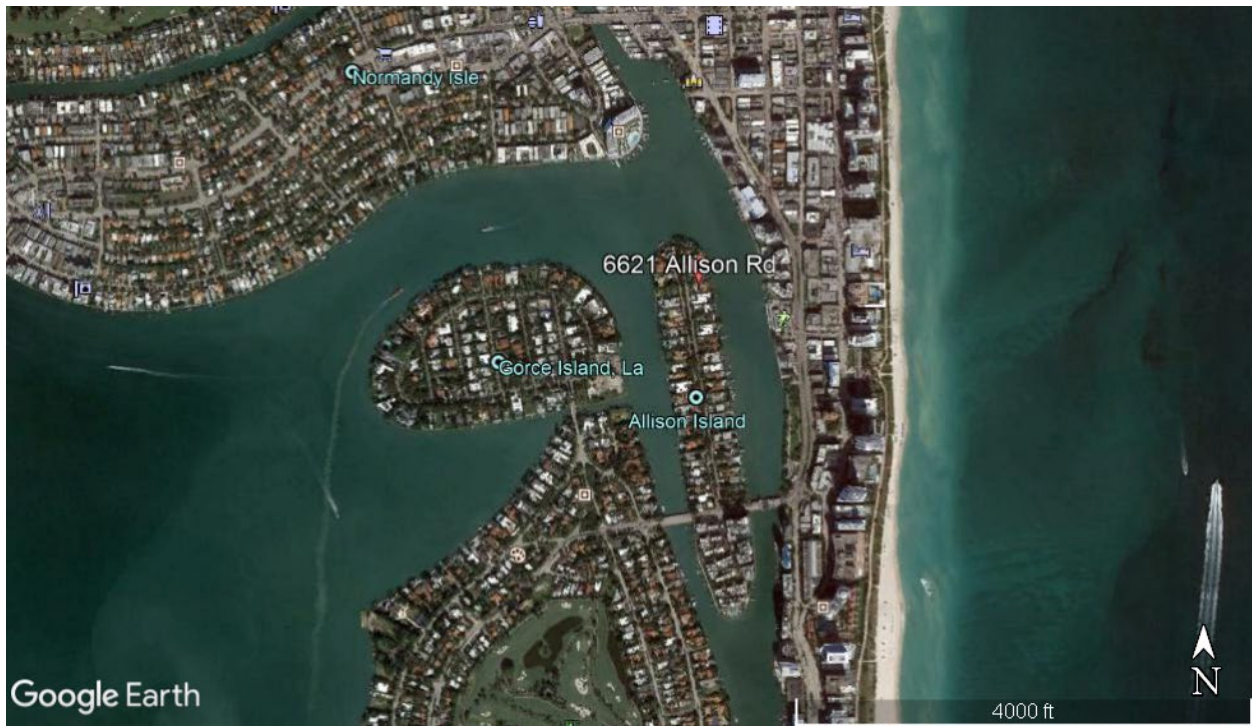


Figure 1. Image showing the project site (red pin) on Biscayne Bay at 6621 Allison Road, Miami-Dade County, Florida (©2021 Google)

The project site is a residential property on Biscayne Bay with an existing seawall, an existing 294.24 ft² dock with 1 boat slip, and 2 existing mooring piles. A benthic assessment was performed by Miami-Dade County on August 26, 2020. The existing substrate in the project area was described as “sand/silt” by the USACE. The benthic report recorded water depths ranging between 3.1 and 6.6 ft at MLW. Macroalgae and sponges are present in the project area, but no seagrasses were found. In addition, there are species of non-ESA listed corals present (i.e., *Siderastrea spp*) located on the existing seawall. 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 directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR 402.02). For the purposes of the Federal actions, the action area includes the shoreline and submerged habitat within the immediate vicinity of the project sites that will be affected by the proposed actions, including the submerged habitat within the boundary of the turbidity curtain. The action area for each proposed project here is equivalent to the largest

radius of effects on ESA-listed species based on the proposed installation of 12-in wood and 12-in concrete piles using an impact hammer, which is 705 ft from the proposed action.

3 STATUS OF LISTED SPECIES AND CRITICAL HABITAT

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

Species	ESA Listing Status ¹	Action Agency Effect Determination	NMFS Effect Determination
Sea Turtles			
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
Fish			
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

¹ E = endangered; T = threatened; NLAA = may affect, not likely to adversely affect; NE = no effect.

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 applicants have also agreed to adhere to NMFS Southeast Region *Protected Species 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.

The action areas contain 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 areas 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 actions will be temporary and intermittent (i.e., proposed in-water work for the project will take 3 months, 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.

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,² it would take an introduction of at least 200 new vessels to an area to result in a take of one 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.

² 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 two 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.^{3,4} 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^{3,4}), because both species are elasmobranchs and lack swim bladders.

Based on our noise calculations, the installation of five or fewer 12-inch wood piles per day by impact hammer will not cause single-strike or peak-pressure injury to sea turtles or ESA-listed fish species. However, the cumulative sound exposure level of multiple pile strikes over the course of a day may cause injury to ESA-listed fishes and sea turtles up to 30 ft (9 m) away from the pile. 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. 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, the installation of five or fewer 12-inch concrete piles per day by impact hammer 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 (14 meters (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 radius of that area is smaller than the 50-ft radius that will be visually monitored for listed species. Construction personnel will cease construction activities if an animal is sighted per NMFS Southeast Region *Protected Species Construction Conditions*. Thus, we believe the likelihood of any injurious cSEL effects is discountable. 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 cause behavioral effects at radii of 151 ft (46 m) for sea turtles and 705 ft (215 m) for ESA-listed fish species. Given the

³ NMFS. Biological Opinion on Regional General Permit SAJ-82 (SAJ-2007-01590), Florida Keys, Monroe County, Florida. June 10, 2014

⁴ NMFS. USACE Jacksonville District's Programmatic Biological Opinion (JAXBO) (SER-2015-17616), November 20, 2017

mobility of these species, we expect them to move away from noise disturbances. Because there is similar habitat nearby, we believe behavioral effects will be insignificant. If an individual chooses to remain within the behavioral response zone, it could be exposed to behavioral noise impacts during pile installation. Since installation would only occur during the day, these species will be able to resume normal activities between pile installations and at night. Therefore, we anticipate any behavioral effects to them 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 one 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

Unit	Location/Area
A	A portion of the Indian River, Florida, north of the Sebastian Inlet Channel
B	A portion of the Indian River, Florida, south of the Sebastian Inlet Channel
C	A portion of the Indian River Lagoon, Florida, in the vicinity of the Fort Pierce Inlet

Unit	Location/Area
D	A portion of the Indian River Lagoon, Florida, north of the St. Lucie Inlet
E	A portion of Hobe Sound, Florida, excluding the federally marked navigation channel of the Intracoastal Waterway
F	A portion of the south side of Jupiter Inlet, Florida
G	A portion of Lake Worth, Florida, north of Bingham Island
H	A portion of Lake Worth Lagoon, Florida, located just north of the Boynton Inlet
I	A portion of northeast Lake Wyman, Boca Raton, Florida, excluding the federally marked navigation channel of the Intracoastal Waterway
J	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 four 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 163rd 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.

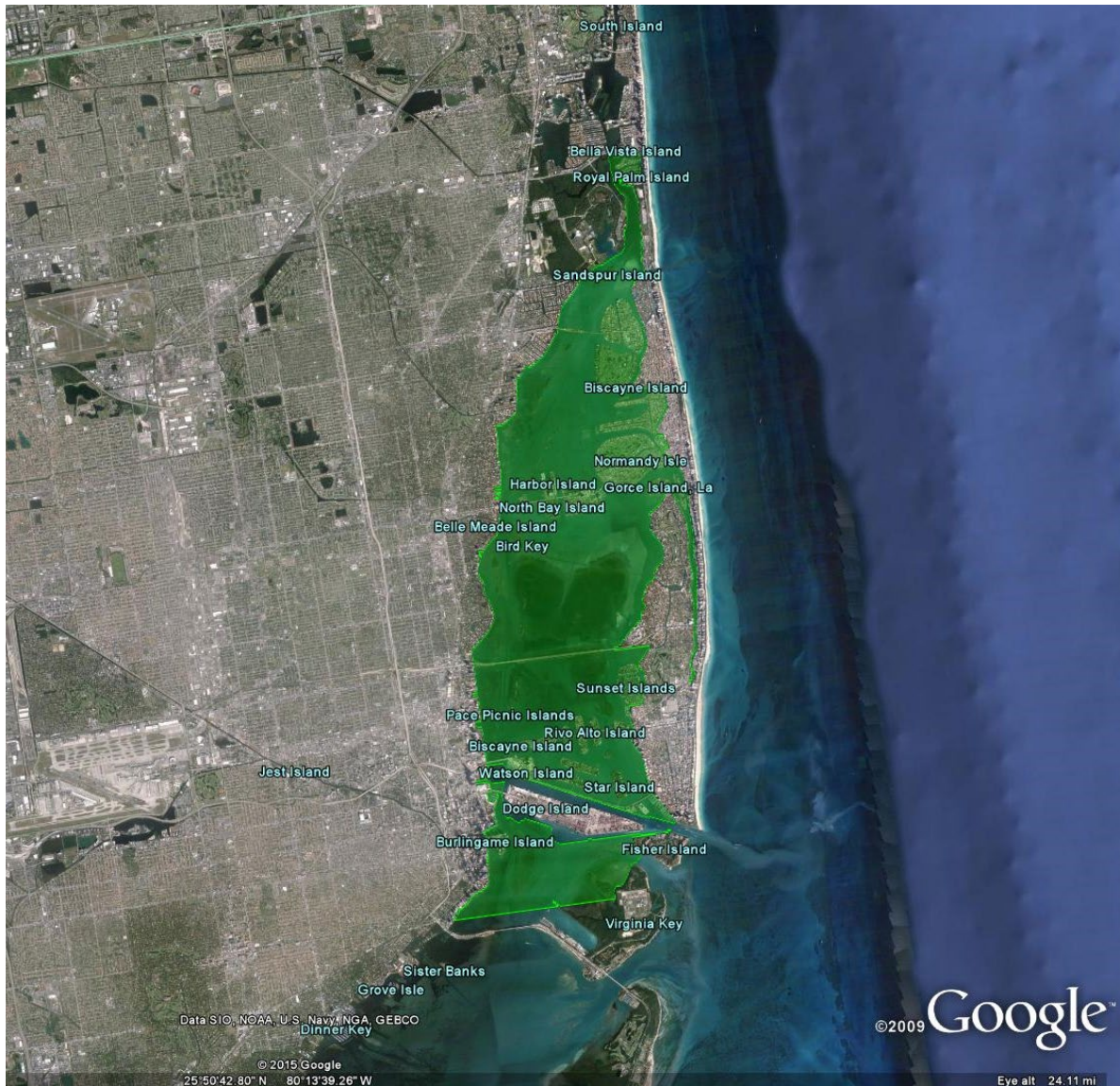


Figure 2. Johnson's seagrass critical habitat Unit J (©2015 Google, Data SIO, NOAA, U.S. Navy, NGA, GEBCO)

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

This section describes the effects of past and ongoing human and natural factors contributing to the current status of the affected critical habitat in the action area. The environmental baseline describes the critical habitat's health based on information available at the time of this consultation.

By regulation (50 CFR 402.02), the environmental baseline for an Opinion refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or 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 listed species or 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.

Focusing on the current state of critical habitat is important because in some areas critical habitat features will commonly exhibit, or be more susceptible to, adverse responses to stressors than they would be in other areas, or may have been exposed to unique or disproportionate stresses. These localized stress responses or stressed baseline conditions may increase the severity of the adverse effects expected from the proposed action.

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 163rd Street south to Central Key Biscayne at 25°45'N with an existing seawall, an existing 294.24 ft² dock with 1 boat slip, and 2 existing mooring piles. A benthic assessment was performed by Miami-Dade County on August 26, 2020. Johnson's seagrass was not present within the survey area. Water depths within the action area range between 3.1 and 6.6 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.

Other than the proposed action, no other federally permitted projects are known to have occurred or have had effects to Johnson's seagrass designated critical habitat within the action area, as per

a review of the NMFS PRD's completed consultation database by the consulting biologist on July 15, 2021.

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 projects are 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

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 four essential features are present at the site. The four 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.

Adequate Water Quality

Johnson's seagrass designated critical habitat may be affected by increased turbidity due to removal of the existing structures, installation of new piles, or shoreline stabilization; however, we believe the effect to the water quality essential feature will be insignificant. We expect turbidity to be temporary (i.e., in-water work will last up to 3 months) and contained to the immediate area by the use of turbidity curtains.

Adequate Salinity Levels

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

Adequate Water Transparency

The water transparency essential feature also may be affected by increased turbidity due to removal of the existing structures, installation of new piles, or shoreline stabilization; however, we believe this effect to the water quality essential feature will be insignificant. We expect turbidity to be temporary (i.e., in-water work will last up to 3 months) and contained to the immediate area by the use of turbidity curtains.

The water transparency essential feature of Johnson's seagrass designated critical habitat is likely to be adversely affected by shading from the new replacement dock not built to the dock construction guidelines and the addition of 1 new boat slip.⁵ Shading from docks not built to the dock construction guidelines, as mentioned in Section 3.2, results in the complete loss of the water transparency essential feature of Johnson's seagrass critical habitat. We only expect adverse effects in the area immediately underneath the dock, as any 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 insignificant.

Due to the shading caused by the existing dock at the project site, the area under the dock is not currently functioning as critical habitat. When the existing 295.24 ft² dock is removed, the adequate water transparency essential feature of Johnson's seagrass designated critical habitat in this portion of the action area will be restored. This also will result in restoring the same amount of functioning critical habitat. However, from the project plans it appears that the new 480 ft² replacement dock will be built over about half of the footprint of the existing dock; it will be offset from the existing dock's footprint to the west of the property. Thus, about 147.62 ft² of

⁵ As noted in the description of the proposed action, this action involves the removal of an existing dock with a single wet boat slip, and the construction of a new dock with two boat lifts. Both wet boat slips and boat lifts present the same shading effects. Thus, one of the new lifts is expected to have the same effect as the existing wet slip being removed, while the additional new boat lift presents an additional shading effect relative to existing conditions.

functioning Johnson's seagrass critical habitat will be restored at the completion of the proposed project ($295.24 \text{ ft}^2 / 2 = 147.62 \text{ ft}^2$).

We can then calculate the amount of Johnson's seagrass critical habitat lost due to shading from the new replacement dock (480 ft^2) by subtracting from the amount of Johnson's seagrass critical habitat restored by leaving a 147.62 ft^2 portion of the existing dock's footprint unshaded. A net total of 332.38 ft^2 ($480 \text{ ft}^2 - 147.62 \text{ ft}^2$) of Johnson's seagrass critical habitat due to shading will be lost by offsetting the placement of the new replacement dock.

Next, we consider the potential impact of shading from the storage of one additional 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. There is an existing wet slip, which upon completion of the proposed project, will be replaced with a boatlift. Based on the dimensions and capacity, we assume the 5,000 lbs-capacity boatlift will store a vessel of similar size to the existing wet slip with no additional shading effects beyond those of existing conditions. The larger 33,000-lbs-capacity boatlift, which will allow for storage of second, larger-than-average-sized vessel at the project site. Therefore, we will estimate the shading likely to result from this larger vessel to determine the total impact from shading from vessel storage. Based on the dimensions and capacity of the 33,000-lbs-capacity boatlift, the typical-sized vessel that could be stored would be approximately 43 ft long with a beam of approximately 15 ft. Thus, storage of a vessel on this lift would result in 645 ft^2 of shading.

In total, we believe the new dock and the vessel will adversely affect 977.38 ft^2 (332.38 ft^2 [shading from the new dock] + 645 ft^2 [shading from the new vessel]) of Johnson's seagrass critical habitat through removal of the adequate water transparency essential feature.

Adequate Stable, Unconsolidated Sediments

The proposed work is likely to adversely affect the stable, unconsolidated sediments essential feature due to the installation of 800 ft^2 of new coral rock boulders and the installation of new piles. First, we calculate the impact to this essential feature due to the placement of the new coral rock boulders. The boulders will be placed at a 2:1 slope not to exceed 8 ft waterward of the new seawall cap. Impacts to stable, unconsolidated sediments essential feature will not occur within the entire 800 ft^2 footprint of the placed boulders because a portion of this area (measuring 8 ft waterward by 20 ft width of dock structure, or 160 ft^2) overlaps with the new dock structure. We do not consider effects to the stable, unconsolidated sediments essential feature from boulders that are placed completely underneath a new structure when estimating the amount of critical habitat affected, to avoid double counting impacts. This is because, as discussed above, the adequate water transparency essential feature of Johnson's seagrass critical habitat also is affected in this same area, and all four essential features must be present for the critical habitat to be functional. Once a single feature is removed, the habitat is no longer functional and adverse effects to a different essential feature does not constitute additional adverse effects to the critical habitat. Therefore, we subtract the overlap area (160 ft^2) from the total footprint of the placed boulders (800 ft^2) to calculate a net total of 640 ft^2 of stable, unconsolidated sediments essential feature displaced by the new coral rock boulders.

The proposed project also includes the installation of 20 new 12-in diameter wood piles, 11 new 12-in square concrete king piles, and 11 new 12 in concrete batter piles. These piles will cover or displace the essential feature. All 22 of the 12 in square concrete batter/king piles would be 100% subsumed under the new seawall cap; and, 4 of the new 12 in wood piles would be 100% subsumed under the new dock and/or coral rock boulders. 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, to avoid double counting impacts. This is because, as discussed above, the adequate water transparency essential feature of Johnson's seagrass critical habitat also is affected in this same area, and all four essential features must be present for the critical habitat to be functional. Once a single feature is removed, the habitat is no longer functional and adverse effects to a different essential feature does not constitute additional adverse effects to the critical habitat.

For twelve of the new 12-in wood piles, as per the drawings, it appears that these piles would be 50% subsumed under the new dock. We believe these piles will adversely affect 4.74 ft² of Johnson's seagrass critical habitat by displacing the stable, unconsolidated sediments essential feature.⁶ Last, the remaining four new 12 in wood piles will not be subsumed by the proposed replacement dock. We believe these piles will affect 3.16 ft² of the stable, unconsolidated sediments essential feature.⁷ In total, the installation of piles for the dock and boatlift will affect 7.9 ft² of the stable, unconsolidated sediments essential feature.

In total, we believe the placement of new coral rock boulders and the installation of new piles will adversely affect 647.9 ft² (640 ft² [coral rock boulders] + 7.9 ft² [piles]) of Johnson's seagrass critical habitat through removal of the stable, unconsolidated sediments essential feature.

Combined Adverse Effects

Combining the adverse effects to Johnson's seagrass critical habitat from the effects to the stable, unconsolidated sediments essential feature (647.9 ft²) and the adequate water transparency essential feature (977.38 ft²), we believe the project will adversely affect 1,625.28 ft² of Johnson's seagrass critical habitat.

6 CUMULATIVE EFFECTS

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 actions 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 critical habitat. Because these activities are subject to USACE permitting and thus, the ESA

⁶ A round 12-in diameter pile occupies 0.79 ft² x 12 piles/2 = 4.74 ft².

⁷ A round 12-in diameter pile occupies 0.79 ft² x 4 piles = 3.16

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.^{8,9,10} 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

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. We intend the phrase "significantly delay" in development of essential features to encompass a delay that interrupts the likely natural trajectory of the

⁸ 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)

⁹ 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

¹⁰ 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

development of physical and biological features in the designated critical habitat to support the species' recovery.

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 1,625.28 ft² (0.037 ac)¹¹ 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 1,625.28 ft² (0.037 ac) of designated critical habitat for Johnson's seagrass would equate to a loss of 0.00017% of Johnson's seagrass critical habitat $[(0.037 \text{ ac} \times 100) \div 22,574 \text{ ac}]$. 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 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.

¹¹ Conversion: $1,625.28 \text{ ft}^2 \div 43,560 \text{ ft}^2 \text{ per } 1 \text{ acre} = 0.037 \text{ acre}$.

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 three 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

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 1,625.28 ft² (0.037 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

NMFS does not anticipate that the proposed action will incidentally take any species and no take is authorized. Nonetheless, as soon as the Action Agency becomes aware of any take of an ESA-listed species under NMFS's purview that occurs during the proposed action, the Action Agency shall report it to NMFS SERO PRD via this online form: <https://forms.gle/85fP2da4Ds9jEL829>. This form shall be completed for each individual known reported capture, entanglement, stranding, or other take incident. Information provided via this form shall include the title,, Mendelson Allison Rd Dock Seawall Boatlifts, issuance date, NMFS ECO tracking number, SERO-2021-01332, for this Opinion; the species name; the date and time of the incident; the general location and activity resulting in capture; condition of the species (i.e., alive, dead, sent to rehabilitation); size of the individual, behavior, identifying features (i.e., presence of tags, scars, or distinguishing marks), and any photos that may have been taken. . At that time, consultation must be reinitiated.

10 CONSERVATION RECOMMENDATIONS

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

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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