

**Brunswick Harbor Navigation Project Modifications  
and Harbor Dredging Operations and Maintenance  
Glynn County, Georgia**

**Final Integrated Feasibility Report and Environmental  
Assessment**

**Appendix J1: Coastal Zone Management Act Response**

**U.S. ARMY CORPS OF ENGINEERS  
SAVANNAH DISTRICT  
100 WEST OGLETHORPE AVENUE  
SAVANNAH, GEORGIA 31401**



**November 2021**



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT  
100 W. OGLETHORPE AVENUE  
SAVANNAH, GEORGIA 31401-3604

May 20, 2021

SUBJECT: CZMA Consistency Determination Conditional Concurrence for the Brunswick Harbor Modifications Study

Mr. Doug Haymans, Director  
Georgia Department of Natural Resources  
Coastal Resources Division  
One Conservation Way  
Brunswick, GA 31520

Dear Mr. Haymans:

This responds to your April 23, 2021 letter providing the Georgia Department of Natural Resources (GADNR), Coastal Resources Division's (CRD's) conditional concurrence to the U.S. Army corps of Engineers, Savannah District (Corps) Coastal Zone Management Act (CZMA) consistency determination for the Brunswick Harbor Modification Study (BHMS). CRD's issuance of a final letter supersedes its three email messages requesting additional documents (that is, the message on March 23<sup>rd</sup> and two messages on March 30<sup>th</sup>). Consequently, this letter focuses on CRD's final letter regarding the study to evaluate modifications to the footprint of the Federal channel and maintenance of any modification. This letter does not address the separate, upcoming routine maintenance dredging that is scheduled for the Brunswick Harbor (1998 Brunswick Harbor deepening) and Savannah Harbor (SHEP entrance channel) navigation projects.

As addressed in more detail below, this letter notifies CRD that its conditional concurrence letter does not include an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the Georgia Coastal Management Program and an identification of the specific enforceable policies, which is required in 15 C.F.R. § 930.4(a)(1). This letter also provides the notification in accordance with § 930.4(a)(2) that conditions are not acceptable. In addition, this letter provides the Corps' conclusion that the proposed action is fully consistent with the enforceable policies of the management program (§ 930.43(d)(2)) or, alternatively, that the proposed action is consistent to the maximum extent practicable with the enforceable policies of the management program (§ 930.43(d)(1)). Finally, this letter notifies CRD, as required in 15 C.F.R. § 930.43(e), of the Corps' decision to proceed with the BHMS after May 12, 2021, which is the end of the 90-day period that is specified in § 930.43(d). Prior to the end of this 90-day period, the Corps and CRD engaged in a good faith effort to resolve differences using an informal process that

included representatives of the National Oceanic and Atmospheric Administration, Office of Coastal Management.

Regarding an explanation of the conditions and request for CRD to identify the specific enforceable policies, the Corps notes that during prior calls with CRD, the Corps asked for information linking the conditions in CRD's draft conditional concurrence letter, dated November 3, 2020, with specific enforceable policies. As defined in 15 C.F.R. § 930.11(h),

'The term *enforceable policy* means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone,' 16 USC 1453(6a), and which are incorporated in a management program as approved by OCRM either as part of program approval or as a program change under 15 CFR part 923, subpart H. An enforceable policy shall contain standards of sufficient specificity to guide public and private uses. Enforceable policies need not establish detailed criteria such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency. State agencies may identify management measures which are based on enforceable policies, and, if implemented, would allow the activity to be conducted consistent with the enforceable policies of the program. A State agency, however, must base its objection on enforceable policies.

CRD generally identified the entirety of three Georgia statutes as the applicable enforceable policies (that is, the Georgia Coastal Marshlands Protection Act (CMPA), Georgia Endangered Wildlife Act (GEWA) of 1973; and Georgia Fish and Game Code). However, CRD did not provide the requested information specified in 15 C.F.R. § 930.4(a)(1) and did not identify the specific enforceable policies containing a requirement for dredging windows, speed restrictions, and other conditions.

The five conditions that are acceptable in part, as modified and/or clarified, or that can otherwise be substantively complied with, are addressed below.

1. Pre- and post-construction surveys of vegetation surrounding Weir #3 outfall at Andrews Island and appropriately addressing impacts:

The Corps believes this erosion is due to wakes from all vessels transiting the area as well as naturally occurring wind-blown waves, not due to Corps activities. However,

as a part of the BHMS, the Corps has agreed to do pre- and post-construction monitoring at this location to determine if impacts are also occurring due to effluent at this location. Should the assessment identify a problem caused by the Corps' activities, we will work closely with the CRD to address those impacts. The Corps cannot accept the additional detail in the condition requiring language be included in the dredging contract. It is inappropriate and outside of CRD's authority to dictate contract requirements. At this time, the Corps anticipates that it will accomplish surveys for pre- and post-construction monitoring using internal resources. If this changes, the Corps will decide which contract and the terms of the contract to accomplish the work.

2. Notifying the Georgia Coastal Management Program (GCMP) of any modifications to the BHMS:

As with any proposed action for which the Corps seeks CZMA consistency concurrence, the Corps will inform GCMP of any substantive (significant) changes to the project description in the BHMS.

6. Having National Marine Fisheries Service (NMFS) approved observers onboard a hopper dredge during operations, and the Corps must notify GADNR, Wildlife Resources Division (WRD) if conditions limit the ability to safely monitor dredging operations:

As the Corps has consistently done in the past and as required under the 2020 SARBO (e.g., in Section 10.4 and Appendix H), the Corps will have a "protected species observer (PSO)" onboard hopper dredges and relocation trawling vessels to monitor for the presence of Endangered Species Act (ESA) listed species. The PSO will meet the qualifications provided by NMFS and will be responsible for handling, tagging, collecting genetic samples, and recording the details of the capture in accordance with the SARBO. The Corps does not accept a process requirement to notify GADNR/WRD about routine dredging operations and provide an assessment of dredging conditions. The Corps disagrees with any condition that allows GADNR to administer a Corps dredge contract or dictate the operations of dredges. However, the Corps can state that dredging would not occur if conditions do not allow for safe operations.

7. Reporting takes to GADNR within 24 hours and transporting the turtle to staff when requested for necropsy:

Notification to GADNR/WRD is not required, and the Corps will not accept a condition requiring the Corps to notify GADNR/WRD of a take. However, the Corps has and will voluntarily continue to notify GADNR regarding takes to the fullest extent practicable in the interest of our long-standing partnership with GADNR. The legal basis

for GADNR/WRD to require the Corps to give WRD carcasses for necropsies is unclear, and the Corps will not accept a condition requiring such action. However, the Corps has always given WRD staff the carcasses when requested and, when practicable, intends to continue to do so.

9. Providing contact information for the Corps access coordinators prior to each dredging event:

This condition is not accepted to the extent the Savannah District is being required to send contact information prior to each dredging event. CZMA concurrence was not requested on an event-by-event basis, and the points of contact are the same for all dredging events. Furthermore, there is no authority for GADNR to require the Corps to allow GADNR personnel to be onboard a hopper dredge at any time. However, the Corps is willing to provide now the single point of contact for all construction and maintenance dredging, which is my Chief of Planning, Ms. Kimberly Garvey. Any requests for WRD staff to be allowed onboard a hopper dredge should be submitted to Ms. Garvey. The request will be considered on a case-by-case basis and may be accommodated in limited circumstances. The decision, however, will be at the discretion of the Savannah District Commander and will not be based on GADNR seeking to require it.

Regarding the other seven (7) conditions, the Corps' role and authority in any project is to manage, oversee, and direct how maintenance dredging operations are conducted in a manner consistent with the 2020 SARBO. The Corps has determined that seven (7) of the proposed conditions are unacceptable in their entirety. The Corps does not agree, nor is there a requirement, that GADNR personnel must be onboard each hopper dredge during dredging. This has never occurred in the past, and it is not appropriate for GADNR to require or be given a position of oversight of the Corps' contractors, Corps employees, and/or qualified observers. Furthermore, the Corps disagrees that GADNR can essentially overrule or dictate all or part of each risk assessment that must be conducted by the Corps, such as by CRD requiring the specific measures that must be used in dredging operations. Finally, there is no legal basis for GADNR to require these seven conditions and, as unmodified, the other five conditions. For these reasons, the Corps disagrees with conditions 3, 4, 5, 8, 10, 11, and 12 being imposed by GADNR. The Corps will comply with the 2020 SARBO and applicable legal requirements, which necessarily satisfies some of the conditions that are being rejected (e.g., having automatic identification system transmitters on vessels, as required by the U.S. Coast Guard via Federal regulations).

Given the Corps' explanation that conditions are not acceptable and, as explained below and pursuant to 15 C.F.R. § 930.4(b), the Corps shall treat CRD's conditional

concurrence as an objection. Resolution could not be reached by the end of the 90-day notice period (May 12, 2021) and, consequently, this letter notifies CRD of the Corps' conclusion that the proposed action is fully consistent with the enforceable policies of the coastal management program or, alternatively, is consistent to the maximum extent practicable.

The regulations at 15 C.F.R. § 930.4(b) require parties to treat the State agency's conditional concurrence as an objection if the requirements of sections 930.4(a)(1) through (3) are not met. Therefore, the Corps will not modify the BHMS to include the conditions, per the above discussion.

In accordance with 15 C.F.R. § 930.43(d), the Corps notifies CRD that it will proceed with completing the BHMS over CRD's objection because the Corps concludes that the proposed action is fully consistent with the enforceable policies of the management program. This conclusion is based on the fact that CRD does not have a promulgated requirement in any of the cited three laws (that is, the CMPA, GEWA; and Georgia Fish and Game Code) that mandates any of the measures in the specified conditions, such as requiring that dredging occur between 15 December through 31 March or vessels to comply with a speed restriction. The Georgia Fish and Game Code and the GEWA require the board to issue such rules and regulations that it deems necessary for the protection of protected species and enforcement of those laws. The Corps cannot locate, nor has CRD provided, a promulgated dredging window or speed restriction. Nor has CRD provided a justification for why such management measures are necessary to allow the activity to be conducted consistent with specifically identified enforceable policies of the program.

Instead, CRD's conditional concurrence stems from its fundamental disagreement with the use of hopper dredges outside of the dredging window that was implemented for past dredging under a previous programmatic Biological Opinion issued by the NMFS that is no longer in effect. CRD is attempting to use its consistency determination and is citing generally to its laws as providing the basis to act on its disagreement with the science and analysis that supported the NMFS's issuance of the 2020 SARBO; its disagreement with the NMFS's determination that risk to Federally-listed species must be addressed regionally; and its disagreement with potential effects even if the Corps conducts activities in compliance with the take limits that are specified in the 2020 SARBO.

In essence, CRD is citing to its enforceable policies to extrapolate requirements that it wishes to impose to overrule the requirements of the 2020 SARBO, but these requirements are not actually in Georgia's enforceable policies and are not directly based on specific, identified enforceable policies. Because dredging windows and

speed restrictions are not in Georgia's enforceable policies and are the two requirements at the heart of the unacceptable conditions, the Corps concludes that its plan to proceed with the BHMS and comply with the requirements in the 2020 SARBO is fully consistent with Georgia's enforceable policies.

The Corps does not only object to the specified conditions because they do not reflect enforceable policies. The Corps also objects to them because they conflict with Federal legal requirements and, therefore, the Corps' proposed action described in the BHMS is consistent to the maximum extent practicable. The basis for this conclusion is twofold. First, CRD's conditions conflict with the ESA by imposing requirements that conflict with the ability of the Federal government to implement the ESA for the protection of all relevant listed species. Second, CRD's conditions directly conflict with the Corps' ability to comply with the ESA and implement the 2020 SARBO – as legally required – to address risk across the southeast to listed species.

The Corps stated during calls and emphasizes again that the 2020 SARBO requires the Corps to conduct maintenance dredging in a manner that protects all of the identified listed species across the region and is within the specified take limits, not just sea turtles in Georgia. While there are take limits for turtles and sturgeon, no take is allowed for the north Atlantic right whale. The 1997 SARBO did not include specific requirements for the protection of the north Atlantic right whale; the 2020 SARBO does. The 2020 SARBO reflects the judgment of the Federal government that protection of these species is best accomplished on a regional basis, rather than a state-by-state basis.

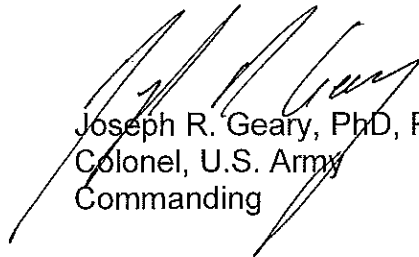
Consequently, the application of Georgia's conditions, whether they reflect enforceable policies or not, interfere with the Corps' ability to minimize risk and prevent harm to listed species regionally and are thus inconsistent with the legal requirements of the ESA. More specifically, the conditions substitute the State's analysis for that of the Federal government and elevate the State's priorities over the broader regional priorities addressed in the 2020 SARBO. Additionally, the State's conditions apply to every dredging event regardless of risk and regardless of the requirements of the 2020 SARBO. In these ways, the State's conditions restrict the ability of the Federal government to identify the suite of measures that should be implemented during each dredging event to avoid harm and minimize risk to all species covered by the 2020 SARBO across the region. Consequently, these conditions conflict with the ESA. This includes conditions 3 (requiring dredging windows), condition 4 (requiring specific screening), condition 10 (dictating bed leveling equipment); and condition 11 (requiring certain vessels to follow the Federal speed rule even when the Federal rule does not).

Because these conditions present a conflict under Section 6(f) of the ESA, they are preempted, and the Corps is consistent with Georgia's coastal zone management plan to the maximum extent practicable without accepting these conditions. In addition, as detailed above, the State does not have legal authority to require most of the conditions, such as dictating contract specifications, notification, State personnel to be onboard dredging vessels, and the maritime equipment that must be installed on vessels.

For comments and conditions in CRD's letter that are relevant to the content and sufficiency of the Corps' Environmental Assessment, the Corps will consider those comments in its work on the BHMS. The Corps will continue to share information as appropriate and work closely with the State for all dredging activities.

Questions regarding this letter can be directed to Ms. Garvey at 912.667.5968 or [Kimberly.l.garvey@usace.army.mil](mailto:Kimberly.l.garvey@usace.army.mil).

Sincerely,



Joseph R. Geary, PhD, PE  
Colonel, U.S. Army  
Commanding