

Before the U.S. Department of Defense
Department of the Army, U.S. Army Corps of Engineers
("USACE")

WASHINGTON, D.C.

In Re Draft)
Estuary Habitat Restoration)
Strategy, Prepared by the)
Estuary Habitat Restoration)
Council)

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To the Secretary of the Army
c/o Estuary Habitat Restoration Strategy
U.S. Army Corps of Engineers
Institute for Water Resources
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Comments of Public Employees for Environmental Responsibility
("PEER")

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An interagency Council has been formed and a draft restoration strategy for estuary restoration has been developed pursuant to the Estuary Restoration Act of 2000, Title I of Public Law 106-457. PEER has reviewed the *Request for Comments on the Draft Estuary Habitat Restoration Strategy Prepared by the Estuary Habitat Restoration Council* (published at 67 FR 22415), and respectfully submits the following comments:

I. Introduction

Estuaries and the coastal wetlands that feed them serve numerous important functions, providing benefits for humans and wildlife. Estuaries function as habitat for seventy-five percent (75%) of commercial fish catch and eighty percent (80%) of recreational catch.¹ Coastal wetlands support estuary health and provide habitat for endangered and threatened birds. In the Florida Everglades, habitat loss has contributed to a ninety percent (90%) decline in wading bird species.² Healthy estuaries contribute to healthy coral reefs, and serve recreational purposes such as swimming, boating and recreational fishing.

The primary causes of estuary degradation are pollution and alteration of natural water flow. Pollution in the form nutrient enrichment is causes algae growth, which depletes available oxygen and thus causes fish kills. Dredging and filling of wetlands for navigation and development purposes has also contributed significantly to estuary degradation. Wetlands absorb nutrients from water as it travels to estuaries. Destruction of wetlands removes the natural filtration process that protects estuaries. The Army Corps of Engineers (Army Corps) has contributed significantly to the degradation of estuaries through destruction of wetlands. In order to restore estuary function, wetlands that historically fed degraded estuaries must be restored and the sources of pollution must be curtailed. Restoration of wetlands may require significant modification of canals and dams, and in some cases, removal of top-soil.

¹ U.S. Environmental Protection Agency newsroom at http://www.epa.gov/epahome/enviroiq_0921.htm (last visited June 2002).

² Timothy D. Searchinger, *Wetlands Issues 1993: Challenges and a New Approach*, 4 MD. J. CONTEMP. LEGAL ISSUES 13, 16 (1993).

As of 1996, forty percent (40%) of the estuaries in the U.S. were in a degraded state.³ This is due in part to the fact that nearly half of all coastal wetlands have been lost since pre-Columbian times.⁴ Obstacles to maintaining and restoring estuary function include limited financial resources, failure to enforce protections that are in place, and fragmentation of preservation and restoration efforts. In 1988, the EPA and Army Corps established a “not net loss of wetlands” standard. This standard has curtailed large-scale loss of wetlands, but incremental and piecemeal losses continue through loopholes.⁵ Estuaries are sensitive to the cumulative effects of pollution and destruction of wetlands occurring within the entire watershed that feeds them. A watershed is the area of land that drains into an estuary. In order to succeed, restoration efforts should consider the entire watershed of an estuary, and efforts within a watershed should be prioritized and coordinated.

II. Comments

A. Coordination of restoration activities.

1. Coordination and prioritization of restoration efforts will require federal oversight and well developed consistent definitions and standards.

The primary function of the estuary restoration strategy should be coordination and prioritization of existing efforts. Restoration efforts are currently fragmented according to political and geographical boundaries. Coordination of restoration efforts within each watershed must begin with coordination of federal restoration efforts, currently fragmented among several agencies. Most federal projects involving wetlands and estuaries are driven by water resource

³ See Jamie E. Lavergne, *Show Us the Money: Managing Our Nations Estuaries*, 37 HOUS. L. REV. 219, 224-5 (2000) citing Coastal Pollution Reduction and Estuary Conservation: Hearing on S. 1222, S. 1321, & H.R. 2207 Before the Comm. on Env't and Pub. Works, 195th Cong. 78, 79 (1998).

⁴ Timothy Beatley, David J. Brower, and Anna K. Schwab, *An Introduction to Coastal Management* 45 (1994).

⁵ Id.

use rather than water resource protection and restoration.⁶ Competition and conflict between management agencies inhibits coordination, which will require cooperation and a “shared understanding of shared system.”⁷ This will require development of consistent definitions and standards and prioritization of estuary problems and restoration activities. Definitions and standards should be consistent with existing federal legislation, such as the National Estuary Program and the Coastal Zone Management Act. Once consistent definitions and standards have been developed, local and state restoration efforts within watersheds can be coordinated, prioritized and supported, with sufficient federal funding and oversight.

2. The definition of estuary habitat must be clarified.

The strategy goal is restoration of one million acres of “estuary habitat,” which is defined as “the estuary and its associated ecosystems.” Examples listed include marine ecosystems and coastal wetlands. Coastal wetlands will tend to be continuous with wetlands that occur further inland. The definition of “estuary habitat” should specify an inland boundary for coastal wetlands to ensure that the restoration goal does not become a general wetlands restoration goal. Restoration of wetlands within the watershed but further inland from coastal wetlands could significantly contribute to estuary restoration, but restoration of such wetlands should not be included in the tally of restored “estuary habitat.” The broad definition of “estuary habitat” must be combined with careful prioritization of projects to ensure significant estuary restoration. A broad definition, however, supports ecosystem restoration, which is scientifically sound and easily coordinated by a watershed management approach.

⁶ Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973, 993 (1995).

⁷ *Id.* at 994 (see n. 160, agencies may purposely foster an “insular approach to resource management” in order to minimize the influence of other agencies).

3. Performance standards for success must be further developed.

The proposed strategy calls for restoration of one million acres of estuary habitat through activities that improve degraded estuary habitat or create estuary habitat. The restored area will be considered to be the “area over which appropriate monitoring can document restored function.” This standard for determining restored area is entirely too ambiguous. It currently takes several years to scientifically determine whether a system is functioning. Without guidance, there will likely be significant variation in the methods used to monitor restored function. The Coastal Zone Management Act failed to provide clear, substantive standards for state performance. As a result, some states adopted an aggressive approach to wetlands management, while others took little action.⁸ The proposed strategy for estuary restoration should include guidelines for determining what monitoring is appropriate, and should also provide, for different types of estuary habitat, a clear definition of “restored function,” that is consistent with good science. If performance standards are lax, the restoration goal will be easily reached without actual significant restoration results. In addition, in order to maintain restored function, causes of degradation must be curtailed. In addition to documentation of restored function, a plan for maintaining function should be required.

4. Inclusion of the Great Lakes will hinder development of consistent definitions and standards.

Inclusion of the Great Lakes in the estuary restoration strategy could hinder development of consistent definitions and standards. The basic definition of estuary used in the proposed strategy is “a part of a river or stream or other body of water that has an unimpaired connection with the open sea and where the sea water is measurably diluted with freshwater from land drainage.” Wetlands of the Great Lakes are included in the definition of estuary for the purpose of the strategy though they are entirely freshwater systems. The Great Lakes will require

⁸ Timothy Beatley, David J. Brower, and Anna K. Schwab, *An Introduction to Coastal Management* 126-7 (1994).

monitoring and performance standards that differ from those that apply to brackish estuary habitats connected to the open sea. The development of a national strategy for estuary restoration would be facilitated by exclusion of the Great Lakes from the strategy. A separate strategy should be developed for this separate type of ecosystem.

5. Further incorporation of watershed approach into restoration strategy.

The watershed approach to water management conforms to the nature of the aquatic ecosystem, which is sensitive to the cumulative effects of pollution and wetlands destruction occurring within the entire watershed. The proposed estuary restoration strategy pays lip service to a watershed approach, but fails to incorporate it into the restoration strategy. For example, the use of the watershed approach is one of the elements to consider in determining whether a restoration program should be funded. Also, priority will be given to projects if a program to address pollution in the watershed is implemented. These suggestions could encourage local and state initiated considerations of the entire watershed, but they do not ensure that the watershed will be the primary consideration in federal coordination, oversight and prioritization of restoration projects.

B. The Role of the Army Corps should be limited.

Restoration of estuaries may require significant alteration to dams and drainage channels, many of which were originally developed by the Army Corps. In restoration of estuaries and associated coastal wetlands, the Army Corps can provide expertise in alteration of such barriers to natural water flow. However, the role that Army Corps has historically played in development, and the role that it continues to play, may hinder its ability to lead restoration and preservation efforts. In 1993, the Army Corps was appropriated \$1.36 billion for new construction.⁹ Army Corps projects usually involve intensive analysis of watersheds, but for the purpose of manipulation for flood control or water supply.¹⁰ Army Corps involvement in restoration is essential, as the Corps can provide needed expertise. In addition, the Army Corps can play a role in maintaining estuary function by taking a preservationist approach to future development, but there may be an internal conflict of interests resulting from its role in development. For this reason, the Army Corps should not have primary authority in the selection of projects to be funded, and should instead play only an advisory role.

C. Expansion of National Wildlife Refuge Service Involvement.

The National Wildlife Refuge Service (NWRS) ? a division of the U.S. Fish and Wildlife Service (FWS) ? is responsible for managing a significant amount of coastal wetlands, estuaries, and coral reefs.¹¹ The FWS also has experience in distributing funding to states for coastal wetlands restoration and developing partnerships with other federal agencies. In addition, the FWS has expertise in restoration techniques. The role of the NWRS division of the FWS service in these proceedings should be expanded.

⁹ Timothy D. Searchinger, *Wetlands Issues 1993: Challenges and a New Approach*, 4 MD. J. CONTEMP. LEGAL ISSUES 13, 68 (1993).

¹⁰ Id.

¹¹ See Testimony of Gary Frazer, Assistant Director for Biological Services, U.S. Fish and Wildlife Service, Department of the Interior before the House Resources Subcommittee on Fisheries Conservation, Wildlife and

III. Conclusion

Coordination of currently fragmented restoration efforts and restoration of one million acres of estuaries by 2010 could be a significant achievement, if the standard for performance represents actual restoration, and if causes of degradation are curtailed so the restored function is maintained. Coordination of restoration efforts must begin with cooperation between federal agencies. This will require consistent definitions and standards of performance. Coordination of local and state efforts within a watershed will require federal oversight and guidance, especially in terms of performance standards. The Great Lakes should be excluded from the estuary restoration strategy, as they are a separate types of ecosystem requiring development of separate definitions and standards. The watershed approach to management should be further incorporated into the restoration strategy. Involvement of the Army Corps is essential, but involvement should be limited, while the role of the NWRS should be expanded.

Very respectfully,

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Oceans Regarding H.R. 1775, The Estuary Habitat Restoration Partnership Act of 1999 (September 23, 1999) at <http://www.nctc.fws.gov/history/testimonies/1999/sept23.htm> (last visited June 2002).