

NORTH CAROLINA MARINE FISHERIES COMMISSION
POLICIES FOR THE PROTECTION AND RESTORATION OF
MARINE AND ESTUARINE RESOURCES AND
ENVIRONMENTAL PERMIT REVIEW AND COMMENTING

(adopted April 13, 1999)

(modified to incorporate MFC approved Compensatory Mitigation component September 4, 2009)

Issue

This document establishes the policies of the NC Marine Fisheries Commission (Commission) regarding overall protection and restoration of the state's marine and estuarine resources, and for environmental permit review for proposed projects with the potential to adversely impact those resources.

Background

The "marine and estuarine resources" of North Carolina are defined broadly as "[a]ll fish, except inland game fish, found in the Atlantic Ocean and in coastal fishing waters; all fisheries based upon such fish; all uncultivated or undomesticated plant and animal life, other than wildlife resources, inhabiting or dependent upon coastal fishing waters; and the entire ecology supporting such fish, fisheries, and plant and animal life." N.C.G.S. 113-129(11). The Commission is charged with the duty to "(m)anage, restore, develop, cultivate, conserve, protect, and regulate the marine and estuarine resources within its jurisdiction." N.C.G.S. 143B-289.51(b)(1).

Two powers of the Commission constitute its primary authorities to effectuate that charge, and thereby to protect and restore North Carolina marine and estuarine resources. First, the Commission is specifically empowered "[t]o comment on and otherwise participate in the determination of permit applications received by state agencies that may have an effect on the marine and estuarine resources of the state." N.C.G.S. 143b-289.52(2)(9). Second, the Commission has to power and duty to participate in the development, approval and implementation of Coastal Habitat Protection Plans (~~CHPPs~~ ~~Habitat Plans~~) for all "critical fisheries habitats." N.C.G.S. 143B-279.8; 143B-289.52(a)(11). The goal of such ~~CHPPs~~ ~~Habitat Plans~~ is "the net long-term enhancement of coastal fisheries associated with each coastal habitat identified." N.C.G.S. 142B-279.8. The Commission by unanimous vote has delegated its permit commenting authority to its Habitat and Water Quality Standing Advisory Committee (Committee) for the sake of efficiency and effectiveness. Likewise, the Commission has designated the Committee as its participating body in the development of ~~CHPPs~~ ~~Habitat Plans~~, which will then be approved and implemented by the full Commission. However, since the formal preparation of ~~CHPPs~~ ~~Habitat Plans~~ will not begin until at least 1 July 1999, it will be some time before final ~~CHPPs~~ ~~Habitat Plans~~ can be developed and implemented in order to help protect against the impacts of coastal development and other human activities that adversely affect North Carolina's marine and estuarine resources. Consequently, the Commission's environmental permit review authority currently constitutes the primary vehicle by which the Commission can effectuate its duty to protect and enhance the state's marine and estuarine resources.

Discussion

There are two equally serious challenges to the Commission's successfully maintaining and enhancing North Carolina's marine and estuarine resources: (1) the lack of necessary information on the current nature and status of many of those resources; and (2) the lack of obvious mechanisms to account for and ameliorate the ever accumulating changes that impair the functioning of critical fisheries habitats and

otherwise adversely affect fisheries stocks. The Commission cannot hope to comply with its statutory duties to protect and enhance marine and estuarine resources without the abilities to identify and monitor changes in those resources, to compensate for losses to critical fisheries habitats, and to enhance the overall functioning of the altered coastal ecosystem.

Cumulative adverse resource impacts from both large and small scale human activities constitute the principal impediment to the Commission's ability to achieve its statutory mandate of conserving, protecting and restoring North Carolina's marine and estuarine resources. Many of the activities that contribute to coastal resource destruction or impairment require no environmental permits. As a consequence, their impacts are not accounted for, to the long-term detriment of marine and estuarine resources. Even for permitted activities, the adverse impacts on marine and estuarine resources may be individually minor, causing them to fall below the thresholds that require compensatory mitigation under existing state policy.

However, where specific projects requiring environmental permits pose a threat to resources under the Commission's jurisdiction, it is reasonable to expect the permittee to contribute to resolving both the informational and resource protection dilemmas faced by the Commission to ensure that unacceptable impacts to marine and estuarine resources do not occur. A direct precedent to such action by a state agency is found in the N.C. Division of Water Quality's current requirement that NPDES permittees conduct upstream and downstream monitoring as a condition of their permits, to ensure that state water quality standards are not violated. In addition, that agency has worked with dischargers in certain river basins to establish industry - funded, integrated monitoring networks to track water quality trends in those waters.

Specific action by the Commission is required if it is to meet its charge of protecting and restoring the state's marine and estuarine resources. To the greatest extent possible, activities that potentially threaten those resources must be prevented from contributing to overall resource degradation. Instead, adequate measures must be implemented to ensure a long-term, net improvement in the quantity and quality of fisheries stocks and critical fisheries habitats under the Commission's jurisdiction. To achieve that end, two goals must be attained:

- adequate compensatory and resource enhancement measures must be incorporated into existing environmental permitting processes
- resource restoration and enhancement programs must be developed to offset losses from activities not requiring permits

No net loss policies for permitted activities, while having many benefits, have at times limited the ability of state agencies to implement compensatory mitigation in a manner that effectively offsets losses to the impacted watershed. By requiring in-kind mitigation, primarily for wetland impacts, mitigation, in some instances, targets wetlands in a different landscape position or watershed, which serves different ecological functions, and consequently does not replace the ecological services lost by the permitted activity in the affected watershed. In addition, mitigation is not required for permitted aquatic resource impacts associated with private water dependent activities, such as loss of submerged aquatic vegetation habitat from channel dredging or degradation of a primary nursery area from shoreline hardening.

The Marine Fisheries Commission authorized DMF staff to begin to incorporate mitigation policy into bylaws at their Business Meeting in Atlantic Beach, NC, on December 2-3, 2004. MFC endorsed the concept of holding workshops to address technical and policy issues related compensatory mitigation. These workshops have now been completed, and provided guidance for a study conducted by East Carolina University, Environmental Defense Fund, and NC Ecosystem Enhancement Program. From this work utilizing two expert panels – one on wetland science and the other on wetland policy, two

documents have been completed to provide guidance on alternatives to traditional mitigation. The first report, A Science-based Framework for Compensatory Mitigation of Coastal Habitat in North Carolina (ECU 2006) presented a scientific framework for an alternative approach to compensatory mitigation to better assure functional replacement. The framework involves evaluating watershed condition, encouraging the use of varied complementary techniques for functional recovery, and designing restoration projects in response to system-wide watershed scale challenges. The goal was to integrate compensatory mitigation requirements into watershed protection strategies that are consistent with the goals and objectives of the CHPP. In the second phase of the project, in a report entitled, An Approach to Coordinate Compensatory Mitigation Requirements to Meet Goals of the Coastal Habitat Protection Plan (ECU and Environmental Defense, 2006), the group developed an alternative assessment procedure for North Carolina's watersheds. The results of the study were presented during a day-long meeting (October 15, 2008) to a group represented by state and federal regulatory agencies and academic researchers, most of who were involved in the original workshops. The next phase of the project involves demonstrating application of the approach in two subwatersheds of the White Oak River basin.

A summary of the first two phases of this project were presented to the MFC on November 6, 2008. The MFC endorsed developing a compensatory mitigation process as part of the policy statement. On January 16, 2009 the Habitat and Water Quality Committee unanimously voted to recommend the following policy for consideration by the MFC. This compensatory mitigation policy would be implemented as a final component of the existing Resource Protection and Environmental Permit Review and Commenting Policies.

The first two policies below were established in 1999 primarily to achieve the first goal of incorporating adequate compensatory and resource enhancement measures into existing environmental permitting processes. The third policy was established in 2009 to provide more direction in how to accomplish that, given our evolving understanding of ecosystem functions, threats, and techniques for successful mitigation and restoration. Progress on the second goal (developing restoration/enhancement programs to offset losses not directly associated with permitted activities) has primarily occurred in North Carolina through enhancement of DMF's oyster sanctuary program, Clean Water Management Trust Fund projects, and numerous wetland and oyster restoration projects conducted by non-profit environmental organizations.

Proposed Resource Protection and Environmental Permit Review and Commenting Policies

It shall be the policy of the North Carolina Marine Fisheries Commission that the overall goal of its marine and estuarine resource protection and restoration programs is the long-term enhancement of the extent, functioning and understanding of those resources.

Toward that end, in implementing the Commission's permit commenting authority pursuant to N.C.G.S. 143B-289.52(a)(9), the Habitat and Water Quality Standing Advisory Committee shall, to the fullest extent possible, ensure that state or federal permits for human activities that potentially threaten North Carolina marine and estuarine resources:

1) are conditioned on (a) the permittee's avoidance of adverse impacts to marine and estuarine resources to the maximum extent practicable; (b) the permittee's minimization of adverse impacts to those resources where avoidance is impracticable; and (c) the permittee's provision of compensatory mitigation for all reasonably foreseeable impacts to marine and estuarine resources in the form of both informational mitigation (the gathering of base-line resource data and/or prospective resource monitoring) and resource mitigation (in kind, local replacement, restoration or enhancement of impacted fish stocks or habitats);and

2) result, at a minimum, in no net loss to coastal fisheries stocks, nor functional loss to marine and estuarine habitats and ecosystems; and

3) incorporate the following array of options when planning compensatory mitigation to allow focus on restoration of equivalent ecosystem functions within a watershed, based on our evolving understanding of the needs of compensatory mitigation to protect and enhance coastal water quality and watersheds:

- i. Establish goals for coastal watersheds by the MFC based on desired outcomes - protection/restoration of shellfishing waters, PNAs, SAV beds, etc.;
- ii. Identify watersheds/areas where these goals can be realistically achieved. The Strategic Habitat Areas approach that emerged from CHPP can be used to identify locations where protection/restoration is most likely to be successful;
- iii. Utilize the Rapid Watershed Assessment Procedure (or other assessment methods) to assess watershed condition and identify problems/solutions;
- iv. Evaluate and authorize compensatory mitigation projects based on their ability to contribute to goals established for coastal watersheds. Projects that provide functional replacement, e.g., increased water retention/storage through the use of BMPs, may be approved if documentation is provided that the projects are the most effective mechanism to achieve the goals established for a watershed;
- v. Implement monitoring to support data acquisition necessary to support the SHA process and the effectiveness of projects that have been implemented;
- vi. Solicit funding from all available sources (compensatory mitigation, CWMTF, 319, etc.) to fully implement protection/restoration strategies in coastal watersheds.

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