



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

New Jersey Field Office

Ecological Services

927 North Main Street, Building D

Pleasantville, New Jersey 08232

Tel: 609/646 9310

Fax: 609/646 0352

<http://www.fws.gov/northeast/njfieldoffice>

In Reply Refer to:

2008-F-0603

Frank J. Cianfrani, Chief  
Regulatory Branch  
Philadelphia District  
U.S. Army Corps of Engineers  
100 Penn Square East  
Philadelphia, Pennsylvania 19017-3390

JUL 28 2008

Dear Mr. Cianfrani:

This letter documents formal consultation with the U.S. Army Corps of Engineers, Philadelphia District (Corps) for beach nourishment activities within the City of Ocean City (City), Cape May County, New Jersey. The Corps' issuance of a 10-year Department of the Army permit (File No. CENAP-OP-R-2008-500-35) addresses beach nourishment/maintenance activities to be conducted by the applicant, the New Jersey Department of Environmental Protection (NJDEP), within the City's beaches between Seaview Road and the Ocean City/Longport Bridge (project area). The proposed permitted activity constitutes a Tier 2 (streamlined) individual project under the U.S. Fish and Wildlife Service's (Service) December 2005 Tier 1 Programmatic Biological Opinion (PBO) on the effects of beach nourishment and maintenance activities on the federally listed (threatened) piping plover (*Charadrius melodus*) and seabeach amaranth (*Amaranthus pumilus*).

### **AUTHORITY**

This response is provided pursuant to the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) (ESA) to ensure the protection of endangered and threatened species and does not address all Service concerns for fish and wildlife resources. These comments do not preclude separate review and comment by the Service directed to the Corps via the Fish and Wildlife Coordination Act (48 Stat. 401; 16 U.S.C. 661. *et seq.*) for any permits required pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344 *et seq.*); or comments on any forthcoming environmental documents pursuant to the National Environmental Policy Act of 1969 (83 Stat. 852, as amended; 42 U.S.C. 4321 *et seq.*).

## **CONSULTATION HISTORY**

- May, 2008 By electronic mail, the NJDEP (Endangered and Nongame Species Program [ENSP] and Bureau of Coastal Engineering [BCE]) coordinated with the Service regarding the Ocean City 10-year beach nourishment/maintenance permit application by NJDEP and to determine appropriate conservation measures to be included as permit conditions.
- June 6, 2008 The Service sent the Corps a letter with recommended conservation measures to protect piping plover and seabeach amaranth to be included as permit conditions in the subject permit.
- June 2008 The Service and the Corps continued to coordinate via electronic mail regarding the recommended permit conditions.

## **PROJECT DESCRIPTION**

The Ocean City beach nourishment/maintenance project area begins at the northern end of the City at Seaview Road and extends northwest to the Ocean City/Longport Bridge. Renourishment is scheduled to begin during the summer of 2008.

Approximately 50,000 cubic yards of sand will be placed on the beach between Seaview Road and the Ocean City/Longport Bridge, on approximately 0.37 linear miles of inlet beach. The renourishment activities will replace sand to return the beach profile to the design criteria of a berm at an elevation of 6.5 feet NAVD with a width of 75 feet. Sand will be obtained from an active Federal borrow site located approximately 5,000 feet offshore from the mouth of the Great Egg Harbor Inlet. The sand is compatible (*i.e.*, 90 % or greater clean sand fill material) with the existing beach.

## **ADHERANCE TO MEASURES TO MINIMIZE IMPACTS TO FEDERALLY LISTED SPECIES**

Relevant conservation measures proposed by the Corps for protection of federally listed species and reasonable and prudent measures imposed by the Service to minimize take of federally listed species are specified within the Service's 2005 Tier 1 Programmatic Biological Opinion and are applicable to all Tier 2 projects carried out under the Corps' program. All applicable measures were incorporated as appropriate permit conditions into the Tier 2 Ocean City 10-year beach nourishment/maintenance permit.

## **STATUS OF THE SPECIES**

Relevant biological and ecological information for the piping plover and seabeach amaranth was previously provided to the Corps in the Service's December 2005 Tier 1 Programmatic Biological Opinion. That information remains pertinent and was considered by the Service in formulating this Tier 2 (streamlined) Biological Opinion.

## ENVIRONMENTAL BASELINE

The environmental baseline for the Corps overall program for Federal beach nourishment, renourishment, stabilization, restoration, and permitted activities along the Atlantic Coast of New Jersey within the Philadelphia District was established and fully described within the Service's December 2005 Tier 1 Programmatic Biological Opinion.

New site-specific information regarding piping plover and seabeach amaranth occurrence within the project area since issuance of the 2005 Tier 1 Programmatic Biological Opinion has become available. Although included within the Corps Program Area and considered within the 2005 Programmatic Biological Opinion, the area between Seaview Road and the Ocean City/Longport Bridge was not initially scheduled for renourishment by the Corps because the area was accreting sand. The area was previously used as a nesting site by piping plovers. Piping plovers last nested at this site in 2005. Since that time, erosion of sandy beach areas has occurred and the site no longer provides suitable piping plover nesting habitat. The area was also previously used by the State-listed (endangered) least tern (*Sterna antillarum*) and black skimmer (*Rynchops niger*) in 2003 and 2002, respectively. Piping plovers currently nest in Ocean City from 19<sup>th</sup> Street south toward 34<sup>th</sup> Street. No seabeach amaranth plants were found within the project area during Service surveys in 2007 and none have been documented in Ocean City since 2004. All other information described within the December 2005 Tier 1 Programmatic Biological Opinion remains pertinent and was considered by the Service in formulating this Tier 2 Biological Opinion.

## EFFECTS OF THE ACTION

Following review of the information provided by the Corps and NJDEP regarding the Ocean City project, the Service has determined that the potential effects of the project are consistent with those addressed in the December 2005 Tier 1 Programmatic Biological Opinion and are hereby incorporated by reference. Beach habitats historically occupied by piping plovers or seabeach amaranth within the Ocean City project area of Seaview Road to the Ocean City/Longport Bridge have been degraded by beach erosion. No piping plovers have nested within that area since 2005.

The work between Seaview Road and the Ocean City/Longport Bridge will be conducted during the 2008 nesting season. However, the site is more than 1,000 meters from current piping plover nesting habitat and does not currently provide suitable habitat for seabeach amaranth. Therefore, no direct adverse impacts to these species are anticipated.

Past shoreline stabilization within the Ocean City project area has interfered with formation and maintenance of natural habitats for piping plover and seabeach amaranth. The project perpetuates shoreline stabilization that has essentially stopped the natural process of shoreline migration and, consequently, prevents the natural formation of optimal habitats for piping plovers and seabeach amaranth (*e.g.*, inlets and overwash areas). Further, the beach renourishment plan selected for the project area will result in creation of sub-optimal beach and dune habitats for piping plover and seabeach amaranth. Therefore, the Ocean City project area will preclude formation of natural habitats and create sub-optimal beach and dune habitats for

piping plover and seabeach amaranth along approximately 0.37 linear miles of Atlantic coastal shoreline.

## CONCLUSION

Actions and effects associated with the Ocean City beach nourishment/maintenance project are consistent with those identified and discussed within the Service's December 2005 Tier 1 Programmatic Biological Opinion. After reviewing the size and scope of the project, the environmental baseline, the status of federally listed species within the project area, and the effects of the action, it is the Service's Biological Opinion that the Ocean City project is not likely to jeopardize the continued existence of the piping plover or seabeach amaranth. No Critical Habitat has been designated for these species within the project area; therefore, no Critical Habitat will be affected.

## INCIDENTAL TAKE STATEMENT

Section 9 of the ESA and the Federal regulation pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, without special exemption. *Take* is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. *Harm* is further defined by the Service to include significant habitat modification or degradation that results in the death or injury to listed species by significantly impairing essential behavioral patterns such as breeding, feeding, or sheltering. *Harass* is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns, which include, but are not limited to, breeding, feeding, or sheltering. *Incidental take* is defined as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to, and not intended as part of, the agency action is not considered a prohibited taking under the ESA, provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement. Sections 7(b)(4) and 7(o)(2) of the ESA do not apply to the incidental take of federally listed plant species; therefore, no incidental take statement, and subsequently no reasonable and prudent measures nor terms and conditions, were provided for seabeach amaranth within the Service's December 2005 Tier 1 Programmatic Biological Opinion or are provided within this Tier 2 Biological Opinion.

No direct take of piping plovers or their nests or young are anticipated by the proposed activities. The indirect effects of the Ocean City project are anticipated to result in harm in the form of reduced habitat quality along approximately 0.37 linear miles of Atlantic coastline annually over the anticipated 10-year life of the beach nourishment/maintenance permit. The type and amount of anticipated incidental take is consistent with that described in the Service's December 2005 Tier 1 Programmatic Biological Opinion. The area of Ocean City between Seaview Road and the Ocean City/Longport Bridge had not been proposed for beach nourishment when the 2005 Programmatic Biological Opinion was issued. Therefore, this incidental take is in addition to that anticipated within the Programmatic Biological Opinion.

## REASONABLE AND PRUDENT MEASURES AND TERMS AND CONDITIONS

Reasonable and prudent measures (RPMs) are measures necessary or appropriate to minimize the amount or extent of anticipated incidental take of the species. To be exempt from the take prohibitions of Section 9 of the ESA, the Corps must implement all pertinent RPMs and associated terms and conditions, pursuant to the Service's December 2005 Tier 1 Programmatic Biological Opinion, to minimize the impact of anticipated incidental take of piping plovers. The Corps has included the relevant RPMs and terms and conditions as non-discretionary permit conditions within the subject Ocean City permit. The Service has determined that no new reasonable and prudent measures, beyond those specified in the December 2005 Tier 1 Programmatic Biological Opinion, are needed to minimize the impact of incidental take anticipated for the Ocean City project.

The Corps has a continuing duty to regulate the activity covered by this incidental take statement. If the Corps: (1) fails to demonstrate clear compliance with the RPMs and their implementing terms and conditions in this Biological Opinion; or (2) fails to require Corps staff, contractors, cooperators, and/or permittees to adhere to the terms and conditions of the incidental take statement; and/or (3) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

## REINITIATION - CLOSING STATEMENT

This concludes Tier 2 formal consultation on the effects of beach renourishment activities to be permitted by the Corps, Philadelphia District within the City of Ocean City, Cape May County, New Jersey. 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 maintained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or Critical Habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or Critical Habitat that was not considered in this opinion; or, (4) a new species is listed or Critical Habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

Please contact Stephanie Egger at (609) 383-3938, extension 47, if you have any questions regarding these comments or require further assistance regarding threatened or endangered species.

Sincerely,

  
J. Eric Davis Jr.  
Supervisor