



United States Department of the Interior



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In Reply Refer to:

2007-F-0515-R004

MAR 4 2010

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

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 Borough of Avalon (Avalon), Cape May County, New Jersey. The Corps' proposed modification of a 10-year Department of the Army permit (File No. CENAP-OP-R-2006-6389-24) addresses beach nourishment/maintenance activities on beaches between 9th and 26th Streets in Avalon (project area). The proposed permitted activity constitutes a Tier 2 individual project under the U.S. Fish and Wildlife Service's (Service) December 2005 Tier 1 Programmatic Biological Opinion (PBO) on the effects of federally implemented or permitted beach nourishment, renourishment, stabilization, and restoration and maintenance activities on the federally listed (threatened) piping plover (*Charadrius melodus*) and seabeach amaranth (*Amaranthus pumilus*) along the Atlantic Coast of New Jersey within the Corps' Philadelphia District.

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

Between November 2009 and February 2010 electronic mail correspondence was exchanged among the Service, the Corps, and the New Jersey Endangered and Nongame Species Program (ENSP) regarding the Avalon beach renourishment project. A chronology of key electronic mail correspondences is provided below.

- November 9, 2009 Via electronic mail, the Corps informed the Service of the proposed Avalon renourishment project.
- December 2009 By electronic mail, exchanges between the Service, the Corps, and the ENSP discussed federally listed species concerns for the project area. The Service informed the Corps that Avalon needed to complete the beach management planning process by signing a Memorandum of Agreement (MOA) with the Service and the New Jersey Department of Environmental Protection (NJDEP).
- January 14, 2010 By electronic mail, the Corps informed Avalon it may not be in compliance with permit requirements due to failure to sign an MOA with the Service and the NJDEP regarding its beach management plan.
- January 14, 2010 By electronic mail, the Service received a pdf of the MOA signed by Avalon and were informed that three original signed copies of the MOA were being sent in the mail to the Service.
- January 20, 2010 Via mail, the Service received three original signed copies of the MOA from Avalon. The Service signed the MOAs which were then forwarded to NJDEP for signature.
- January 21, 2010 Via electronic mail the Corps requested re-initiation of Section 7 formal consultation (Tier 2 streamlined consultation under the Tier 1 PBO) and included draft permit conditions for the Service to review.
- January 26, 2010 The Service and the Corps' discussed modifying permit conditions for the project via electronic mail.
- January 27, 2010 By electronic mail, the Corps provided a revised copy of the proposed permit conditions and indicated that all changes the Service recommended had been made.

February 17, 2010

By electronic mail, the Service concurred with the Corps that through the revised permit conditions the authorized work would not likely have direct impacts to federally listed piping plover and seabeach amaranth; however, indirect effects are likely over the life of the permit.

PROJECT DESCRIPTION

The Avalon renourishment project is scheduled to begin in the spring of 2010 and extend into the piping plover nesting season with an anticipated end date of July 1, 2010. Approximately 500,000 cubic yards of sand will be placed along Avalon's beach between 9th and 26th Streets (4,800 linear feet [0.91 linear miles] of shoreline). The current permit authorizes nourishment between 9th and 18th Streets, however; the proposed permit modification also includes 19th through 26th Streets. The renourishment activities for the Avalon project area will replace sand to return the beach profile to the design criteria of a berm at an elevation of +7.22 feet NAVD88 with a variable width of 100 to 213 feet, and a foreshore slope of 20:1 down to the mean low water level (MLWL) and a 12:1 slope below the MLWL. The project would also include restoration of eroded dunes.

The currently valid permit authorizes three separate quarries or gravel pits for land-based sources of sand. They are located in Middle Township and Lower Township in Cape May County, New Jersey. In addition, the permit also authorizes an alternative borrow site for dredging sand. The dredged sand borrow site is the previously approved Townsends Inlet Borrow Area and is located approximately 1000 feet northeast of the Avalon inlet shoreline. The proposed borrow site is an area approximately 72.3 acres in size within Townsends Inlet between Avalon and the City of Sea Isle. The sand would be dredged by hydraulic method to a maximum depth of -21.27 feet NAVD88 or 19.02 feet below mean low water. Avalon is working jointly with the City of Sea Isle, as the two municipalities are proposing similar projects using the same proposed borrow area. They propose to use the same contractor and equipment. The Corps is currently reviewing a separate application from the City of Sea Isle for a 10-year maintenance permit (CENAP-OP-R-2009-1615-24).

Existing access roads at 10th and 15th Streets will be used for construction (vehicle and equipment access). Access is also allowed at 9th and 20th Streets, subject to certain conditions in the permit.

The Avalon permit allows for 10 years of maintenance of the fill area until 2017.

ADHERENCE 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 December 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, by the Corps as permit conditions for the proposed project.

As a requirement of the previously approved federally permitted beach nourishment project, Avalon has prepared and officially implemented an Endangered Species Management Plan (Beach Management Plan), which was approved by the Service and the ENSP in April 2009.

STATUS OF THE SPECIES

Relevant biological and ecological information for the piping plover and seabeach amaranth was 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 Biological Opinion.

ENVIRONMENTAL BASELINE

The environmental baseline for the Corps' overall program for Federal beach nourishment, renourishment, stabilization, and restoration 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 and in the vicinity of the project area since issuance of the December 2005 Tier 1 Programmatic Biological Opinion has become available. Specifically, no piping plovers have nested since 2001 within the renourishment area. However, piping plovers continue to nest in Avalon approximately 0.8+ miles south of 26th Street (Avalon Dunes). Between 4 and 5 pairs of piping plovers have used the Avalon Dunes nesting area within the 5-year period from 2005 to 2009.

No seabeach amaranth plants are known to have historically occurred within the project area or were found during the annual surveys within Avalon over the last several years. Seabeach amaranth was last documented in Avalon in 2003. 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 regarding the Avalon renourishment 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 previously occupied by piping plovers within the Avalon project area have been degraded by beach erosion, and no piping plover or seabeach amaranth were present within the project area in 2009. However, nourishment of the Avalon beach may create moderately suitable habitat for piping plover and/or seabeach amaranth.

No seasonal restriction to protect piping plovers will be required for the 2010 nesting season provided work is confined to the proposed renourishment area located between 9th and 26th Streets. The proposed renourishment area does not presently provide suitable piping plover nesting habitat and is located greater than 1,000 meters from a current nesting area. Therefore, no direct adverse impacts to these species are anticipated.

Following beach nourishment in other areas of New Jersey, piping plovers have established nesting in previously unoccupied sites, and seabeach amaranth has colonized suitable habitats created by the beach fill. However, piping plover nesting and productivity on such stabilized beaches (where no habitat enhancement occurs) is generally lower than on unstabilized beaches where over-wash zones and/or tidal pools are available. Therefore, it is likely that at least one pair of piping plovers may nest or attempt to nest within the Avalon project area following the fill, and productivity is anticipated to be lower than on unstabilized beaches or stabilized beaches with habitat enhancement.

Impacts to the piping plover associated with nourishment activities such as increased human disturbance, increased recreational activities, incompatible beach management practices, and increased predation are likely to occur and were addressed in the December 2005 Tier 1 Programmatic Biological Opinion. Without management, as addressed in the December 2005 Tier 1 Programmatic Biological Opinion, seabeach amaranth plants may also be damaged or destroyed by recreational activities or beach management activities.

Past shoreline stabilization within the Avalon 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 habitat for piping plover and seabeach amaranth. Therefore, the Avalon renourishment project will preclude formation of natural habitats and create sub-optimal beach habitat for piping plover and seabeach amaranth along approximately 4,800 linear feet (approximately 0.91 linear miles) of Atlantic coastal shoreline.

CONCLUSION

Actions and effects associated with the Avalon renourishment 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 Avalon renourishment 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.

The indirect effects of the Avalon renourishment project are anticipated to result in harm in the form of reduced habitat quality along approximately 0.91 linear miles of Atlantic coastal shoreline annually over the anticipated 10-year life of the permit and harassment of one pair of piping plovers and their young from disturbance by beach management activities and beach recreation, resulting in reduced productivity. The type and amount of anticipated incidental take is consistent with that described in the Service's December 2005 Tier 1 Programmatic Biological Opinion and does not cause the total annual level of incidental take in the December 2005 Tier 1 Programmatic Biological Opinion to be exceeded.

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 reasonable and prudent measures and 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 Avalon 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 Avalon renourishment project.

The Corps has a continuing duty to regulate the activity covered by an incidental take statement. If the Corps: (1) fails to demonstrate clear compliance with the RPMs and their implementing terms and conditions in the December 2005 Tier 1 Programmatic Biological Opinion; or (2) fails to require Corps staff, contractors, cooperators, and/or permittees to adhere to the RPMs and terms and conditions of the incidental take statement; and/or (3) fails to retain oversight to ensure compliance with the RPMs and terms and conditions, the protective coverage of section 7(o)(2) of the ESA may lapse.

REINITIATION - CLOSING STATEMENT

This concludes Tier 2 formal consultation on the effects of beach renourishment activities permitted by the Corps' Philadelphia District in the Borough of Avalon, 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.

As a reminder, pursuant to Conservation Measures identified in the PBO, should the renourishment create piping plover nesting habitat that is occupied by plovers prior to completion of the project, work must cease temporarily and the Service must be notified immediately to provide further guidance. If plovers are present, the Corps will be required to provide a Service-approved qualified monitor for the duration of construction activities to ensure piping plovers are not adversely affected by project activities. 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,

A handwritten signature in black ink, appearing to be the initials 'RR' with a stylized flourish extending to the right.

Acting Supervisor