



United States Department of the Interior



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In Reply Refer to:

2008-F-0254

FEB 12 2008

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 City of Ocean City (City), Cape May County, New Jersey. The Corps' proposed issuance of a 10-year Department of the Army permit (File No. CENAP-OP-R-2007-1026-24) 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 34th Street (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

September 26, 2007

By electronic mail, the Corps coordinated with the Service to initiate consultation 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.

- October 2007 Throughout October 2007, the Service, the Corps, and the NJDEP (Bureau of Coastal Engineering [BCE] and Endangered and Nongame Species Program [ENSP]) coordinated via telephone and electronic mail to exchange additional project information.
- November 28, 2007 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.
- December 2007 The Service, Corps, BCE, and ENSP continued to coordinate via electronic mail regarding a recommended permit condition requiring preparation of a beach management plan for Ocean City.
- January 2007 The Service, Corps, BCE, and ENSP coordinated via telephone and electronic mail to finalize permit conditions regarding State-listed species, vegetation management, and beach management planning. The BCE confirmed the project will not include a dune nor will the project include planting vegetation or use of sandfencing. Therefore, related permit conditions were removed from the draft. The Corps sent the Service the final permit conditions via electronic mail.

PROJECT DESCRIPTION

The overall Ocean City beach nourishment/maintenance project area begins at the northern end of the City at Seaview Road and extends southwest to 34th Street with a 1,000-foot taper south of 34th Street. However, a reduced scope (Seaview Road to 13th Street) is scheduled for calendar year 2008 based on available funding and site conditions. Renourishment of Seaview Road to 13th Street is scheduled to begin during the 2008 piping plover nesting season, but may be delayed until the fall of 2008 due to easement issues between the NJDEP and private homeowners.

Approximately 600,000 to 800,000 cubic yards of material will be placed on the beach between Seaview Road and 12th Street, with a taper to 13th Street, on approximately 2.17 miles of oceanfront beach. The renourishment activities will replace sand to return the beach profile to the design criteria of a berm at an elevation of +7.0 feet NAVD with a width of 100 feet. Sand will be obtained from the ebb shoal area located approximately 5,000 feet offshore of Ocean City, in the Great Egg Harbor Inlet. The sand is compatible (*i.e.*, 90 % or greater clean sand fill material) with the existing beach and will not negatively impact piping plovers or seabeach amaranth.

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. The area between Seaview Road to 13th Street (proposed for nourishment in 2008) was previously used as a nesting site by piping plovers. Piping plovers last nested at this site in 2005. Since that time, the site has become degraded and is no longer considered to provide suitable habitat. Specifically, erosion of the sandy beach areas has reduced the extent of available nesting habitat. The area was also previously used by State-listed (endangered) least tern (*Sterna antillarum*) and black skimmer (*Rynchops niger*) in 2003 and 2002, respectively. Piping plovers currently nest from 19th Street south toward 34th Street. No seabeach amaranth plants were found within the project area during Service surveys in 2007 and none have been documented in the 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 13th Street have been degraded by beach erosion. No piping plovers have nested within that area since 2005.

The work between Seaview Road and 13th Street is being conducted during the 2008 nesting season. However, the site is more than 1,000 meters from current nesting habitat and is not currently suitable seabeach amaranth habitat. Any work between 13th Street and 34th Street will be conducted outside the piping plover nesting season and most of the seabeach amaranth growing season; 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 4.4 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 4.4 linear miles of oceanfront beach 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 and does not cause the total annual level of incidental take described in the 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 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,

A handwritten signature in cursive script that reads "J. Eric Davis Jr.".

J. Eric Davis Jr.
Supervisor