

Memorandum of Agreement

Among

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

and

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

and

BOROUGH OF MANTOLOKING

to mutually adopt the provisions of the *Borough of Mantoloking Beach Management Plan for the Protection of Federally and State-Listed Species*

This Memorandum of Agreement (MOA) is made and entered into between the U.S. Department of the Interior, Fish and Wildlife Service (hereinafter referred to as "USFWS"), the New Jersey Department of Environmental Protection (hereinafter referred to as "NJDEP"), and the Borough of Mantoloking (hereinafter referred to as "Borough") to mutually adopt the provisions of the *Borough of Mantoloking Beach Management Plan for the Protection of Federally and State-Listed Species* (hereinafter referred to as "the management plan").

WHEREAS, the piping plover (*Charadrius melodus*), red knot (*Calidris canutus rufa*), least tern (*Sternula antillarum*), and black skimmer (*Rynchops niger*) are birds listed as endangered species pursuant to the New Jersey Endangered and Nongame Species Conservation Act (N.J.S.A. 23:2A-1 *et seq.*) (ENSCA), and the piping plover and red knot are also listed as threatened species pursuant to the Federal Endangered Species Act of 1973 (16 U.S.C. Section 1531 *et seq.*) (ESA), and the piping plover, red knot, least tern, and black skimmer are protected as migratory birds pursuant to the Federal Migratory Bird Treaty Act of 1918 (16 U.S.C. Section 703 *et seq.*) (MBTA), and;

WHEREAS, the American oystercatcher (*Haematopus palliatus*) is listed as a species of special concern pursuant to the New Jersey Endangered, Nongame and Exotic Wildlife rules (N.J.A.C. 7:25-4.1 and 4.17), and is protected as a migratory bird pursuant to the MBTA, and;

WHEREAS, the seabeach amaranth (*Amaranthus pumilus*), seabeach knotweed (*Polygonum glaucum*), and seabeach sandwort (*Honckenia peploides*) are listed as endangered species pursuant to the New Jersey Endangered Plant Species List Act (N.J.S.A. 13:1B-15.151 *et seq.*) (EPSLA), and the seabeach amaranth is also listed as a threatened species pursuant to the ESA, and;

WHEREAS, the seabeach purslane (*Sesuvium maritimum*) is designated as a plant species of concern pursuant to the New Jersey Endangered Plant Species rules (N.J.A.C. 7:5C-3.1), and;

WHEREAS, pursuant to N.J.S.A. 23:2A-2, 3, 4 and 7 and to the existing Cooperative Agreement of 1976 for endangered wildlife species pursuant to Section 6 of the ESA, between the USFWS and the NJDEP (under the terms of 16 U.S.C. Section 1535 and N.J.S.A. 23:2A-7b & c), NJDEP is the principal steward of endangered and threatened wildlife populations in New Jersey and is directed and authorized to conserve, manage, and enhance sustainable populations of endangered or threatened species, including beach-nesting birds, and is authorized to enter into agreements with other governmental entities and private individuals for administration and management of these wildlife species, and;

WHEREAS, pursuant to N.J.S.A. 13:1B-15.147, 15.148, 15.150 and 15.152 through 15.156 and to the existing Cooperative Agreement of 1985 for endangered and threatened plant species pursuant to Section 6 of the ESA, between the USFWS and the NJDEP (under the terms of 16 U.S.C. Section 1535 and N.J.S.A. 13:1B-15.150 and 15.156), NJDEP has a responsibility to conserve endangered and threatened species, including beach flora of New Jersey and is directed and authorized to do so by research and investigation that will aid in determining the eligibility of a plant species for inclusion on the endangered plant species list, and is authorized to cooperate with other government entities and private individuals for administration and management of these plant species, and;

WHEREAS, notwithstanding the aforementioned NJDEP stewardship of endangered and threatened species populations, the USFWS retains certain responsibilities for implementation of the ESA in New Jersey, including Section 7 (16 U.S.C. Section 1536) consultation with the U.S. Army Corps of Engineers for its ongoing, long-term program of federally funded beach nourishment within the Borough, and including activities to implement and oversee recovery of piping plover and seabeach amaranth, and;

WHEREAS, the Borough, as an Atlantic coastal beach community that has previously provided and currently provides crucial habitat for listed species, is obliged, consistent with N.J.S.A. 23:2A-6 and 16 U.S.C. Section 1538 (and as defined and codified in 50 CFR 17.3, 17.21 and 17.31), to ensure that activities carried out, promoted, or encouraged by the Borough do not harm endangered or threatened species or otherwise hinder the restoration or maintenance of sustainable populations, and;

WHEREAS, the Borough, as principal steward of the beaches and dunes on which listed species depend, recognizes a further responsibility to participate actively in the management plan designed to recover listed species populations, and;

WHEREAS, the USFWS and the NJDEP recognize the additional responsibilities of the Borough to minimize the threat to life and property from coastal flooding and storms and to provide a safe and secure town, a sustainable economy, and recreational opportunities for residents and visitors, and;

WHEREAS, the USFWS, the NJDEP, and the Borough have jointly developed the *Borough of Mantoloking Beach Management Plan for the Protection of Federally and State-Listed Species*

which defines and describes the roles and responsibilities of the Borough, the NJDEP, and the USFWS in the protection and management of listed species within the Borough and endeavors to provide for the long-term conservation and restoration of listed species populations while balancing potentially conflicting missions, and;

WHEREAS, the USFWS has determined that the management plan is consistent with the USFWS' applicable Programmatic Biological Opinion for the U.S. Army Corps of Engineers' long-term Federal beach nourishment programs in New Jersey, and is consistent with the USFWS *Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act*, and that implementation of the management plan is not likely to result in unauthorized take of federally listed species in violation of Section 9 of the ESA (16 U.S.C. Section 1538).

NOW THEREFORE, the parties hereto in consideration of the foregoing and recognizing their shared responsibility for the stewardship of listed species, do hereby agree to implement the *Borough of Mantoloking Beach Management Plan for the Protection of Federally and State-Listed Species* which is attached hereto and incorporated by reference in accordance with the following terms and conditions:

REVISIONS: This MOA and the management plan may be revised or amended when deemed necessary by the USFWS, the NJDEP, or the Borough. Any such revision or amendment to either document shall become effective only upon the mutual written agreement of the USFWS, the NJDEP, and the Borough.

HABITAT CONSERVATION PLAN: Development of a Habitat Conservation Plan and/or issuance of an incidental take permit pursuant to Section 10(a)(1)(B) of the ESA (16 U.S.C. Section 1539) is not necessary for implementation of the management plan (unless otherwise required pursuant to other applicable law).

EFFECTIVE DATE AND DURATION: This MOA will remain in effect for seven (7) years following its formal adoption and signature by all parties. This MOA may be terminated prior to the seven-year term by any party only upon sixty (60) days written notice. This MOA will be reviewed by all parties immediately following the seven-year period for renewal or extension.

EXCEPTIONS AND LIMITATIONS: Neither this MOA nor the management plan exempts the Borough, in any way from any of the provisions of ENSCA or ESA, nor from any other State or Federal laws or regulations (*e.g.*, Coastal Zone Management Rules [N.J.A.C. 7:7]; Clean Water Act [33 U.S.C. 1251 *et seq.*, as amended]). Neither this MOA nor the management plan referenced herein constitutes a permit under Section 10(a)(1)(A) or 10(a)(1)(B) of the ESA, nor does it constitute any other type of approval under either ENSCA or ESA or their implementing regulations. The agreement also does not release the Borough from any provisions of any other contracts or agreements between the Borough and the NJDEP or the USFWS or any other State or Federal entity. Under the Antideficiency Act (31 U.S.C. Section 1341), the United States of America is not authorized to make any expenditure or obligation of funds for this MOA or the management plan, except as authorized in specific appropriations and is subject to all laws, regulations, and policies governing the USFWS. No funds are obligated by this agreement, and

the Borough, NJDEP, and USFWS shall bear its own expenses in implementation of the management plan.

INDEMNIFICATION: The Borough of Mantoloking shall hold harmless, indemnify and defend State of New Jersey, the United States of America and their members, directors, officers, employees, agents, and contractors, and their successors and assigns from and against all liabilities, penalties, costs, losses, damages, expenses or claims, including, without limitation, reasonable attorneys fees, arising from or in any way connected with the work covered by this Agreement, regardless of cause, unless due solely to the negligence of any of the indemnified parties. The liability of the United States for personal injury and/or property damage claims arising from the activities authorized under this agreement shall be governed in accordance with the provisions of the Federal Tort Claims Act (28 U.S.C. Section 1346(b), 2671-2680), and subject to the availability of funds. The NJDEP shall be responsible for losses or damages arising from this agreement resulting from its own negligence or the negligence of its employees to the extent legally liable for such actions by the New Jersey Tort Claims Act (N.J.S.A. 59:1-1 et seq.), as amended, and subject to the availability of funds. (N.J.S.A. 59:12 as amended). The Borough's agreement to hold harmless and indemnify the State of New Jersey and the United States of America shall not affect the statutory protections available to the Borough under the Landowner's Liability Act (N.J.S.A. 2A:42A-2 *et seq.*).

IN WITNESS WHEREOF, the parties have caused this MOA to be executed by an authorized official on the date and year set forth as signed below.

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
ECOLOGICAL SERVICES
NEW JERSEY FIELD OFFICE

Field Supervisor, New Jersey Field Office

Date

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Assistant Commissioner, Natural and Historic Resources

Date

BOROUGH OF MANTOLOKING

Mayor, Borough of Mantoloking

Date