State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PHIL MURPHY
Governor
SHEILA OLIVER
Lt. Governor

CATHERINE R. McCABE
Commissioner

Division of Land Use Regulation
Mail Code 501-02A
P.O. Box 420
Trenton, New Jersey 08625-0420
www.nj.gov/dep/landuse

June 25, 2018

Peter D. Lopez, Regional Administrator
Environmental Protection Agency, Region 2
290 Broadway
M.C. #24th Floor
New York, New York 10007-1866
Attn: Dan Montella

Eric Schrading, Field Supervisor
U.S. Fish and Wildlife Service
New Jersey Field Office
4 East Jimmie Leeds Road, Suite 4
Galloway, New Jersey 08205

Dear Mr. Lopez and Mr. Schrading:

The New Jersey Department of Environmental Protection (NJDEP) has reviewed the attached annotated version of the December 22, 1993 Memorandum of Agreement (MOA) between the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (the Service), and the NJDEP. Please be advised that NJDEP acknowledges and accepts the March 2018 updates and understands that the annotated MOA will serve as a working copy for the protection of federally listed species under the State-assumed Section 404 program.

If you have any questions, please contact me at (609) 984-3444.

Sincerely,

Diane Dow, Director,
Division of Land Use Regulation
New Jersey Department of Environmental Protection

Enclosure

Cc: Virginia Kopkash
Larry Torok

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

May 10, 2018

Eric Schrading, Field Supervisor
U.S. Fish and Wildlife Service
4 East Jimmie Leeds Road, Suite 4
Galloway, New Jersey 08205

Catherine R. McCabe, Commissioner
New Jersey Department of Environmental Protection
401 East State Street
P.O. Box 420
Trenton, New Jersey 08625
Attn: Diane Dow

Dear Mr. ~~Schrading~~ Eric, and Ms. ~~McCabe~~ Catherine,:

This letter responds to the March 8, 2018 letter from the U.S. Fish and Wildlife Service, New Jersey Field Office (Service) concerning the December 22, 1993 Memorandum of Agreement (MOA) among the U.S. Environmental Protection Agency (EPA), New Jersey Department of Environmental Protection (NJDEP), and the Service. This MOA was implemented to protect federally listed species under the New Jersey state-assumed Section 404 program. In its letter, the Service proposed several updates to the MOA.

EPA has reviewed these proposed updates and has determined that they are non-substantive and therefore may be incorporated by letter. For ease of understanding, we have incorporated the proposed changes into an annotated version of the 1993 MOA (enclosed). Should both the Service and NJDEP concur, we propose that this annotated version serve as a working copy of the MOA's updated procedures.

If you have any questions regarding this matter, please contact me at (212) 637-5000, or have your staff contact Mr. Richard Balla, Chief of EPA Region 2's Watershed Management Branch, at balla.richard@epa.gov or (212) 637-3788.

Sincerely,

Peter D. Lopez
Regional Administrator

Enclosure

cc: D. Dow, New Jersey Department of Environmental Protection, Trenton, NJ
V. Kopkash, New Jersey Department of Environmental Protection, Trenton, NJ

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Annotations reflect March 2018 procedure updates.

Memorandum of Agreement

Among the

U.S. Fish and Wildlife Service
U.S. Environmental Protection Agency
New Jersey Department of Environmental Protection ~~and Energy~~

Related to the Protection of Federally-Listed Threatened
or Endangered Species and Designated Critical Habitat
Under a New Jersey-Assumed Section 404 Program

WHEREAS: The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are the federal agencies responsible for implementing Section 404 of the Clean Water Act of 1977, as amended (CWA) (33 U.S.C. 1344), which regulates the discharge of dredged or fill material into waters of the United States, including the freshwater wetlands in New Jersey;

WHEREAS: The U.S. Fish and Wildlife Service (Service) is the primary federal agency responsible for ensuring that species and their critical habitat listed or designated, respectively, pursuant to the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 to 1544), under the Service's jurisdiction. are protected as mandated by federal law, and such species occur in New Jersey;

WHEREAS: According to Section 7 of the ESA, and its implementing regulations (50 CFR Part 402), the EPA and other federal agencies are responsible for consulting with the Service for any actions they fund, authorize, or carry out that may affect species or critical habitat listed or designated, respectively, pursuant to the ESA and for utilizing their authorities to further the conservation of federally-listed species;

WHEREAS: According to Section 404(g) of the CWA, and its implementing regulations (40 CFR Part 233), a State can apply to assume the regulatory authority for Section 404 and the EPA can approve such application, provided the State program is as stringent as the federal 404 program;

WHEREAS: The New Jersey Department of Environmental Protection ~~and Energy~~ (NJDEP~~E~~), for the State of New Jersey, has submitted an application to the EPA to assume the regulatory authority under Section 404 for freshwater wetlands and other State waters in New Jersey;

WHEREAS: According to the CWA's Section 404(bXl) Guidelines (40 CFR Part 230.10(b)(3)), Section 404 permits cannot be issued if they would jeopardize the

continued existence of a federally-listed species, or result in the adverse modification of a designated critical habitat, unless an exemption from the ESA is granted by the Endangered Species Committee;

WHEREAS: According to the rules implementing the New Jersey Freshwater Wetlands Protection Act (NJFWPA) (N.J.A.C 7:7A-1 *et. seq*. and subsequent amendments). State freshwater wetlands permits cannot be issued if they would destroy, jeopardize, or adversely modify a present or documented habitat for listed species, or jeopardize the continued existence of any local population of a listed species; and/or will not be likely to result in the destruction or adverse modification of a habitat which is determined by the Secretary of the United States Department of the Interior or the Secretary of the U.S. Department of Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, 16 U.S.C. Section 1531 *et seq*.;

WHEREAS: According to the EPA's 404 State Program Regulations (40 CFR Part 233.51), all applications for Section 404 permits with reasonable potential for affecting federally-listed species must be reviewed by the EPA after assumption is approved;

NOW THEREFORE: The EPA, the Service, and the NJDEPE agree, as a matter of comity, to implement the following procedures regarding the protection o'f federally-listed species and designated critical habitat under the State of New Jersey's assumed Section 404 permit program for freshwater wetlands. The procedures in this Agreement do not constiMe procedures for consultation pursuant to section 7(a)(2) of the ESA. This Agreement is specific to the circumstances surrounding State assumption of the Section 404 program for the freshwater wetlands and other State waters of New Jersey. These procedures do not create any substantive standards relating to any aspect of the permit program or impose any legal obligations on the public.

## I. PARTIES AND EFFECTIVE DATES

A This Memorandum of Agreement (MOA) is entered into by: the Regional Director, Region 5, for the Service, the Acting Regional Administrator, Region II, for the EPA, and the Acting Commissioner of the New Jersey Department of Environmental Protection ~~and Energy~~.

B. This MOA shall be executed by the aforementioned parties in conjunction with the EPA's approval of the State's application for assumption of the Section 404 program. As such, this MOA shall become effective immediately upon the EPA's approval of the State program.

C. This MOA shall remain in effect until modified or revoked by agreement of all parties, or upon the EPA withdrawing authority from the State and returning the Section 404 program to the Corps. Parties to the MOA may propose, in writing, revisions to the terms and procedures of the MOA at any time. Such requests should be submitted to all parties concurrently. If any party to this Agreement identifies a procedural or substantive breach of the Agreement by any other party, the Region 5

Regional Director for the Fish and Wildlife Service, the Region II Regional Administrator for the EPA, or the Commissioner of the NJDEPE mav call a meeting with the other parties within 30 calendar days to discuss the matter ruldagree upon appropriate corrective measures to be implemented within 60 days of the meeting.
The corrective measures may be in the form of written guidance to field personnel or proposed modifications to this Agreement.

## II. GENERAL

A Federally-listed species means those species identified as threatened or endangered pursuant to Section 4 of the ESA, as specified in 50 CFR Parts 17.11-17.12, and subsequent amendments thereto. Species proposed for federal listing, through publication of a proposed rulernaking in the Federal Register; shall be treated under this Agreement the same as federally-listed species, to the maximum extent allowed by law.

B. Critical habitat means those areas designated as critical habitat for federally-listed species in 50 CFR Part 17, and subsequent amendments thereto. Habitat proposed as critical, through publication of a proposed rulernaking in the Federal Register, shall be treated under this Agreement the same as designated critical habitat, to the maximum extent allowed by law.

C. For the purposes of this Agreement, "effects of the action", as it relates to the evaluation of effects of a permit action on federally-listed species or designated critical habitat, has meaning as defined in 50 CFR Part 402.02.

D. For purposes of this Agreement, the phrase "reasonable potential for affecting endangered or threatened species", as used in 40 CFR Part 233, is synonymous with the phrase "may affect listed species or critical habitat", as used in 50 CFR Part 402.

E. "Remedial measures" specified by the Service under this Agreement must be capable of being implemented in a manner consistent with the intended purpose of the permitted activity and the scope of the permitting agencys legal authority and jurisdiction. Such measures must also be economically and technologically feasible.

## III. PROCEDURES

The following procedures will occur simultaneously with the NJDEPE's permit review process as described in N.J.A.C. 7:7A. Where required, the NJDEPE's time frames on permit processing are adhered to in order to avoid permit processing delays.

A. The NJDEP staff will screen all Statewide general permit #1, #2, #4, #5, #6, #7, #10A #10B, #11, #13, #15, #16, #17, #17A, #18, #20, #21, #22, #23, and #25 applications in locations with the potential for occurrences of federally-listed species or designated critical habitat for the potential to adversely affect federally-listed species or designated critical habitat. New Statewide general permits added after the signatory date of this Agreement may be added to this screening review by mutual consent of the parties. Based on this screening review, NJDEP staff will take the following steps:

1. Projects determined to have no potential to adversely affect federally listed species or designated critical habitat based upon mutually agreed upon criteria will be signed-off on by NJDEP staff and no further federal review will be needed. Copies of each NJDEP review application will be forwarded to the Service if requested by the Service. The Service may request that the NJDEP provide a copy of any such decision within 15 calendar days of receipt of the application determination.

2. Projects determined to have a potential to adversely affect federally listed species or their critical habitat will be forwarded to the Service for further review consistent with the process outlined in this Section (Section III).

A.1. The NJDEP will provide the Service with a copy of all applications for individual permits from locations with federally listed species and copies of Statewide general permit applications identified in III.A.2. above.

B. Within 20 calendar days of receipt of an individual permit application, the Service may request the NJDEP~~E~~ to provide additional information to assist its evaluation of NJDEP~~E~~ the respective permit application. This request will describe the need for the additional information. The will obtain the requested information if available and, upon delivery to the Service, will provide the Service with a new response date.

C. Within 30 calendar days of receipt of an individual permit application. unless extended pursuant to paragraph III.B. above, or 15 calendar days of receipt of a Statewide general permit application, the Service will review and comment to the NJDEP~~E~~ on the proposed permit action. When possible, the Service's review will include an inspection of the project area. If the Service cannot participate in a joint inspection with the NJDEP~~E~~ or conduct a solo inspection, it will accept the NJDEP~~E~~'s inspection results. The Service's response to the NJDEP~~E~~ (with a copy to the EPA) regarding the proposed permit action's potential effects on federally-listed species and designated critical habitat will be in one of the following forms:

1. the proposed permit action has no potential to affect federally-listed species or designated critical habitat;

2. the proposed permit has the potential to affect federally-listed species or designated critical habitat, unless the effects are eliminated through remedial measures (project modifications and/or permit conditions) recommended by the Service; or

3. the proposed pennit action has the potential to affect federally-listed species or designated critical habitat.

D. Permit applications that receive a response from the Service as indicated in III.C. I. above will not require federal review pursuant to 40 CFR Part 233.51(b)(2).

E. Upon receipt of a response from the Service as indicated in III.C.2. above, the NJDEP~~E~~ will evaluate the recommended remedial measures for consistency with the NJFWPA and its implementing rules and regulations.

1. If the NJDEP~~E~~ concurs with the remedial measures recommended by the Service, it will impose them as terms and conditions for the pennit. The Service and EPA will be informed of the NJDEP~~E~~'s action in this regard through copies of all correspondence related to the permit action. Permit applications addressed in this way will not require federal review pursuant to 40 CFR Part 233.51(b)(2).

2. If the NJDEPE does not concur (through either technical review or the appeals process defined in NJ .A C. 7:7A-12.7) with the remedial measures recommended by the Service, it will provide the Service a written explanation (with a copy to the EPA) of its position. Such permit applications will require federal review pursuant to 40 CFR Part 233.51(b)(2).

F. Permit applications that receive a response from the Service as indicated in III.CJ . above will require federal review pursuant to 40 CFR Part 233.51(b)(2).

G. When federal review is required pursuant to 40 CFR Part 233.51(b)(2), EPA shall conduct a review of the permit application pursuant to 40 C.F.R 233.50. In such cases, the State will provide EPA, along with the application, information needed for review of the application under 233.50(b), including: 1) a description of the action and the specific area, federally-listed species or designated critical habitat that may be affected; 2) a description of the manner in which the action may affect any federally listed species or designated critical habitat, and an analysis of any cumulative effects; and 3) relevant reports or other information comprising the best scientific or commercial information available or which can be obtained, within the available time under 40 CFR 233.50(b) regarding the affect the action may have on federally-listed species or designated critical habitat. This information may be developed by the State or obtained by the State from the permit applicant. Information already provided to the Service by the NJDEPE pursuant to paragraph III.B. above need not be resubmitted. Proposed and final rules for listing species and designating critical habitat, approved recovery plans, status reports, and previous biological opinions or findings generated by the Service's New Jersey Field Office, need be included by reference only in the information submittal. EPA will send the application and accompanying information to the Service pursuant to 40 CFR Part 233.50(b).

H. Based upon its review of the information provided pursuant to paragraphs III.Band III.G. above, and other available information, the Service shall make one of the following determinations:

1. that the proposed permit action is not likely to adversely affect federally-listed species or critical habitat;

2. that the proposed permit action is likely to adversely affect federally-listed species or critical habitat, unless the effects are addressed through remedial measures (project modifications and/or permit conditions) recommended by the Service; or

3. that the proposed permit action is likely to adversely affect federally-listed species or critical habitat.

I. The Service will provide its response and all supporting documentation to EPA within the timeframes established under 40 CFR Part 233.50(b). The Service's determination under paragraph III.H. will constitute the federal comment under 40 CFR Part 233.50(e) with respect to the likelihood of adverse effects of the proposed discharge on federally-listed species or

designated critical habitat and the conservation measures that are necessary to avoid adversely affecting such federally listed species or designated critical habitat. For EPA reviews that receive a response from the Service as indicated in III.H.2 above, the federal comments conveyed to the State by EPA will require the imposition of permit conditions to avoid adverse effects on federally-listed species or designated critical habitat. For EPA reviews that receive a response from the Service as indicated in III.H.3 above, the federal comments conveyed to the State by EPA will object to permit issuance.

J. If the Service concurs that the proposed activity is not likely to adversely affect federally-listed species or designated critical habitat, (responds as indicated in III.H.1. above), no further coordination with the Service is necessary with regard to impacts to federally listed species or designated critical habitat.

K. Where the federal comment objects to issuance of the permit or requires the imposition of permit conditions to avoid adverse effects on federally-listed species or designated critical habitat, the State is precluded from issuing the permit unless it has taken the steps required by the federal comment.

L. The State will evaluate the federal comments regarding effects on federally-listed endangered and threatened species or designated critical habitat. If the NJDEPE agrees with the federal comments, it will implement them as part of its permit action. If the State disagrees with the assessment of such effects, the State will provide a written response within 20 days of receipt of the federal comment to EPA explaining its position and providing any supporting information or documentation. EPA will provide the State's response to the Service.

M. If the State does not agree to take actions specified by the Service to avoid adverse effects to federally-listed species or designated critical habitat, the Service will make a finding as to whether the proposed permitting action is likely to jeopardize the continued existence of the federally-listed species, adversely modify or destroy designated critical habitat, or result in the incidental take of federally-listed species. The Service may also include in its finding appropriate terms and conditions to minimize or avoid adverse effects to the listed species, or discretionary recommendations regarding the development of information or other measures relating to the conservation of federally-listed species. The Service will provide a draft of the finding to EPA when requested.

N. The Service will issue a finding to EPA within 45 days of receipt of the State's response under paragraph III.L. In the event that EPA submits comments to the Service on the draft finding within 10 days of the deadline for issuing the finding, the Service shall be provided an automatic 10 day extension on the deadline. Based on consideration of the Service's finding, EPA's decision shall ensure that a State permit is issued only if it is not likely to jeopardize the continued existence of federally-listed species or result in the destruction or adverse modification of designated critical habitat, and if it avoids or minimizes incidental take of federally-listed species. In making this decision, EPA shall give the same weight to the finding provided by the Service under paragraph M.as an action agency would in the context of a

biological opinion issued by the Service under Section 7 of the ESA EPA shall notify the Service of its final decision on the action. EPA will reaffirm, modify or withdraw its objection to the State permit, within the time-frames contained in 40 C.F.R Part 233.50.

O . In the event that the NJDEPE neither satisfies the EPA's objections or requirements for a permit condition (as determined under paragraph III .N.) nor denies the permit, the permit application will be transferred to the Corps for processing pursuant to 40 CFR Part 233.50(j).

P. The Service's responses under Section III.D or Section III.I, or the Service's finding under Sections III.N and O, may be reconsidered if the project, as permitted by NJDEP, changes or if additional information on federally-listed species or designated critical habitat becomes available

IV. INTERAGENCY COORDINATION

A Notwithstanding any other provision of this MOA, the EPA, NJDEPE, and Service may interact informally throughout this process. In addition, joint meetings between the EPA, the NJDEPE, the Service, and the applicant may be conducted in an attempt to reach agreement on a permit application with regard to the protection of federally-listed species or designated critical habitat if requested by any affected party.

B. The Service will provide to NJDEP electronic files and/or online information showing the range of each federally-listed species in New Jersey and any designated critical habitat. At any time, project proponents (applicants and prospective applicants) can obtain information on the potential for listed species to occur in their project areas via the Service's online Information, Planning, and Conservation System (IPaC). The Service will periodically update the information that underpins IPaC based on information receive by any of the signatory agencies, or as new species or critical habitat are listed or designated, respectively, pursuant to Section 4 of the ESA.

B1. Consistent with the review process outlined in Section III above, the Service and NJDEP may develop a mutually agreed to list of standard permit conditions or recommendations that may be applied by the NJDEP to permit applications in order to facilitate or comply with federal review requirements (*e.g.,* timing restrictions).

C. The Service will be responsible for notifying the EPA and the NJDEPE of any changes in status of federally-listed species and designated critical habitat, including proposals for listing, listings, and de-listings.

D. The State or EPA, as appropriate lead enforcement action agency pursuant to the EPA/NJDEPE MOA, will notify the Service at the onset of an enforcement action related to any violation wider the State-assumed Section 404 program in municipalities where federally-listed species or designated critical habitat are documented to occur. Within 30 days of such notification, the Service will advise the State, or EPA as appropriate, of any adverse effects on federally-listed species or designated critical habitat resulting from the violation and provide advice on appropriate remedial measures

E. To the extent practicable and appropriate under applicable Federal regulations, the Service and EPA will assist the State in implementation of the State-assumed Section 404 program, including (but not limited to) making appropriate personnel available for litigation assistance.

F. A list of Standard Operating Procedures (SOPs) will be developed by the Service, EPA, and NJDEP. The SOPs can be updated at any time by mutual agreement of the Service, EPA, and the NJDEP without revision of this underlying Agreement. The SOPs are to ensure consistency and the use of current information in the course of implementing the procedures and other provisions set forth in this Agreement.

V. GENERAL PROVISIONS

A The policy and procedures contained in this Agreement do not create any rights, either substantive or procedural. enforceable by any party.

B. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or the enforceability of the NJFWPA, the ESA, or the CWA

C. Nothing in this MOA shall be construed as obligating the signatory agencies to the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack staMory authority.

D. All time frames may be adjusted by agreement of the parties.

E. Nothing in this MOA authorizes any take of federally-listed threatened or endangered spec1 .

VI. SIGNATURES

U.S. Fish and Wildlife Service

Regional Director, Region 5

Date: 12-22-93

U.S. Environmental Protection Agency

Acting Regional Administrator, Region II

Date: 12-22-93

New Jersey Department of Environmental Protection and Energy

Acting Commissioner, NJDEPE

Date: December 22, 1993



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The following pages are the original 1993 MOA among the U.S . Fish and Wildlife Service, U.S . Environmental Protection Agency, and the New Jersey Department of Environmental Protection and Energy Related to the Protection of Federally-Listed Threatened or Endangered Species and Designated Critical Habitat under a New Jersey-Assumed Section 404 Program

United States Department of the Interior

FISH AND WILDLIFE SERVICE
300 Westgate Center Drive
Hadley, MA 01035-9589

TAKE PRIDE IN AMERICA

In Reply Refer To:
FWS/Region 5/ES

DEC 22 1993

Mr. William J. Muszynski
Acting Regional Administrator
U.S. Environmental Protection Agency
26 Federal Plaza
New York, New York 10278-0090

Dear Mr. Muszynski:

On May 4, 1993, the Environmental Protection Agency (EPA) requested the Fish and Wildlife Service (FWS) concur with the determination that EPA's approval of the New Jersey Department of Environmental Protection and Energy's (NJDEPE) application to assume the Section 404 permit program pursuant to the Clean Water Act of 1977 (33 U.S.C. 1344 et seq.) (State assumption) is not likely to adversely affect federally-listed threatened and endangered species. By FWS' letter of May 25, 1993, we were not able to concur with that finding, based on analysis of NJDEPE's proposed program. FWS suggested that an MOA outlining an adequate conservation program for listed species would, if implemented, allow FWS to concur that the State assumption "is not likely to adversely affect" these species.

In the ensuing months, EPA, FWS, and NJDEPE have worked on that MOA, which all three parties signed on December 22, 1993. In light of that agreement, FWS can now concur that New Jersey's assumption of the Section 404 permit program is not likely to adversely affect federally-listed species.

Authority

This response is provided as informal consultation on the subject action pursuant to section 7(a)(2) of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.) and regulations (50 CFR §402.13) to ensure the protection of federally-listed threatened and endangered species.

Federally-listed Species

Federally-listed species dependent on the waters and wetlands within the jurisdictional boundaries of the proposed State assumption include: swamp pink (*Helonias bullata*), Knieskern's beaked-rush (*Rhynchospora knieskernii*), and the bald eagle (*Haliaeetus leucephalus*). Another

federally-listed species, sensitive joint-vetch (*Aeschynomene virginica*) does not appear within the jurisdictional boundaries covered by the State assumption, however, this species occurs within the tidal freshwater wetlands immediately adjacent to the assumption boundaries and could be directly impacted by activities in State-assumed wetlands and waters upstream of its habitat. Three other federally-listed species, the Indiana bat (*Myotis sodalis*), American chaffseed (*Schwaleba americana*), and the small whorled pogonia (*Isotria medeoloides*) are not wetland species: however, they could be indirectly affected by projects requiring State-assumed Section 404 permits in New Jersey.

Attached are the lists of municipalities in New Jersey where federally-listed species are documented to occur. These lists represent FWS' current determination of locations where any category of discharges will have reasonable potential for affecting endangered and threatened species, as provided in 40 CFR Part 233.51(b)(2), and thus are not subject to waiver. FWS will revise these lists as species are added to the federal list of endangered and threatened species, as species are extirpated from New Jersey, or as new information on listed species or potential impacts to those species becomes available.

Candidate Species

Candidate species are species under consideration by the Service for possible inclusion on the List of Endangered and Threatened Wildlife and Plants (50 CFR Parts 17.11 and 17.12). Currently, there are 47 federal candidate species (Categories 1 and 2) in New Jersey, many of which are dependent on freshwater wetlands. FWS is mandated to continually monitor the status of these species to determine priorities for listing. If listed, these species will receive the full protection provided by ESA.

Incidental Take

Coordination under the MOA is designed to eliminate adverse effects to listed species and designated critical habitat. When this coordination process fails to eliminate take considered "incidental take" under the ESA, the State and/or applicant must seek authorization for such incidental take of federally-listed animal species under section 10(a)(1)(B) of the ESA (the habitat conservation planning process). EPA should insure that NJDEPE advises permit applicants that their project has not undergone ESA section 7 review, and therefore, the action is not entitled to protection from prosecution under section 9 of ESA, as no incidental take statement has been issued. Take of federally-listed plants is a violation of State law, and thus a violation of section 9 of ESA.

Conclusions

FWS has reviewed the State's program and EPA's procedures for review of permit applications outlined in the attached document entitled "Memorandum of Agreement Among the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, New Jersey Department of Environmental Protection and

Energy Related to the Protection of Federally-Listed Threatened and Endangered Species and Designated Critical Habitat Under a New Jersey-Assumed Section 404 Program," dated December 22, 1993. The procedures described in that agreement (MOA procedures) do not constitute procedures for consultation pursuant to section 7(a)(2) of the ESA. These MOA procedures are designed to eliminate adverse effects to federally-listed species and critical habitats through alternative coordination.

Under MOA procedures, when adverse effects cannot be eliminated through informal coordination between NJDEPE and FWS, EPA has committed to ensuring that a State permit will be issued only if it is not likely to jeopardize the continued existence of federally-listed species or result in the destruction or adverse modification of designated critical habitat, and if it avoids or minimizes incidental take of federally-listed species. When the State cannot agree with EPA's decision, the permit application will be transferred to the Corps of Engineers for processing under Section 404 of the Clean Water Act. Any residual incidental take must be dealt with under section 10(a)(1)(B) of the ESA if not addressed through section 7 consultation with the Corps.

The procedures adopted in this consultation are specific to the circumstances surrounding State assumption of the Section 404 program for the freshwater wetlands and other State waters of New Jersey. I would advise you for planning purposes, that future consultations on state assumptions will be conducted as programmatic formal consultations, requiring preparation of all data enumerated at 50 CFR §402.14(c), the ESA consultation regulations.

If changes in the State program occur or additional information on effects to listed or newly listed species or critical habitat becomes available, this determination of concurrence may need to be reconsidered, and section 7 consultation may have to be reinitiated.

Other issues

This ESA consultation does not address all FWS concerns about the proposed State assumption. FWS identified many significant concerns other than endangered species in our September 2, 1993, technical comments on NJDEPE's assumption application. We look forward to EPA's response pursuant to 40 CFR 233.15(g).

Sincerely,

Ronald E Lambertson

Regional Director

Memorandum of Agreement

Among the

U.S. Fish and Wildlife Service
U.S. Environmental Protection Agency
New Jersey Department of Environmental Protection and Energy

Related to the Protection of Federally-Listed
Threatened or Endangered Species and Designated Critical Habitat
Under a New Jersey-Assumed Section 404 Program

WHEREAS: The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are the federal agencies responsible for implementing Section 404 of the Clean Water Act of 1977, as amended (CWA) (33 U.S.C. 1344), which regulates the discharge of dredged or fill material into waters of the United States, including the freshwater wetlands in New Jersey;

WHEREAS: The U.S. Fish and Wildlife Service (Service) is the primary federal agency responsible for ensuring that species and their critical habitat listed or designated, respectively, pursuant to the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 to 1544), under the Service's jurisdiction, are protected as mandated by federal law, and such species occur in New Jersey;

WHEREAS: According to Section 7 of the ESA, and its implementing regulations (50 CFR Part 402), the EPA and other federal agencies are responsible for consulting with the Service for any actions they fund, authorize, or carry out that may affect species or critical habitat listed or designated, respectively, pursuant to the ESA and for utilizing their authorities to further the conservation of federally-listed species;

WHEREAS: According to Section 404(g) of the CWA, and its implementing regulations (40 CFR Part 233), a State can apply to assume the regulatory authority for Section 404 and the EPA can approve such application, provided the State program is as stringent as the federal 404 program;

WHEREAS: The New Jersey Department of Environmental Protection and Energy (NJDEPE), for the State of New Jersey, has submitted an application to the EPA to assume the regulatory authority under Section 404 for freshwater wetlands and other State waters in New Jersey;

WHEREAS: According to the CWA's Section 404(b)(1) Guidelines (40 CFR Part 230.10(b)(3)), Section 404 permits cannot be issued if they would jeopardize the



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continued existence of a federally-listed species, or result in the adverse modification of a designated critical habitat, unless an exemption from the ESA is granted by the Endangered Species Committee;

WHEREAS: According to the rules implementing the New Jersey Freshwater Wetlands Protection Act (NJFWPA) (N.J.C.A. 7:7A-3.5(a)(2 and 3)), state freshwater wetlands permits cannot be issued if they would jeopardize present or documented habitat or the continued existence of a local population of federally-listed species, or result in the destruction or adverse modification of critical habitat;

WHEREAS: According to the EPA's 404 State Program Regulations (40 CFR Part 233.51), all applications for Section 404 permits with reasonable potential for affecting federally-listed species must be reviewed by the EPA after assumption is approved;

NOW THEREFORE: The EPA, the Service, and the NJDEPE agree, as a matter of comity, to implement the following procedures regarding the protection of federally-listed species and designated critical habitat under the State of New Jersey's assumed Section 404 permit program for freshwater wetlands. The procedures in this Agreement do not constitute procedures for consultation pursuant to section 7(a)(2) of the ESA. This Agreement is specific to the circumstances surrounding State assumption of the Section 404 program for the freshwater wetlands and other State waters of New Jersey. These procedures do not create any substantive standards relating to any aspect of the permit program or impose any legal obligations on the public.

I. PARTIES AND EFFECTIVE DATES

A. This Memorandum of Agreement (MOA) is entered into by: the Regional Director, Region 5, for the Service, the Acting Regional Administrator, Region II, for the EPA, and the Acting Commissioner of the New Jersey Department of Environmental Protection and Energy.

B. This MOA shall be executed by the aforementioned parties in conjunction with the EPA's approval of the State's application for assumption of the Section 404 program. As such, this MOA shall become effective immediately upon the EPA's approval of the State program.

C. This MOA shall remain in effect until modified or revoked by agreement of all parties, or upon the EPA withdrawing authority from the State and returning the Section 404 program to the Corps. Parties to the MOA may propose, in writing, revisions to the terms and procedures of the MOA at any time. Such requests should be submitted to all parties concurrently. If any party to this Agreement identifies a procedural or substantive breach of the Agreement by any other party, the Region 5

Regional Director for the Fish and Wildlife Service, the Region II Regional Administrator for the EPA, or the Commissioner of the NJDEPE may call a meeting with the other parties within 30 calendar days to discuss the matter and agree upon appropriate corrective measures to be implemented within 60 days of the meeting. The corrective measures may be in the form of written guidance to field personnel or proposed modifications to this Agreement.

## II. GENERAL

A. Federally-listed species means those species identified as threatened or endangered pursuant to Section 4 of the ESA, as specified in 50 CFR Parts 17.11 - 17.12, and subsequent amendments thereto. Species proposed for federal listing, through publication of a proposed rulemaking in the Federal Register, shall be treated under this Agreement the same as federally-listed species, to the maximum extent allowed by law.

B. Critical habitat means those areas designated as critical habitat for federally-listed species in 50 CFR Part 17, and subsequent amendments thereto. Habitat proposed as critical, through publication of a proposed rulemaking in the Federal Register, shall be treated under this Agreement the same as designated critical habitat, to the maximum extent allowed by law.

C. For the purposes of this Agreement, "effects of the action", as it relates to the evaluation of effects of a permit action on federally-listed species or designated critical habitat, has meaning as defined in 50 CFR Part 402.02.

D. For purposes of this Agreement, the phrase "reasonable potential for affecting endangered or threatened species", as used in 40 CFR Part 233, is synonymous with the phrase "may affect listed species or critical habitat", as used in 50 CFR Part 402.

E. "Remedial measures" specified by the Service under this Agreement must be capable of being implemented in a manner consistent with the intended purpose of the permitted activity and the scope of the permitting agency's legal authority and jurisdiction. Such measures must also be economically and technologically feasible.

## III. PROCEDURES

The following procedures will occur simultaneously with the NJDEPE's permit review process as described in N.J.A.C. 7:7A. Where required, the NJDEPE's time frames on permit processing are adhered to in order to avoid permit processing delays.

A. The NJDEPE will provide the Service with a copy of all applications for individual permits and Statewide general permits #2, #4, #6, #7, #10, #11, #13, #15, #18, and

#20, in municipalities with documented occurrences of federally-listed species or designated critical habitat.

B. Within 20 calendar days of receipt of an individual permit application, the Service may request the NJDEPE to provide additional information to assist its evaluation of the respective permit application. This request will describe the need for the additional information. The NJDEPE will obtain the requested information if available and, upon delivery to the Service, will provide the Service with a new response date.

C. Within 30 calendar days of receipt of an individual permit application, unless extended pursuant to paragraph III.B. above, or 15 calendar days of receipt of a Statewide general permit application, the Service will review and comment to the NJDEPE on the proposed permit action. When possible, the Service's review will include an inspection of the project area. If the Service cannot participate in a joint inspection with the NJDEPE or conduct a solo inspection, it will accept the NJDEPE's inspection results. The Service's response to the NJDEPE (with a copy to the EPA) regarding the proposed permit action's potential effects on federally-listed species and designated critical habitat will be in one of the following forms:

   1. the proposed permit action has no potential to affect federally-listed species or designated critical habitat;

   2. the proposed permit has the potential to affect federally-listed species or designated critical habitat, unless the effects are eliminated through remedial measures (project modifications and/or permit conditions) recommended by the Service; or

   3. the proposed permit action has the potential to affect federally-listed species or designated critical habitat.

D. Permit applications that receive a response from the Service as indicated in III.C.1. above will not require federal review pursuant to 40 CFR Part 233.51(b)(2).

E. Upon receipt of a response from the Service as indicated in III.C.2. above, the NJDEPE will evaluate the recommended remedial measures for consistency with the NJFWPA and its implementing rules and regulations.

   1. If the NJDEPE concurs with the remedial measures recommended by the Service, it will impose them as terms and conditions for the permit. The Service and EPA will be informed of the NJDEPE's action in this regard through copies of all correspondence related to the permit action. Permit applications addressed in this way will not require federal review pursuant to 40 CFR Part 233.51(b)(2).



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2. If the NJDEPE does not concur (through either technical review or the appeals process defined in N.J.A.C. 7:7A-12.7) with the remedial measures recommended by the Service, it will provide the Service a written explanation (with a copy to the EPA) of its position. Such permit applications will require federal review pursuant to 40 CFR Part 233.51(b)(2).

F. Permit applications that receive a response from the Service as indicated in III.C.3. above will require federal review pursuant to 40 CFR Part 233.51(b)(2).

G. When federal review is required pursuant to 40 CFR Part 233.51(b)(2), EPA shall conduct a review of the permit application pursuant to 40 C.F.R. 233.50. In such cases, the State will provide EPA, along with the application, information needed for review of the application under 233.50(b), including: 1) a description of the action and the specific area, federally-listed species or designated critical habitat that may be affected; 2) a description of the manner in which the action may affect any federally-listed species or designated critical habitat, and an analysis of any cumulative effects; and 3) relevant reports or other information comprising the best scientific or commercial information available or which can be obtained, within the available time under 40 CFR 233.50(b), regarding the affect the action may have on federally-listed species or designated critical habitat. This information may be developed by the State or obtained by the State from the permit applicant. Information already provided to the Service by the NJDEPE pursuant to paragraph III.B. above need not be resubmitted. Proposed and final rules for listing species and designating critical habitat, approved recovery plans, status reports, and previous biological opinions or findings generated by the Service's New Jersey Field Office, need be included by reference only in the information submittal. EPA will send the application and accompanying information to the Service pursuant to 40 CFR Part 233.50(b).

H. Based upon its review of the information provided pursuant to paragraphs III.B and III.G. above, and other available information, the Service shall make one of the following determinations:

1. that the proposed permit action is not likely to adversely affect federally-listed species or critical habitat;

2. that the proposed permit action is likely to adversely affect federally-listed species or critical habitat, unless the effects are addressed through remedial measures (project modifications and/or permit conditions) recommended by the Service; or

3. that the proposed permit action is likely to adversely affect federally-listed species or critical habitat.

I. The Service will provide its determination and all supporting documentation to EPA within the timeframes established under 40 CFR Part 233.50(b). The Service's determination under paragraph III.H. will constitute the federal comment under 40

CFR Part 233.50(e) with respect to the likelihood of adverse effects of the proposed discharge on federally-listed species or designated critical habitat and the remedial measures that are necessary to avoid adversely affecting such federally-listed species or designated critical habitat. Based upon the Service's determination, the federal comments conveyed to the State by EPA will object to permit issuance or require the imposition of permit conditions to avoid adverse effects on federally-listed species or designated critical habitat.

J. If the Service determines that the proposed activity is not likely to adversely affect federally-listed species or designated critical habitat, no further coordination with the Service is necessary with regard to endangered species impacts.

K. Where the federal comment objects to issuance of the permit or requires the imposition of permit conditions to avoid adverse effects on federally-listed species or designated critical habitat, the State is precluded from issuing the permit unless it has taken the steps required by the federal comment.

L. The State will evaluate the federal comments regarding effects on federally-listed endangered and threatened species or designated critical habitat. If the NJDEPE agrees with the federal comments, it will implement them as part of its permit action. If the State disagrees with the assessment of such effects, the State will provide a written response within 20 days of receipt of the federal comment to EPA explaining its position and providing any supporting information or documentation. EPA will provide the State's response to the Service.

M. If the State does not agree to take actions specified by the Service to avoid adverse effects to federally-listed species or designated critical habitat, the Service will make a finding as to whether the proposed permitting action is likely to jeopardize the continued existence of the federally-listed species, adversely modify or destroy designated critical habitat, or result in the incidental take of federally-listed species. The Service may also include in its finding appropriate terms and conditions to minimize or avoid adverse effects to the listed species, or discretionary recommendations regarding the development of information or other measures relating to the conservation of federally-listed species. The Service will provide a draft of the finding to EPA when requested.

N. The Service will issue a finding to EPA within 45 days of receipt of the State's response under paragraph III.L.. In the event that EPA submits comments to the Service on the draft finding within 10 days of the deadline for issuing the finding, the Service shall be provided an automatic 10 day extension on the deadline. Based on consideration of the Service's finding, EPA's decision shall ensure that a State permit is issued only if it is not likely to jeopardize the continued existence of federally-listed species or result in the destruction or adverse modification of designated critical habitat, and if it avoids or minimizes incidental take of federally-listed species. In making this decision, EPA shall give the same weight to the finding provided by the Service under paragraph III.M. as an action agency would in the context of a

biological opinion issued by the Service under Section 7 of the ESA. EPA shall notify the Service of its final decision on the action. EPA will reaffirm, modify or withdraw its objection to the State permit, within the time-frames contained in 40 C.F.R. Part 233.50.

O. In the event that the NJDEPE neither satisfies the EPA's objections or requirements for a permit condition (as determined under paragraph III.N.) nor denies the permit, the permit application will be transferred to the Corps for processing pursuant to 40 CFR Part 233.50(j).

## IV. INTERAGENCY COORDINATION

A. Notwithstanding any other provision of this MOA, the EPA, NJDEPE, and Service may interact informally throughout this process. In addition, joint meetings between the EPA, the NJDEPE, the Service, and the applicant may be conducted in an attempt to reach agreement on a permit application with regard to the protection of federally-listed species or designated critical habitat if requested by any affected party.

B. The current list of municipalities where federally-listed species and designated critical habitat are documented to occur is attached to this MOA. The list of municipalities will be updated every six months based on information received by any of the signatory agencies, or as new species or critical habitat are listed or designated, respectively, pursuant to Section 4 of the ESA.

C. The Service will be responsible for notifying the EPA and the NJDEPE of any changes in status of federally-listed species and designated critical habitat, including proposals for listing, listings, and de-listings.

D. The State or EPA, as appropriate lead enforcement action agency pursuant to the EPA/NJDEPE MOA, will notify the Service at the onset of an enforcement action related to any violation under the State-assumed Section 404 program in municipalities where federally-listed species or designated critical habitat are documented to occur. Within 30 days of such notification, the Service will advise the State, or EPA as appropriate, of any adverse effects on federally-listed species or designated critical habitat resulting from the violation and provide advice on appropriate remedial measures.

E. To the extent practicable and appropriate under applicable Federal regulations, the Service and EPA will assist the State in implementation of the State-assumed Section 404 program, including (but not limited to) making appropriate personnel available for litigation assistance.

V. GENERAL PROVISIONS

A. The policy and procedures contained in this Agreement do not create any rights, either substantive or procedural, enforceable by any party.

B. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or the enforceability of the NJFWPA, the ESA, or the CWA.

C. Nothing in this MOA shall be construed as obligating the signatory agencies to the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack statutory authority.

D. All time frames may be adjusted by agreement of the parties.

E. Nothing in this MOA authorizes any take of federally-listed threatened or endangered species.

VI. SIGNATURES

U.S. Fish and Wildlife Service

Ronald E. Lambertson
Regional Director, Region 5

Date: 12-22-93

U.S. Environmental Protection Agency

William J. Muszynski
Acting Regional Administrator, Region II

Date: 12-22-93

New Jersey Department of Environmental Protection and Energy

Jerome M. Fitz
Acting Commissioner, NJDEPE

Date: December 22, 1993



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