

# **APPENDIX Q**

## **ENVIRONMENTAL COMPLIANCE**

## **6.8 CONSISTENCY WITH OTHER STATE AND FEDERAL LAWS**

This EIS has been prepared to satisfy the requirements of all applicable environmental laws and regulations and has been prepared using the Council on Environmental Quality (CEQ) NEPA regulations (40 CFR Part 1500–1508) and the USACE’s regulation ER 200-2-2 - Environmental Quality: Policy and Procedures for Implementing NEPA, 33 CFR 230. In implementing the Recommended Plan, USACE would follow provisions of all applicable laws, regulations, and policies related to the proposed actions. The following sections present brief summaries of Federal environmental laws, regulations, and coordination requirements applicable to this EIS.

### **6.8.1 Clean Air Act**

Air emission analysis resulting from construction of the TSP have been calculated; the analysis is presented in Appendix P. The TSP Rockaway reach is located in the New York-N. New Jersey-Long Island-Connecticut Non-Attainment Area (NAA)). Construction of the TSP in this area would result in emissions above the *de minimis* threshold for nonattainment pollutants and thus a General Conformity Determination is required, and has been provided in Appendix P.

Air emissions from the operation of internal combustion engines that produce exhaust result in Greenhouse Gas (GHG) emissions that could contribute to global climate change. The CEQ published “Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions”, December 18, 2014. The Draft Guidance suggests that the impacts of projects directly emitting GHG in excess of 25,000 metric tons or more of carbon dioxide (CO<sub>2</sub>)-equivalent (CO<sub>2</sub>e) GHG emissions per year be considered in a qualitative and quantitative manner in NEPA reporting; however, there are no implementing regulations to direct development of these analyses for Federal projects. Analyses of GHG emissions are provided, as required, in the DGRR/EIS. .

### **6.8.2 Clean Water Act**

Clean Water Act Section 404 of the CWA regulates dredge-and/or-fill activities in waters of the U.S. In New York, Section 401 of the CWA (State Water Quality Certification Program) is regulated by the NYSDEC. Compliance will be achieved through coordination of the EIS with NYSDEC to obtain water quality certification for the TSP. Coordination includes an evaluation of the TSP based on the Section 404(b)(1) Guidelines as presented in Appendix R.

Submittal of this EIS to NYSDEC initiates USACE’s requested Section 401 State Water Quality Certification for the TSP. USACE has determined that construction and operation of the TSP will not violate water quality standards. The proposed alignment of the Rockaway Atlantic Ocean CSRM, Inlet Barrier, and burrow area has been located to minimize, to the greatest extent

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practicable, impacts on the Rockaway shoreline and to avoid and minimize impacts on the aquatic ecosystem in Jamaica Bay and Atlantic Ocean. The TSP is the least environmentally damaging practicable alternative; overall, the TSP provides protection from coastal storms that would otherwise damage the environment to a far greater degree than the No Action Alternative.

### **6.8.3 USFWS Section 7 Consultation**

USACE has prepared a draft Biological Assessment (BA) to describe the TSP study area, Federally-listed threatened and endangered species of potential occurrence in the study area as identified by USFWS, and potential impacts of the TSP on these protected species—in particular: piping plover and red knot. The draft BA is presented in the DGRR/EIS in Appendix J.

Submittal of this EIS to USFWS initiates USACE’s requested Section 7 consultation for the TSP. The EIS will document the consultation process, USFWS’s determinations for protected species, and any mitigation of significant impacts required by USACE for the TSP.

A Not Likely to Adversely Affect (NLAA) determination has been prepared for those aquatic species under the jurisdiction of NOAA NMFS for the Atlantic Shoreline Planning Reach of the project, which is provided in Appendix J. The Jamaica Bay Planning Reach consultation is deferred until such time sufficient detail of the recommended plan or selected alternative is available for analyses.

### **6.8.4 Magnuson-Stevens Fishery Conservation and Management Act**

The Magnuson-Stevens Fishery Conservation and Management Act (PL 94-265), as amended, establishes procedures for identifying Essential Fish Habitat (EFH) and required interagency coordination to further the conservation of Federally-managed fisheries. Its implementing regulations specify that any Federal agency that authorizes, funds, or undertakes, or proposes to authorize, fund, or undertake, an activity that could adversely affect EFH is subject to the consultation provisions of the Act and identifies consultation requirements. EFH consists of those habitats necessary for spawning, breeding, feeding, or growth to maturity of species managed by Regional Fishery Management Councils in a series of Fishery Management Plans.

Submittal of this EIS to National Marine Fisheries Service (NMFS) initiates EFH consultation between USACE and NMFS. It contains an assessment of impacts on EFH in Appendix K Essential Fish Habitat (EFH) Impacts. Direct and indirect impacts associated with the Rockaway Atlantic Ocean reach CSRM Plan would result from dredging offshore in the borrow site; construction of groins, seawalls, and the Inlet Barrier; and beach fill placement in the intertidal zone and nearshore. As a result of sand removal (suction dredging) and placement of the material, the most immediate, indirect effect on EFH areas would be the loss of benthic

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invertebrate prey species. Small motile and sedentary epifaunal species (*e.g.*, small crabs, snails, tube-dwelling amphipods), and all infaunal species (*e.g.*, polychaetes), would be most vulnerable to suction dredging and burial. In total, the TSP would permanently impact approximately 110 acres of habitat including subtidal bottom, intertidal mudflats and wetlands, beach, and dune ecotypes.

USACE plans to conduct a biological monitoring program (BMP) to evaluate the effects of dredging clean sand for flood control/shoreline stabilization construction activities for five years, similar to the plan accepted for Long Beach Island Hurricane and Storm Damage Reduction project. The offshore area to be evaluated is the borrow area and it will be compared to the 1994 data collected as well as comparing the data to East Rockaway benthic data. The offshore and nearshore components will focus on benthic infauna, grain size, and water quality.

The District will notify NMFS prior to commencement of each dredging event prior to the solicitation of bids to ensure the EFH conservation recommendations remain valid. The District will also report annually to NMFS the areas of area dredged including volumes and depths removed. Surf clam surveys would be conducted prior to construction so that areas of high densities can be identified and avoided. Copies of the survey results will be provided to NMFS. Implementation of the selected plan will have an overall beneficial effect on existing shellfish and macroinvertebrate species, as well as some finfish species. Therefore, the TSP will not cause any significant adverse effects to EFH or EFH species.

### **6.8.5 Coastal Zone Management Act**

Under the New York State Coastal Management Program (NYCMP), enacted under the Coastal Zone Management Act in 1972, the NY Department of State (NYDOS) reviews Federal activities to determine whether they are consistent with the policies of the NYCMP. The waterward boundary extends 3 miles into open ocean, to shared state lines in Long Island Sound and the New York Bight and to the International boundary in the Great Lakes, Niagara and St. Lawrence Rivers. Generally, the inland boundary is approximately 1,000 feet from the shoreline following well-defined features such as roads, railroads or shorelines. In urbanized and other developed locations along the coast, the landward boundary is approximately 500 feet from the shoreline or less than 500 feet at locations where a major roadway or railway line runs parallel to the shoreline. The seaward boundary of New York State's coastal area includes all coastal waters within its territorial jurisdiction.

USACE has prepared a Consistency Determination that evaluates the TSP for consistency with the NYCMP; it is provided in the DGRR/EIS Appendix N. USACE has concluded that the TSP is consistent to the maximum extent practicable with the enforceable policies of the NYSDOS Coastal Zone Management (CZM) program.

### **6.8.6 Fish and Wildlife Coordination Act**

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The Fish and Wildlife Coordination Act provides for consultation with the USFWS and, in New York, with NYSDEC whenever the waters or channel of a body of water are modified by a department or agency of the U.S.

Submittal of this EIS initiates coordination with both USFWS and NYSDEC. As previously described under the Endangered Species Act and the Clean Water Act headings, the EIS contains information regarding impacts associated with implementing the TSP on protected species and regulated waters. USACE anticipates receiving draft recommendations from USFWS through the Section 7 consultation process and NYSDEC through the Section 401 certification process. Additionally, NYSDEC may also provide recommendations regarding State-listed threatened, endangered, and special concern wildlife species identified under the NY Natural Heritage Program. USACE will incorporate these into the EIS impact evaluations and implementation recommendations.

### **6.8.7 Marine Mammal Protection Act of 1972**

The Marine Mammal Protection Act was passed in 1972 and amended through 1997. It is intended to conserve and protect marine mammals and establish the Marine Mammal Commission, the International Dolphin Conservation Program, and a Marine Mammal Health and Stranding Response Program.

Section 6.8.7 of the EIS identifies negligible impacts on threatened and endangered sea turtles and marine mammals during temporary construction activities for the Atlantic Shoreline Planning Reach of the TSP.

### **6.8.8 National Historic Preservation Act**

Compliance with the National Historic Preservation Act of 1966, as amended (54 U.S.C. § 306108), requires the consideration of effects of the undertaking on all historic properties in the project area and development of mitigation measures for those adversely affected properties in coordination with the NY SHPO and the Advisory Council on Historic Preservation.

USACE has initiated Section 106 consultation with the NY SHPO and selected Native American Tribes. Copies of Section 106 consultation letters are provided in the DGRR/EIS Appendix L. Additionally, USACE anticipates executing a Programmatic Agreement among USACE, the NY SHPO, and non-Federal implementation sponsors to address the identification and discovery of cultural resources that may occur during the construction and maintenance of proposed or existing facilities. USACE will also invite the ACHP and Native American Tribes to participate as signatories to the anticipated Programmatic Agreement.

### **6.8.9 Federal Water Project Recreation Act**

This 1995 Act requires consideration of opportunities for outdoor recreation and fish and wildlife enhancement in planning water-resource projects. The TSP is not expected to have any long-term effects on outdoor recreation opportunities in the area.

#### **6.8.10 Farmland Protection Policy Act of 1981 and the CEQ Memorandum Prime and Unique Farmlands**

In 1980, the CEQ issued an Environmental Statement Memorandum “Prime and Unique Agricultural Lands” as a supplement to the NEPA procedures. Additionally, the Farmland Protection Policy Act, passed in 1981, requires Federal agencies to evaluate the impacts of Federally funded projects that may convert farmlands to nonagricultural uses and to consider alternative actions that would reduce adverse effects of the conversion. The TSP will not impact prime or unique farmlands identified by the Natural Resource Conservation Service or NYSDEC, as identified in Section 6.8.10 in the DGRR/EIS.

#### **6.8.11 Executive Order 11988, Floodplain Management**

This Executive Order (EO) directs Federal agencies to evaluate the potential effects of proposed actions on floodplains. Such actions should not be undertaken that directly or indirectly induce growth in the floodplain unless there is no practicable alternative. The Water Resources Council Floodplain Management Guidelines for implementation of EO 11988, as referenced in USACE ER 1165-2-26, require an eight-step process that agencies should carry out as part of their decision making on projects that have potential impacts on or within the floodplain. The eight step assessment, presented in Section 6.8.11 of the DGRR/EIS, concludes that all practicable alternatives have been considered in developing the TSP, and that the main Federal objective of reducing coastal flood risk cannot be achieved by alternatives outside the floodplain. Additionally, USACE has determined that the TSP does not induce direct or indirect floodplain development within the base floodplain.

#### **6.8.12 Executive Order 11990, Protection of Wetlands**

This EO directs Federal agencies to avoid undertaking or assisting in new construction located in wetlands, unless no practicable alternative is available. Construction of the TSP would result in the conversion of approximately 7.5 acres of intertidal mudflats, 0.4 acres of non-native wetlands, and approximately 35 acres of subtidal bottom. All practicable measures have been taken to minimize the loss of wetlands. Alternatives to avoid the loss of wetlands were evaluated, and the CSR elements were carefully located to minimize the loss. Additionally, the TSP will effectively protect existing wetlands from damage caused by coastal storms; this protection would not be afforded by the No Action Alternative. However, through consultation with other Federal, State and local agencies, as well as public comment, USACE will review the alignment of the TSP to determine if impacts may be minimized further, and a record of this communication will be presented in the EIS.

### **6.8.13 Coastal Barrier Improvement Act of 1990**

This act is intended to protect fish and wildlife resources and habitat, prevent loss of human life, and preclude the expenditure of Federal funds that may induce development on coastal barrier islands and adjacent nearshore areas. The Coastal Barrier Improvement Act (CBIA) of 1990 was enacted to reauthorize the Coastal Barrier Resources Act (CBRA) of 1982. The western portion of Rockaway Peninsula and all of Jamaica Bay are located within the designated CBRA (Unit NY-60P) regulated under the Wetland Act of 1970 and Article 42 of New York Codes, Rules, and Regulations, Part 600.2.

USACE has determined that the National Park Service has local jurisdiction of the CBRA Unit. Additional, USACE has determined that construction and operation of the TSP in this CBRA Unit is permitted by and consistent with NPS rules in this CBRA Unit. Accordingly, no further coordination under the CBIA or CBRA is necessary.

### **6.8.14 Executive Order 12898, Environmental Justice**

This EO directs Federal agencies to determine whether the Preferred Alternative would have a disproportionate adverse impact on minority or low-income population groups within the project area. Based on a demographic analysis of the study area presented in the DGRR/EIS Section 6.8.14 and findings of an environmental justice review, the TSP would not have a disproportionately high and adverse impact on any low-income or minority population. USACE has determined that the TSP will provide short- and long-term benefits to disappropriated populations by protecting infrastructure resources (e.g. housing, transportation, commercial/retail/recreational facilities) from damage caused by coastal storms.

### **6.8.15 Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds and the Migratory Bird Treaty Act**

This is what the coordination report is supposed to do, we don't need to list all species

The Migratory Birds and the Migratory Bird Treaty Act (MBTA) of 1918 (as amended) extends Federal protection to migratory bird species. Among other activities, nonregulated "take" of migratory birds is prohibited under this Act in a manner similar to the ESA prohibition of "take" of threatened and endangered species. Additionally, EO 13186 "Responsibilities of Federal Agencies to Protect Migratory Birds" requires Federal agencies to assess and consider potential effects of their actions on migratory birds Section 6.8.15(including, but not limited to, cranes, ducks, geese, shorebirds, hawks, and songbirds).

Under the USFWS Section 7 consultation process, USFWS will prepare a Draft Fish and Wildlife Coordination Act Report (DFWCAR); it will be included in the DGRR/EIS (Appendix O). The Draft FWCAR will provide draft conservation recommendations for specific species;

USACE will incorporate these into the EIS impact evaluations and implementation recommendations for avoiding and minimizing impacts to migratory birds and their nests from construction and operation of the TSP.

#### **6.8.16 Executive Order 13045, Protection of Children from Environmental and Safety Risks**

This EO requires Federal agencies to make it a high priority to identify and assess environmental health and safety risks that may disproportionately affect children and to ensure that policies, programs, activities, and standards address these risks. This report has evaluated the potential for the TSP to increase these risks to children, and it has been determined that children in the project areas would not likely experience any adverse effects from the TSP.