

**APPENDIX E**

**PRELIMINARY DRAFT  
PROGRAMMATIC AGREEMENT**

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AGREEMENT  
AMONG  
THE UNITED STATES ARMY CORPS OF ENGINEERS,  
THE NEW YORK STATE HISTORIC PRESERVATION OFFICE,  
THE NATIONAL PARK SERVICE,  
AND  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION  
REGARDING  
THE FIRE ISLAND to MONTAUK POINT, NEW YORK  
GENERAL RE-EVALUATION STUDY**

WHEREAS, the US Army Corps of Engineers, New York District (District) is proposing to undertake measures to reduce coastal storm damages and minimize impact along the Atlantic Coast from Fire Island to Montauk Point and the backbay and mainland areas along Great South, Shinnecock and Moriches Bays (Project); and

WHEREAS, the Fire Island Inlet to Montauk Point, New York, Combined Beach Erosion Control and Hurricane Protection Project was authorized by the River and Harbor Act of 14 July 1960, and subsequently modified in accordance with Section 103 of the River and Harbor Act of 12 October 1962, Section 31 of the Water Resources Development Act of 1974, Section 156 of the Water Resources Development Act of 1976, and Section 502 of the Water Resources Development Act of 1986 (P.L. 99-662), and the Water Resources Development Acts of 1992 and 1999, to vary cost-sharing and periodic nourishment; and

WHEREAS, the New York State Department of Environmental Conservation is the non-federal sponsor; and

WHEREAS, the Project consists of the continuation of authorized inlet navigation projects, including ebb shoal dredging, and placement of dunes and berms; non-structural measures for residential/non-residential structures consisting of wet/dry floodproofing, relocations, and acquisitions/demolitions; road-raising, breach response along the barrier islands; beach and dune fill with renourishment every four years for up to thirty years; modifications (tapering or shortening) of existing groins; and the restoration of coastal process features and habitat restoration; and

WHEREAS, the Area(s) of Potential Effect include the offshore borrow sites, the nearshore sand placement and groin modification areas, the mainland locations for non-structural measures, and the location of the coastal process features and habitat restoration sites (Figure 1); and

WHEREAS, the continuation of the current inlet management, including the dredging of the ebb-shoal and its placement on the adjacent shoreline and the modifications (tapering or shortening) of existing groins will not have an adverse effect on historic properties; and

WHEREAS, the Breach Response Plan has a process for coordination with the New York State Office of Parks, Recreation and Historic Preservation, which serves as the New York State Historic Preservation Office (NYSHPO), and other interested parties incorporated into the response plan; and

WHEREAS, the Fire Island Light Station Historic District, the Beach Road Historic District, the Canoe Place Historic District, the Remsenberg Historic District, the East

Quogue Historic District, the Quogue Historic District, William Floyd Estate and a number of other properties have been listed, determined to be eligible or are potentially eligible for the National Register of Historic Places (Appendix A); and

WHEREAS, pursuant to 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108), the District has determined that implementation of the Project will have the potential to cause adverse effects on properties listed in or eligible for listing in the National Register of Historic Places (NRHP) 800.16(m); and

WHEREAS, the District is notifying the Advisory Council on Historic Preservation (ACHP) of the potential for the Undertakings to affect historic properties and that a programmatic agreement will be prepared; and

WHEREAS, the District will consult with the NYSHPO, the Shinnecock Indian Nation, the Unkechaug Indian Nation, the Fire Island National Seashore, National Park Service, and municipal and county historic societies, and other appropriate consulting parties to define efficient and cost effective processes for taking into consideration the effects of the Undertakings upon historic properties; and

WHEREAS, the District will involve the general public through the National Environmental Policy Act (NEPA) process, which affords all persons, organizations, and government agencies the right to review and comment on proposed major federal actions that are evaluated by a NEPA document and participate in public meetings during the review of the feasibility report; and

NOW, THEREFORE, the District, NYSHPO, and ACHP agree that the Undertakings shall be implemented in accordance with the following stipulations in order to take into account the effects of the Undertakings on historic properties.

#### STIPULATIONS

##### I. BEACH FILL - NEAR SHORE/TIDAL ZONE

- A. The District shall conduct a remote sensing survey(s) of all areas with the beach fill and placement APE that were not previously surveyed, or have not been previously disturbed by the placement of sand, or in which sand will be placed and for which the limit of fill will extend into the near shore area.
- B. The District shall evaluate the targets identified by this remote sensing survey(s) as potential resources to determine if they are cultural resources. If determined to be cultural resources, an assessment of the integrity of the sites and their historic significance, in accordance with the eligibility criteria of the National Register of Historic Places, will be conducted. Following that evaluation a determination will be made regarding the effect the Project will have on any items determine to be eligible for the National Register and the need for further investigation.
- C. The District will coordinate these investigations of the near shore/tidal zone with the NYSHPO, the FIIS, the Shinnecock Indian Nation, the Unkechaug Indian Nation, and other interested parties and resolve any adverse effects in accordance with Stipulation X below.

## II. BEACH FILL - BORROW AREA INVESTIGATIONS

- A. A remote sensing (magnetometer and side scan sonar survey) of any borrow areas not previously surveyed will be conducted to identify any potential cultural resources. In addition, cores for any borrow areas not previously surveyed will be examined to determine the potential for the recovery of buried landsurfaces.
- B. If a cultural resource(s) is identified, the District will designate a buffer zone around each potential resource, as determined by the nature of the anomaly/return. Buffer zone(s) shall be clearly delineated on construction plans. No construction activities, including the removal of sand, anchoring, etc., that could potentially impact the wrecks will occur within the designated buffer zones.
- C. Should targets and/or anomalies be identified, they will be avoided through the use of buffer zones as identified in Stipulation II.B above.
- D. If any targets and/or anomalies cannot be avoided, the District will consult with the NYSHPO and other relevant signatories and other consulting parties to consider alternatives and determine the level of additional investigations (diving, documentation, additional reconnaissance diving, Phase II survey, etc.) are required.
- E. The results of any investigations will be coordinated with the NYSHPO and other signatories and consulting parties.
- F. If the anomalies/targets are determined to represent a historic property, the District in coordination with the NYSHPO and other relevant signatories and interested parties will determine alternatives including avoidance, data recovery through underwater archaeological investigations, and documentation. The District will resolve adverse effects to historic properties in accordance with Stipulation IV below.

## III. NON-STRUCTURAL MEASURES AND ROAD RAISINGS

- A. Non-structural measures include building retrofits, flood proofing, relocation, and acquisition/demolition. The District will identify the properties to be acquired/demolished, flood-proofed and/or relocated and determine, in coordination and consultation with the NYSHPO, and other relevant signatories and interested parties, if these properties are eligible for the National Register. As part of these investigations, the District will ensure the New York State structure form is completed. As part of these investigations, the District will also determine if archaeological survey(s) are required. The District will document the results of each properties determination of eligibility.
- B. The District will determine if any historic properties will be effected by the proposed road raisings. The District will document the results of any investigations and provide them for review to the NYSHPO, the Shinnecock Indian Nation, the Unkechaug Indian Nation, property owners and any other relevant interested party.
- C. If a property is determined to be eligible for the National Register, the District will consult with the NYSHPO, relevant signatories and interested parties to resolve the adverse effects in accordance with Stipulation IV.

- D. Archaeological investigations associated with non-structural measures, if required, should be a part of any treatment plan identified as part of the resolution of adverse effects in accordance with Stipulation IV.

#### IV. COASTAL PROCESS FEATURES

- A. The District will determine, in coordination and consultation with the NYSHPO, the Shinnecock Indian Nation, the Unkechaug Indian Nation, and other relevant signatories and interested parties, what investigations are necessary to determine if the construction of any coastal process features would have an adverse effect on historic properties. The District would carry out investigations, as necessary, to identify historic properties, determine the proposed features effect.
- B. The District will document the results of any investigations and provide them for review to the NYSHPO, Shinnecock Indian Nation, the Unkechaug Indian Nation and other relevant signatories and interested parties.
- C. If a property is determined to be eligible for the National Register, the District will consult with the NYSHPO, relevant signatories and interested parties to resolve the adverse effects in accordance with Stipulation IV.

#### V. RESOLUTION OF ADVERSE EFFECTS

- A. The District shall continue consultation with the NYSHPO, FIIS, the Shinnecock Indian Nation, the Unkechaug Indian Nation, and other signatories and consulting parties, as appropriate, pursuant to 36 CFR Part 800.6 to avoid, minimize or mitigate adverse effects to historic properties.
- B. The District shall notify the NYSHPO and other relevant signatories, property owners and consulting parties and provide documentation regarding the identification and evaluation of the historic properties. The District will work with the NYSHPO, other relevant signatories, property owners, etc. to determine how best to resolve any adverse effects and document the proposed resolution.
- C. Once there is agreement on how the adverse effects will be resolved, the District shall prepare treatment plan that will identify the activities to be implemented that will resolve the adverse effects. The treatment plan will be provided for review and comment prior to implementation.
- D. Should the District, NYSHPO, and the relevant signatories disagree on how the adverse effects will be resolved, the District shall seek to resolve such objection through consultation in accordance with procedures outlined in Stipulation X.

#### VI. PUBLIC INVOLVEMENT AND OUTREACH

- A. The District shall inform the public of the existence of this PA and the District's plan for meeting the stipulations of the PA. Copies of this agreement and relevant documentation prepared pursuant to the terms of this PA shall be made available for public inspection. Information regarding the specific locations of terrestrial and submerged archaeological sites, including potential wreck areas, will be withheld in accordance with the Freedom of Information Act and National Register Bulletin No. 29, if it appears that this information could jeopardize archaeological sites. Any comments received from the public related to the

activities identified by this PA shall be taken into account by the District.

- B. The District shall develop, in coordination with the NYSHPO, the FIIS, and other interested parties, publically accessible information about the cultural resources and historic properties investigations for the Undertaking in the form of brief publication(s), exhibit(s), or website.

## VII. CURATION

- A. The District shall ensure that all collections resulting from the identification and evaluation of surveys, data recovery operations, or other investigations pursuant to this PA are maintained in accordance with 36 CFR Part 79 until the collection is turned over to the landowner or other entity. Minimally, the District will ensure that analysis is complete and the final report(s) are produced and accepted by the NYSHPO.
- B. The District shall be responsible for consulting with landowners regarding the curation of collections resulting from archaeological surveys, data recovery operations, or other studies and activities pursuant to this agreement. The District shall coordinate the return of collections to non-federal landowners. If landowners wish to donate the collection, the District, in coordination with the NYSHPO, the FIIS, and others to determine an appropriate entity to take control of the collection.
- C. The District shall be responsible for the preparation of federally-owned collections and the associated records and non-federal collections donated for curation in accordance with the standards of the curation facility.

## VIII. UNANTICIPATED DISCOVERY

- A. The following language shall be included in construction plans and specifications:

“When a previously identified cultural resource, including but not limited to archaeological sites, shipwrecks and the remains of ships and/or boats, standing structures, and properties of traditional religious and cultural significance to the Shinnecock Indian Nation are discovered during the execution of the Project, the individual(s) who made the discovery shall immediately secure the vicinity and make a reasonable effort to avoid or minimize harm to the resource, and notify the Project’s Contracting Officer’s Representative (COR) and the District. All activities shall cease within a minimum of 50 feet from the inadvertent discovery (50-foot radius ‘no work’ buffer) until authorized by the District and the Project COR.

- B. If previously unidentified and unanticipated properties are discovered during Project activities, the District shall cease all work in the vicinity of the discovery until it can be evaluated in accordance with 36 CFR Part 800.13 “Post Review Discoveries”. Upon notification of an unanticipated discovery, the District shall implement any additional reasonable measures to avoid or minimize effects to the resource. Any previously unidentified cultural resource will be treated as though it is eligible for the NRHP until such other determination may be made.
- C. The District shall immediately notify the NYSHPO, the FIIS and the signatories, and additional interested or consulting parties as appropriate, within 48 hours of the finding and request consultation to resolve potential adverse effects.

1. If the District, NYSHPO, and the signatories agree that the cultural resource is not eligible for the NRHP, then the suspension of work in the area of the discovery will end.
2. If the District, NYSHPO, and the signatories agree that the cultural resource is eligible for the NRHP, then the suspension of work will continue, and the District, in consultation with the NYSHPO and the signatories, will determine the actions to avoid, minimize, or mitigate adverse effects to the historic property and will ensure that the appropriate actions are carried out.
3. If the District, the NYSHPO and the signatories cannot agree on the appropriate course of action to address an unanticipated discovery or effects situation, then the District shall initiate the dispute resolution process set forth in Stipulation VIII.C below.

#### IX. DISCOVERY OF HUMAN REMAINS

1. If any human remains and/or grave-associated artifacts are encountered during any of the investigations, including data recovery, the District follow the NYSHPO Human Remains Discovery Protocol (2008; Appendix D) and, as appropriate, develop a treatment plan for human remains that is responsive to the Council's Policy Statement on Human Remains" (September 27, 1988), the Native American Graves Protection and Repatriation Act (PL 101-601) and , US Army Corps of Engineers, Policy Guidance Letter No. 57 (1998) Indian Sovereignty and Government-to-Government Relations with Indian Tribes.
2. The following language shall be included in the construction plans and specifications:

“When human remains, suspected human remains, or indications of a burial are discovered during the execution of a Project, the individual(s) who made the discovery shall immediately notify the local law enforcement, coroner/medical examiner, and the Project COR and the District, and make a reasonable effort to protect the remains from any harm. The human remains shall not be touched, moved or further disturbed. All activities shall cease within a minimum of 50 feet from the area of the find (50-foot radius ‘no work’ buffer) until authorized by the District.”

#### X. PROFESSIONAL QUALIFICATIONS AND STANDARDS

- A. The District shall ensure that qualified professionals meeting the National Park Service professional qualifications for the appropriate discipline [National Park Service Professional Qualification Standards, Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44738-39)] are used to complete all identification and evaluation plans related to this undertaking, to include remote sensing surveys, underwater investigations, historic structure inventory and documentation.
- B. All historic structures surveys carried out pursuant to this PA will be undertaken in accordance with the standards and guidelines of the NYSHPO and the Secretary of the Interior's *Standards for the Treatment of Historic Properties* (36 CFR Part 68).
- C. All archaeological investigations carried out pursuant to this PA will be undertaken in accordance with the New York State Archaeological Council's Standards for Cultural Resource Investigations and the Curation of Archaeological Collections in New Yorik State

(1994) and Cultural Resources Standards Handbook (2000), the NYSHPO Archaeological Report Format Requirements (2005), and the Secretary of the Interior's *Standards for the Treatment of Historic Properties* (36 CFR Part 68).

## X. ADMINISTRATIVE TERMS

### A. REPORTING

1. Each year following the execution of this PA until it expires or is terminated, the District shall provide the NYSHPO, FIIS, all signatories, and interested parties a summary report detailing work undertaken pursuant to this PA. This report will include any scheduling changes, problems encountered, project work completed, PA activities completed, and any objections and/or disputes received by the District in its efforts to carry out the terms of this PA.
2. Following authorization and appropriation, the District shall coordinate a meeting or equivalent with the signatories to be held annually on a mutually agreed upon date to evaluate the effectiveness of this PA and discuss activities carried out pursuant to this PA during the preceding year and activities scheduled for the upcoming year.

### B. REVIEW PERIODS

1. The District shall ensure that all draft and final reports resulting from action pursuant to this PA will be provided to the NYSHPO, Council, FIIS, the Shinnecock Indian Nation, the Unkechaug Indian Nation, and, upon request, to other interested parties.
2. The NYSHPO, Council, FIIS, the Shinnecock Indian Nation, Unkechaug Indian Nation, and any other interested party shall have 30 calendar days to review and/or object to determinations, evaluations, plans, reports and other documents submitted to them by the District.
3. Any comments and/or objections resulting from a review of any District determination, evaluations, plans, reports and other documents must be provided in writing to the District.
4. If comments, objections, etc., are not received within 30 calendar days, the District will assume concurrence with the subject determination, evaluation, plan, report or other document submitted.

### C. DISPUTE RESOLUTION

1. Should any signatory object in writing to the District object in writing to the District at any time to any actions proposed or the manner in which the terms of this PA are implemented, the District and the signatories shall attempt to resolve any disagreement arising from implementation of this PA.
2. If there is a determination that the disagreement cannot be resolved, the District shall forward all documentation relevant to the dispute to the Council and request the Council's recommendations or request the comments of the Council in accordance with 36 CFR

Part 800.7(c).

3. The Council shall provide the District with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Any Council recommendations or comments provided in response will be considered in accordance with 36 CFR Part 800.7(c), with reference only to the subject of the dispute. The District shall respond to Council recommendations or comments indicating how the District has taken the Council's recommendations or comments into account and complied with the Council's recommendations or comments prior to proceeding with the Undertaking activities that are the subject to dispute. Responsibility to carry out all other actions under this PA that are not the subject of the dispute will remain unchanged.
4. If the Council does not provide its advice regarding the dispute within the thirty (30) calendar day time period, the District may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, the District shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories to the PA, and provide them and the Council with a copy of such written response.

#### D. WITHDRAWAL AND TERMINATION

1. Any signatory may withdraw its participation in this PA by providing thirty (30) days advance written notification to all other signatories. In the event of withdrawal, any signatory to this PA may terminate it by providing 30 calendar days, written notice to the signatories. In the event of withdrawal, this PA will remain in effect for the remaining signatories.
2. This agreement may be terminated in accordance with 36 CFR Part 800, provided that the signatories consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. Any signatory requesting termination of this PA will provide thirty (30) days advance written notification to all other signatories.
3. In the event of termination, the District will comply with 36 CFR 800.4 through 800.6 with regard to individual undertakings covered by this Agreement.

#### E. DURATION AND SUNSET CLAUSE

1. This PA shall take effect upon execution by the District, the NYSHPO, and the signatories with the date of the final signature.
2. This PA will continue in full force and effect until the construction of the Undertaking is complete and all terms of this PA are met, unless the Undertaking is terminated or authorization is rescinded or a period of five years from execution of the PA has passed, at which time the agreement may be extended as written provided all signatories concur.

#### F. AMENDMENT

1. This PA may be amended upon agreement in writing by all signatories. Within thirty (30) days of a written request to the District, the District will facilitate consultation between the signatories regarding the proposed amendment.

2. Any amendments will be in writing and will be in effect on the date the amended PA is filed with the Council.

#### G. ANTI-DEFICIENCY ACT

All requirements set forth in this PA requiring expenditure of funds by the District are expressly subject to the availability of appropriations and the requirements of the Anti-Deficiency Act (31 U.S.C. 1341). No obligation undertaken by the District under the terms of this PA shall require or be interpreted to require a commitment to extend funds not appropriated for a particular purpose. If the District cannot perform any obligation set forth in this PA because of unavailability of funds that obligation must be renegotiated among the District and the signatories as necessary.

Execution and implementation of this PA evidences that the District has satisfied its Section 106 responsibilities for all individual undertakings of the Project, and has afforded the NYSHPO and the Council an opportunity to comment on the undertaking and its effects on historic properties.

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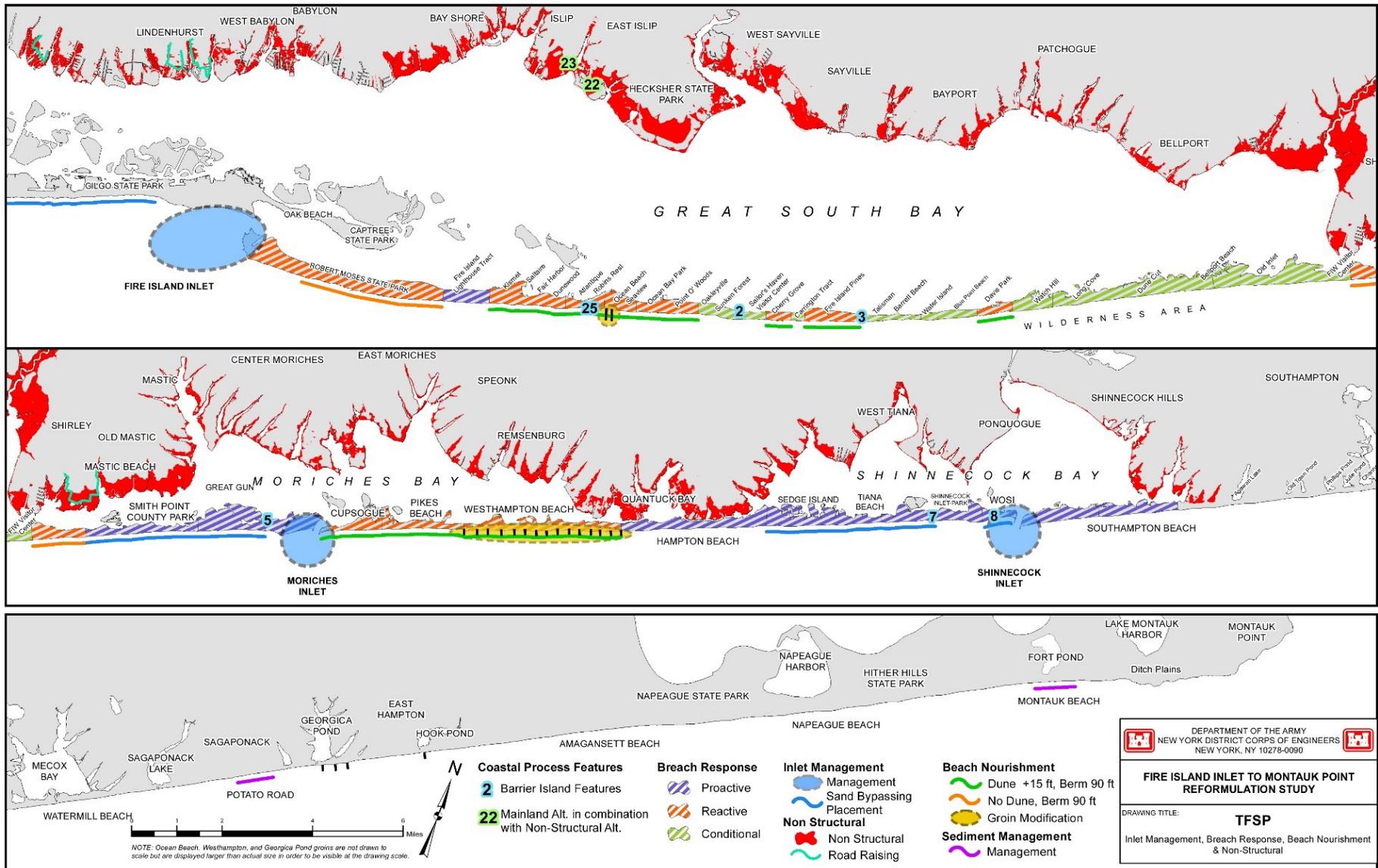


Figure 1: Area of Potential Effect for all elements of the proposed Project.