FINAL MOU – NMFS & FWS – June 14, 2012

Memorandum of Understanding

Between the

U.S. Department of Commerce
National Marine Fisheries Service

and

U.S. Department of the Interior
Fish and Wildlife Service

This Memorandum of Understanding (MOU) is entered into between the U.S. Department of Commerce National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) (hereinafter "the Parties").

I. Purpose and Scope

The purpose of this MOU, as required by Executive Order 13186 (66 FR 3853, January 17, 2001) (Executive Order), is to promote the conservation of migratory bird populations. This MOU focuses on avoiding, or where impacts cannot be avoided, minimizing to the extent practicable adverse impacts on migratory birds and strengthening migratory bird conservation through enhanced collaboration between NMFS and FWS by identifying general responsibilities of both agencies and specific areas of cooperation. Given NMFS' focus on marine resources and ecosystems, this MOU places an emphasis on seabirds, but does not exclude other taxonomic groups of migratory birds.

II. Authorities

This MOU is entered under the provisions of the following statutes and other authorities available to the Parties:

- Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d) (BGEPA);
- Endangered Species Act of 1973, as amended (16 U.S.C. §§ 1531-1544) (ESA);
- Executive Order 13112, Invasive Species, 1999 (64 FR 6183);
- Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 2001 (66 FR 3853);

- Fish and Wildlife Act of 1956, amended (16 U.S.C. §§ 791a *et seq.*);
- Fish and Wildlife Conservation Act of 1980, as amended (16 U.S.C. §§ 2901 *et seq.*);
- Fish and Wildlife Coordination Act of 1980, as amended (16 U.S.C. §§ 661 *et seq.*);
- Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§ 1801 *et seq.*) (MSA);
- Marine Mammal Protection Act (16 U.S.C. §§ 1361 *et seq.*)
- Migratory Bird Conservation Act of 1929, as amended (16 U.S.C. §§ 715 *et seq.*);
- Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712) (MBTA);
- National Aquaculture Act of 1980 (16 U.S.C. 2801 *et seq.*); and
- National Environmental Policy Act of 1969, as amended (42 U.S.C. §§ 4321-4347).

This MOU does not waive legal requirements under the MBTA, MSA, BGEPA, ESA, or any other statute and does not authorize the take of migratory birds. In addition, this MOU does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

III. Mission of Both Parties

NMFS

The mission of NMFS is the stewardship of living marine resources through science-based conservation and management and the promotion of healthy ecosystems.

NMFS is responsible for the management, conservation, and protection of many living marine resources within Federal waters. NMFS also plays a supportive and advisory role in the management of living marine resources in coastal areas under state jurisdiction, provides scientific and policy leadership in the international arena, and implements international conservation and management measures as appropriate.

Under this mission, the goal is to optimize the benefits of living marine resources to the Nation through sound science and management. This requires a balancing of multiple public needs and interests in the sustainable benefits and use of living marine resources, without compromising the long-term biological integrity of coastal and marine ecosystems.

Many factors, both natural and human-related, affect the status of fish stocks, protected species, and ecosystems. Although these factors cannot all be controlled, available scientific and management tools enable the agency to have a strong influence on many of them. Maintaining and improving the health and productivity of these species and ecosystems is the heart of NMFS' stewardship mission. These activities will maintain and enhance current and future opportunities for the sustainable use of living marine resources as well as the health and biodiversity of their ecosystems.

Seabirds are of interest to and are studied by NMFS. NMFS has a responsibility through various statutory authorities and agency policies to monitor, understand, and minimize the negative impacts of agency actions, including the agency's regulatory actions, on seabird populations, including seabird bycatch; monitor and understand the effects of seabird populations on ESA-listed fish species; and manage the coastal and marine habitats,including forage fish stocks, that both seabirds and other aquatic species depend on.

In 2001, the United States finalized its National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds) resulting in the establishment of NMFS' National Seabird Program (NSP). Focus areas for the NPOA-Seabirds and NSP include:

- *Seabird Bycatch:* Work to minimize the direct take of seabirds by fisheries (e.g., incidental catch or bycatch, gear entanglement) and understand the effects of seabird bycatch on marine ecosystems, including seabird populations, addressing both domestic and international fishery issues.

- *Seabirds as Valuable Ecosystem Indicators:* Seabird distribution and abundance can reflect physical and biological oceanographic changes, abundance and distribution of mid-trophic-level organisms, and the effects of climate change on apex predators. Further, contaminant levels in seabirds can provide insight into possible pollution events in particular ecosystems. And, unlike so many marine organisms, seabirds are relatively easy to sample. Because the state of the ecosystem directly affects the resources for which NMFS has management responsibility, ecosystem integrators and indicators such as seabirds are critical components of Integrated Ecosystem Assessments, which are developed by NMFS Office of Science Technology in coordination with Science Centers. These Integrated Ecosystem Assessments can advance the science of ecosystem management for NMFS.

NMFS has the responsibility to work with the Regional Fishery Management Councils established under the Magnuson-Stevens Act to produce fishery management plans (FMPs) for fisheries under federal jurisdiction in need of conservation and management. FMPs are approved and implemented by the Secretary of Commerce through NMFS. Conservation and management measures developed under the FMPs through the Regional Fishery Management Council process are measures that are required to rebuild, restore, or maintain the fishery resource and the marine environment.

The MOU will be implemented at national and regional levels, through existing agency infrastructure. The NSP resides in the Office of Science & Technology's Assessment & Monitoring Division and is led by a coordinator. The NSP Coordinator works with a steering committee and with seabird contacts in each of the NMFS regional offices, science centers, and headquarter offices to implement the NPOA-Seabirds, EO 13186 (including this MOU), and any other relevant statutes or agency policies. The Parties will call upon the Interagency Seabird Working Group (ISWG) to lead the coordination and implementation of such efforts.

FWS

As a Federal agency within the U.S. Department of the Interior, the mission of the FWS is to work with others to conserve, protect, manage, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. The FWS Migratory Bird Program serves as a focal point in the United States for policy development and strategic planning, program implementation, and evaluation of actions designed to conserve migratory birds and their habitats.

The FWS is legally mandated to implement the conservation provisions of the MBTA, which includes responsibilities for managing migratory bird populations, domestic and international coordination, and the development and enforcement of regulations that govern the take of migratory birds. The Migratory Bird Conservation Act and the Fish and Wildlife Coordination Act mandate migratory bird habitat conservation, protection through acquisition, enhancement, and/or management to avoid and minimize adverse impacts.

FWS programs that involve bird conservation activities include:

1. The Division of Migratory Bird Management and the Migratory Bird Programs in the FWS Regional Offices serve as focal points for policy development and strategic planning. These offices develop and implement monitoring and management initiatives that help maintain healthy populations of migratory birds and their habitats and provide continued opportunities for citizens to enjoy bird-related recreation.

2. The Division of Bird Habitat Conservation is instrumental in supporting habitat conservation partnerships through the administration of bird conservation grant programs and development of Joint Ventures that serve as major vehicles for implementing the various bird conservation plans across the country.

3. Ecological Services Field Offices across the country serve as the primary contacts for technical assistance and environmental reviews involving migratory bird issues. Field Offices work with the Regional Migratory Bird Offices, as necessary, regarding BGEPA or MBTA permits and overall migratory bird conservation.

4. The Office of Law Enforcement is the principal FWS program that enforces the legal provisions of the MBTA, BGEPA, ESA, and other laws pertaining to migratory bird conservation.

5. The National Wildlife Refuge System manages National Wildlife Refuges and Waterfowl Production Areas across the country, many of which were established to protect and conserve migratory birds. The National Wildlife Refuge System not only protects important bird habitat, but also focuses on monitoring migratory bird

populations and restoring and maintaining the biological diversity, integrity, and environmental health of native habitats.

IV. Statement of Mutual Benefits

NMFS and FWS have a well-established history of working collaboratively on seabird conservation activities and believe that the existence of an MOU can further strengthen this work. Although the FWS has primary responsibility for migratory birds in the United States, NMFS manages some human activities that affect migratory birds- primarily fishing activities in U.S. waters and in U.S. fisheries on the high seas. NMFS' activities and policies relate to ensuring the long-term sustainability of fisheries by taking into account habitat conservation issues and by making decisions based upon the best scientific information available. NMFS' policies and activities may therefore affect migratory birds—such as, seabirds and their prey.

FWS and NMFS agree that migratory birds are important components of biological diversity and that their conservation and management will help sustain ecological integrity. Furthermore, both Parties agree that migratory birds are important economically, and recreational activities associated with migratory birds contribute to the economic base of many communities. Both Parties will take this into consideration, to the extent practicable, when taking actions to avoid take or, to the extent take cannot be avoided, to minimize take of seabirds. Two important issues surrounding the conservation of migratory birds are: (1) the interaction between fishery operations and birds, especially seabirds; and (2) the maintenance of healthy habitats and prey populations for foraging and breeding seabirds.

This MOU provides a broad outline of collaborative and proactive ways to promote the conservation of migratory birds and avoid, or where take cannot be avoided, minimize to the extent practicable the potential measureable negative effects that NMFS actions may have on seabird populations.

The FWS and NMFS mutually agree that it is important to: (1) conserve migratory bird populations and their habitats; (2) recognize that actions taken to benefit some migratory bird populations may adversely affect other migratory bird populations; (3) recognize that actions that may provide long-term benefits to migratory bird populations may have short-term negative impacts on individual birds; (4) recognize that restoration of migratory bird populations and habitats can be a long-term endeavor and (5) recognize that in certain instances, recovery actions for ESA-listed fish species may include management of predation by seabirds.

Furthermore, the Parties mutually agree that it is important to contribute to migratory bird conservation through a variety of means, including but not limited to: (1) seabird bycatch reduction; (2) information sharing; (3) international policy and diplomacy; and (4) marine and terrestrial habitat conservation. This MOU highlights examples of general and specific responsibilities related to the areas listed above in which NMFS and FWS may collaboratively engage to further the objectives outlined in Section 3(e) of the Executive Order. It is in the

interest of both parties to assess potential direct and indirect impacts, and appropriately minimize those impacts that may have measurable negative effects on migratory bird populations.

V. General Responsibilities

The Parties agree that this MOU shall be implemented to the extent permitted by law and consistent with agency missions, subject to the availability of appropriations.

A. Responsibilities of Both Parties

1. Support the conservation intent of Executive Order 13186.
2. Identify where take reasonably attributable to NMFS actions may negatively affect migratory bird populations, focusing first on Species of Concern, and other regional priority habitats and key risk factors.
3. Identify best practices for: (i) avoiding, or where take cannot be avoided, minimizing to the extent practicable take of migratory birds; (ii) conserving and restoring migratory bird habitats; (iii) monitoring demographic parameters of migratory birds; (iv) standardizing data, where appropriate, collection to allow comparison of migratory bird data across studies; and (v) promoting bird conservation.
4. Promote training opportunities (e.g., workshops, outreach materials) for appropriate employees in the methods and techniques to: (i) inventory and monitor migratory birds; (ii) assess population status of migratory birds; (iii) assess temporal and spatial bird use of specific areas; (iv) evaluate impacts of projects on migratory birds; and (v) develop management and operational practices that avoid, or where impacts cannot be avoided, minimize to the extent practicable adverse impacts and promote beneficial proactive approaches to migratory bird conservation.
5. Develop partnerships to further migratory bird conservation, including prey resources, as practicable. This includes cooperation, coordination, and data sharing with other Federal or State agencies, the fishery management councils, the fishing industry, universities, and non-governmental organizations involved in monitoring and research and analytical studies to provide reliable and comparable information on the distribution and abundance or status and trends of migratory bird populations.
6. Participate in the interagency Council. The duties of the Council include the following:
    a. Sharing the latest resource information to assist in the conservation and management of migratory birds.
    b. Reporting annually on accomplishments and recommendations related to the Executive Order.
    c. Fostering partnerships to further the goals of the Executive Order.
    d. Selecting an annual recipient of the Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.
7. Work cooperatively with other partners to incorporate and implement migratory bird action plans or conservation strategies in management plans for Marine National Monuments that harbor migratory birds.

8. Develop and update, as appropriate, region-specific seabird conservation recommendations, priorities, and areas of concern.

B. Responsibilities of NMFS

1. Integrate migratory bird conservation principles, measures, and practices into NMFS activities and science and resource-management plans to outline measures and practices to avoid, or where take cannot be avoided, minimize to the extent practicable the take of migratory birds and adverse impacts on their habitats. NMFS will evaluate and revise these principles, measures, and practices to ensure that they are effective in minimizing, to the extent practicable, the negative effect of NMFS actions on migratory bird populations, given considerations for the protection and conservation of ESA-listed fish species.
2. Ensure to the extent practicable, that environmental analyses required by NEPA or other established environmental-review processes evaluate the effects of actions and agency plans on migratory birds (with an emphasis on seabirds) and their habitats, including estimating the level or extent of take of Species of Concern likely to result from the action.
3. Support efforts by FWS to promote the ecological, economic, and recreational values of migratory birds by encouraging outreach and educational activities and materials when appropriate.
4. Minimize or prevent the pollution or detrimental alteration of the environment used by migratory birds, as practicable.
5. Address as appropriate the potential introduction, establishment, and spread of non-native species that could result from agency actions.
6. Consult with FWS Regional Migratory Bird Offices to determine whether permits for intentional take of migratory birds pursuant to 50 CFR parts 10, 13, 21, and 22 are needed and report numbers taken under any such permits.

C. Responsibilities of FWS

1. Inform NMFS of any bird conservation updates or changes in policy that affect agency actions. These include:
   a. Revisions to the lists of Birds of Conservation Concern, threatened or endangered species, or the birds covered under the MBTA.
   b. Changes to the MBTA and other acts and associated regulations and procedures affecting management of migratory birds.
   c. Changes in, updates to, or additions to national and regional bird conservation plans.
2. Provide NMFS with information needed for NEPA or other environmental analyses to assess the effects of NMFS actions on populations of migratory birds, which could include the effects on seabirds from management actions implemented to control predation on ESA-listed fish species.

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3. Provide NMFS information regarding migratory bird population status and trends, at-sea-distribution data and observations, colonies, over-wintering areas, migration stopovers, significant changes in condition or availability of key food resources, and any other applicable information as it becomes available and upon request.
4. As information is available, identify important migratory bird areas and habitats (e.g., foraging, wintering, molting areas at sea) that NMFS should evaluate in its environmental reviews.

VI. Specific Areas of Collaboration and Cooperation

A. Seabird Bycatch Reduction

Section 316 of the MSA established the Bycatch Reduction Engineering Program. A major portion of this program is dedicated to addressing seabird bycatch issues through fishery management plans. Section 316(b) of the MSA authorizes the Secretary of Commerce and the Regional FMCs to establish through the fishery management plans a series of incentives to reduce total bycatch and seabirds interactions. In addition, Section 316(c) authorizes NMFS and FWS to undertake projects in cooperation with industry to improve information and technology to reduce seabird bycatch.

NMFS and FWS will continue to promote and implement the NPOA-Seabirds to obtain these objectives, and to assess the implementation of the NPOA-Seabirds and the seabird-bycatch-mitigation plans for individual fisheries to determine their effectiveness. This should be accomplished at the regional level through the Fishery Management Council (FMC) process, or the Atlantic Highly Migratory Species management process as appropriate, and by the FWS through research and/or analysis of existing data needed to assess and monitor seabird populations and to improve population-assessment methodologies. The ISWG should continue to collaborate on seabird-bycatch issues at both the national and international levels.

NMFS and FWS will:

1. As appropriate, use the NPOA-Seabirds and the FAO Best Practice Technical Guidelines for IPOA/NPOA-Seabirds and peer-reviewed results of current research to provide examples of methods that are effective at minimizing the unintentional take of seabirds in longline gear as well as other fishing gear (e.g. trawl and gillnet fisheries)
2. Identify priority areas/fisheries that may require further investigation regarding extent of interaction of fisheries with seabirds.
3. Develop a process to identify and assess seabird interactions with longline and other fishing gear that constitute a bycatch problem. This process will consider those fisheries that negatively affect migratory bird populations, focusing first on Species of Concernor other regional priority habitats and key risk factors.

4. Collaborate with each other and with the fishing industry on research and/or analysis of existing data to identify key geographical areas and fisheries with seabird interactions, to determine whether existing seabird bycatch mitigation measures are effective at avoiding or minimizing to the extent practicable seabird interactions, and to assess the need to further refine and improve those mitigation measures.
5. Participate in the FMC process to help develop and encourage incorporation of measures to avoid, or where bycatch cannot be avoided, minimize to the extent practicable seabird bycatch into fishery management plans.
6. Work together to incorporate, as appropriate, measures to avoid, or where bycatch cannot be avoided, minimize to the extent practicable seabird bycatch in Secretarial fishery management plans.
7. Provide training for and information exchange among fishers and observers regarding seabird bycatch and avoidance measures. This includes working together to:
    a. Develop outreach and education materials to be provided to fishers and gear specialists to increase awareness of seabird take and effective solutions to avoid, or where take cannot be avoided, minimize to the extent practicable such take, including the use of new technologies and methods.
    b. Design and deliver observer and fisher training and outreach materials to enhance the collection and quality of data regarding at-sea survey and identification of seabirds associated with fishing activities and to improve seabird handling and release techniques for entangled or damaged birds to maximize the likelihood of survival of seabirds caught incidental to fishing operations and released alive.
    c. Identify ways to improve the public availability of information on seabird-bycatch in fisheries, as well as seabird distribution (e.g., foraging, breeding). Provide recognition to fishermen and organizations that promote seabird-bycatch reduction.
8. Continue timely consultations under ESA Section 7.
9. Continue working through the ISWG to promote and coordinate implementation of the NPOA-Seabirds and the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds) in all relevant international and regional fisheries organizations, and participate in relevant national and international meetings and workshops.

NMFS will:

1. Improve the collection of at-sea information and the sharing of biological information to assess the vulnerability of seabird species to fishing operations. This could include enhancement of fishery observer coverage, particularly in areas where coverage is currently low.
2. Conduct seabird bycatch analyses and coordinate with FWS to assess the population level effects of the bycatch.

3. Incorporate information on seabird bycatch occurring in fisheries under NMFS jurisdiction into the NMFS National Bycatch Report. Provide this report to FWS upon availability.
4. Distribute information to NMFS and the FMC offices regarding the need to consider seabird conservation during the development of relevant fishery-management actions. This distribution may include migratory bird population status and trends reports, colony-monitoring reports, or any other applicable information to assist in policy development and decision-making.
5. Avoid, or where take cannot be avoided, minimize to the extent practicable the unintentional take of seabirds in NMFS research operations, such as fishery stock assessment surveys and cruises.
6. Implement habitat restoration programs that restore living marine and coastal resources supporting fisheries and migratory birds. These living marine and coastal resources may include habitats or organisms that provide shelter, food or other ecosystem services characteristic of healthy marine and coastal waters and substrates, intertidal zones, living shorelines, and adjacent coastal habitats.

FWS will:

1. As early as practicable and as appropriate, during the development of NMFS and/or regional FMC actions, review and provide comments on the potential effects the action may have on migratory birds and how to avoid, or where impacts cannot be avoided, minimize to the extent practicable adverse impacts resulting from activities associated with NMFS actions to better ensure appropriate protection for migratory birds.
2. Participate in meetings of the regional FMCs (FWS-designated seat as per 16 U.S.C. 1852(c)), including membership on associated committees, panels or teams, as appropriate, and consult with NMFS regarding the actions of the regional FMC that may affect migratory bird populations. (e.g., meetings when seabird issues are on the agenda).
3. Provide recommendations to NMFS identifying conservation and management objectives for relevant migratory bird populations and for migratory bird habitats, particularly as they relate to the development of fishery management plan actions.

B. <u>Information Sharing and Coordination</u>

NMFS and FWS agree that the collection and sharing of biological information regarding migratory bird species can assist in a greater understanding of the health of their populations and of marine ecosystems.

NMFS and FWS will:

1. Promote research, data analysis, and information exchange related to migratory bird conservation and management including inventorying, monitoring, and conducting studies related to agency decisions and management practices that may affect migratory birds and their habitats.
2. Collaborate on studies that could include: (i) migratory bird species that may be affected by agency actions (e.g., expand migratory bird population surveys and data collection for species commonly subject to bycatch across all fisheries); (ii) the effects of management activities; (iii) avoiding degradation of migratory bird habitat (e.g., research and analysis focused on evaluating impacts of agency actions on seabird prey populations and foraging habitats,); and (iv) developing appropriate mitigation measures.

3. Engage in long-term planning to facilitate cooperative efforts in conducting migratory bird surveys, monitoring, and research and data analysis (e.g., population counts and research cruises) and, to the extent practicable, share resources. Some examples include:
   a. Collaborate to use existing research cruises to access remote breeding colonies or conduct at-sea surveys.
   b. Collaborate to design research projects to yield better information about the trophic relationship between seabirds and their marine prey.
   c. Collaborate to standardize, where appropriate, the type of information collected by each agency, identify parties responsible for data collection, and better correlate and incorporate fishery data with seabird-distribution and ecological data.
4. Share inventory, monitoring, research, data in a timely fashion with other Federal and State agencies as appropriate and practicable. Data should be archived with national or regional repositories, when appropriate.
5. Work together to continue to streamline and improve the permit process for the salvage of birds or bird parts by NMFS employees, contractors, and observers.

C. <u>International Policy and Diplomacy</u>

NMFS and FWS agree it is important to build and maintain positive working relationships with foreign entities to further U.S. objectives of migratory bird conservation.

NMFS and FWS will:

1. Promote migratory bird conservation internationally, through the implementation of the IPOA-Seabirds and NPOA-Seabirds via participation in Regional Fisheries Management Organizations (RFMOs), meetings of the Agreement on the Conservation of Albatrosses and Petrels (ACAP), other multilateral meetings, and within other international fora, as appropriate.
2. Coordinate the development of priority actions and activities related to ACAP and other multilateral agreements specific to the conservation of seabirds.

3. Coordinate, as appropriate, prospective capacity-building projects to enhance the ability of other nations to conserve seabird populations, including reducing seabird bycatch in fisheries.
4. Coordinate with the U.S. Department of State to explore and implement, as appropriate, international arrangements that advance U.S. policies and practices related to conservation of migratory birds at sea, through technical cooperation, conservation planning, project support, cooperative studies, education, and training.

NMFS will:

1. Promote the use of the FAO Best Practices Technical Guidelines for IPOA/NPOA – Seabirds with other nations and with relevant multilateral organizations, such as RFMOs.
2. Coordinate with FWS, as appropriate, in preparation for relevant RFMO and other international meetings to further the goal of reducing seabird interactions in fisheries.
3. Inform FWS of RFMO conservation and management measures regarding seabird bycatch mitigation as well as any new measures adopted or modification of existing RFMO measures.

FWS will:

1. Coordinate with NMFS, as appropriate, when working with international partners on issues or activities that may affect international fisheries.

D. <u>Habitat Conservation</u>

NMFS (Office of Habitat Conservation), in coordination with appropriate NOAA line offices and NMFS Region offices and Science Centers, will work with FWS to minimize impacts to and restore and enhance marine and coastal habitats of migratory birds, as opportunities allow This work may include the prevention or abatement of pollution for the benefit of migratory birds, as well as the development and implementation of restoration projects to address the introduction of non-native nest predators to islands with seabird breeding colonies; and public outreach to provide information about these habitat program activities.

NMFS and FWS, as appropriate, will collaborate with NOAA's Restoration Center to:

1. Consider impacts to migratory bird habitat when selecting habitat restoration sites and avoid, or where impacts cannot be avoided, minimize to the extent practicable negative impacts to migratory bird habitat, when possible.
2. Identify habitats needed for successful reproduction, migration, over-wintering, and foraging in conjunction with other comprehensive planning efforts for migratory birds.
3. Identify and avoid activities that may have measurable negative effects on migratory birds, including their nesting, foraging, migration, or over-wintering habitats, and seek to avoid, or where impacts cannot be avoided, minimize to the extent practicable such impacts or the activities causing them

FWS will:

1. Assist NMFS in identifying agency activities that may have measurable negative effects on migratory bird habitat, including their nesting, migration, foraging, or over-wintering habitats, and developing management objectives to avoid, or where impacts cannot be avoided, minimize to the extent practicable such impacts ().
2. Provide guidance to NMFS in identifying habitat initiatives and specific projects that can promote protection and restoration of habitats important to migratory birds (e.g., control and eradication of invasive species on islands, construction of ungulate- and predator-proof fences, enhancement of colonies or populations through social attraction or translocation).

VII. Definitions

Action – a program, activity, project, official policy, rule, regulation or formal plan directly carried out by the agency.

Birds of Conservation Concern – a list published and periodically updated by the FWS Division of Migratory Bird Management. The overall goal of this list is to identify the migratory and non-migratory bird species that, in addition to species already listed under the ESA, represent the FWS's highest conservation priorities. The most current version of the list, Birds of Conservation Concern 2008, is available at http://www.fws.gov/migratorybirds.

Council for the Conservation of Migratory Birds (Council) – an interagency council established by the Secretary of the Interior to oversee the implementation of Executive Order 13186.

Effects (adverse or beneficial) – "effects" and "impacts," as used in this MOU are synonymous. Effects may be direct, indirect, or cumulative, and refer to effects from management actions on migratory bird populations, habitats, ecological conditions or significant bird-conservation sites.

FAO – Food and Agriculture Organization of the United Nations.

Fishery Management Plan (FMP) (see MSA Section 302(h)(1) (16 U.S.C. § 1852(h)(1)) - provides authority for regional Fishery Management Council FMPs; Section 304(g)(1) (16 U.S.C. § 1854(g)(1)) provides authority for Atlantic Highly Migratory Species FMPs done by the Secretary of Commerce. Sections 303(a) and 303(b) (16 U.S.C. § 1853(a) and (b)) articulate what the FMP must and can, respectively, contain.

Incidental take – see Take.

Intentional take – see Take.

Interagency Seabird Working Group (ISWG) – Working Group composed of agency staff from NMFS, FWS, and DOS. The ISWG was originally formed to develop the NPOA-Seabirds. The Group's work has continued in some capacities as the NPOA-Seabirds is implemented and when need arises for an interagency approach to seabird conservation. NMFS continues to identify a seabird contact in each of its Region offices, Science Centers, and Headquarter offices.

IPOA – International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries; a plan developed by the Food and Agriculture Organization of the United Nations (FAO) in 1999 (http://www.fao.org/fishery/ipoa-seabirds/en).

Migratory Bird – an individual of any species protected by the Migratory Bird Treaty Act; a list of protected migratory birds can be found in 50 CFR § 10.13, Code of Federal Regulations or at http://www.fws.gov/migratorybirds.

NMFS's National Seabird Program (NSP) – NMFS's headquarters-based program that addresses NMFS's responsibilities to protect seabirds under the NPOA-Seabirds and the Executive Order. The NSP is led by a national coordinator and implemented regionally through seabird points of contact at each Regional Office, Science Center, and Headquarters office (http://www.fakr.noaa.gov/protectedresources/seabirds/seabird_factsheet.pdf).

NPOA – National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries developed by NMFS, FWS, Department of State, and the Interagency Seabird Working Group in 2001.

Regional Fishery Management Council (as established by the MSA under Section 302 (16 U.S.C. § 1852) – Eight committees created for the purpose of managing Federal fisheries off the coast of the United States. Each council is composed of members of the fishing industry, non-governmental organizations, and various Federal and State employees and is responsible for providing recommendations to the Secretary of Commerce on fisheries in the Federal waters of their region. Councils develop fishery management plans and management measures for the fisheries within their region. FMPs are approved and implemented by the Secretary of Commerce through NMFS (http://www.nmfs.noaa.gov/sfa/reg_svcs/councils.htm).

RFMO – Regional Fishery Management Organization – an international organization established by any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish

Seabird For purposes of this MOU, the term "seabird" refers to migratory birds that habitually obtain their food from the sea below the low water mark.

Species of Concern – refers to several categories of birds including: (1) species listed in the periodic report, Birds of Conservation Concern, published by the FWS Division of Migratory Bird Management (http://www.fws.gov/migratorybirds); (2) priority migratory bird species documented in the comprehensive bird-conservation plans (North American Waterbird Conservation Plan, United States Shorebird Conservation Plan, Partners in Flight Bird Conservation Plans); (3) species or populations of waterfowl identified as high, or moderately high, continental priority in the North American Waterfowl Management Plan; (4) ESA-listed threatened and endangered bird species in 50 CFR § 17.11; and (5) MBTA-listed gamebirds of management concern (as listed in the Birds of Management Concern list, http://www.fws.gov/migratorybirds).

Take – to pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to pursue, hunt, wound, kill, trap, capture or collect (50 CFR § 10.12). Executive Order 13186 further defines "take" to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (incidental) take, meaning take that results from, but is not the purpose of, the otherwise legal activity in question. Take prohibited by the MBTA includes both intentional and unintentional take. The regulations implementing the BGEPA define "take" to mean pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb bald and golden eagles (50 CFR § 22.3).

Unintentional take – See Take.

VIII. Dispute Resolution

The Parties will attempt to prevent potential conflicts or resolve actual disagreements between the Parties first at the lowest levels, elevating through the respective organizational levels if necessary. The Parties will use conflict prevention or traditional Alternative Dispute Resolution (ADR) processes to achieve consensus. The Parties will use collaborative processes, including informal meetings or negotiations, to avoid or minimize a dispute. If the dispute already has developed, more traditional processes may be appropriate, such as mediation or a negotiation assisted by a neutral third-party.

The Parties must notify each other in writing of potential conflict or a dispute, and attempt to resolve the issue at the Field level within 30 days. If the Parties are unable to resolve the issue at this level within 30 days, either party may elevate the issue to the appropriate officials at NMFS or FWS Regional offices. If the Parties are unable to resolve the issue at the Regional level within 30 days, either party may elevate the issue to the appropriate level of each agency.

Representatives of both agencies shall agree to enter into a conflict-prevention process using collaborative methods or to enter into a traditional ADR process, as appropriate.

IX. Agreement

It is Mutually Agreed and Understood That:

This MOU in no way alters or diminishes theParty's obligations or responsibilities under any statute or other legal authority.

A. NMFS will advise the public of the availability of this MOU, once finalized, through a notice published in the Federal Register. Any other public notification of this MOU or the relationship therein shall have prior approval of both NMFS and FWS.

B. Either NMFS or FWS may terminate this MOU, in whole or in part, at any time before the date of expiration by providing the other with a written statement at least 30 calendar days prior to the effective date of termination.

C. Matters that, on the effective date of termination, remain pending shall proceed to final resolution, and such final resolution shall be binding upon the Parties notwithstanding termination of this MOU. Changes within the scope of this instrument shall be made by the issuance of a bilaterally executed modification.

D. This MOU in no way restricts either NMFS or FWS from participating in similar activities with other public or private agencies, governments, organizations, or individuals.

E. Any information furnished to NMFS or FWS under this MOU is subject to the Freedom of Information Act (5 U.S.C. § 552) unless proscribed by agency policy or law relating to confidentiality.

F. This instrument in no way diminishes any requirement, including under NEPA, MSA, or the ESA, that NMFS or FWS conduct an environmental analysis.

G. Modifications within the scope of the instrument shall be made by mutual consent of NMFS and FWS, by the issuance of a written modification, signed and dated by both agencies, prior to any changes being performed.

H. This MOU is neither a fiscal nor a funds-obligation document. Any endeavor involving reimbursement, contribution of funds, or transfer of anything of value between NMFS and FWS will be handled in accordance with applicable laws, regulations, and procedures, including those for government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of NMFS and FWS and shall be independently authorized by appropriate statutory authority. This MOU does not provide such authority. Specifically, this MOU does not establish authority for noncompetitive award of any contract or other agreement. Any contract or agreement for training or other service must fully comply with all applicable requirements for competition.

I. Meetings will be scheduled at the headquarters level periodically to review implementation, summarize accomplishments, and identify opportunities for advancing the purpose of this MOU. Each party will designate a point of contact to carry out the terms of this MOU.

J. This MOU does not require changes to current contracts, permits, or other third-party agreements, nor does it create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

K. The principal contacts for this instrument are as follows:

National Seabird Coordinator
National Marine Fisheries Service
Alaska Region
P.O. Box 21668
Juneau, Alaska

Chief, Division of Migratory Bird Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Ste.634
Arlington, VA 22203

This instrument is executed as of the last date signed below and expires no later than five years from the effective date, at which time it is subject to review and renewal, or expiration.

The Parties hereto have executed this agreement as of the date shown below.

Samuel D. Rauch III
Acting Assistant Administrator for
National Marine Fisheries Service

6/14/12
Date

Dan Ashe
Director
U.S. Fish and Wildlife Service

7.16.12
Date