

Appendix A.
The Nature Conservancy – Eastern New York
Safe Harbor Cooperative Agreement

This Cooperative Agreement constitutes a written, binding contract between the parties identified in Section 1 below, and recognizes the unique and important role that private landowners in New York can play in helping conserve rare species that are valued by the people of the state and of the nation. The purpose of this Agreement is to enable land management activities beneficial to rare species to be carried out on privately owned land while minimizing the impact of such activities on the right and ability of the landowner or the landowner's manager thereof to use the land as he or she wishes, consistent with State and Federal law. The terms of this agreement are as follows:

1. The Nature Conservancy ("TNC") and _____ ("Cooperator") agree to enter into this Cooperative Agreement for the purpose of maintaining, improving, and managing habitat for the Karner blue butterfly, Persius duskywing, and frosted elfin butterfly on certain land owned by the Cooperator and delineated on the attached map (Exhibit A). The land subject to this agreement is currently used for [describe current land use] and the nature and condition of the habitat thereon is [describe nature and condition of habitat]. [Note: Photos and legal descriptions of the property will be referenced here as well.]

2. The United States Fish and Wildlife Service ("Service") and the New York State Department of Environmental Conservation ("State") have issued to TNC permits dated [provide date] and [provide date] that authorize, until the year 2040, the incidental taking of the Karner blue butterfly by TNC and Cooperators to whom TNC has issued certificates of inclusion under such permits. In addition, the State's permit authorizes, until the year 2040, the incidental taking of the Persius duskywing and frosted elfin. Should the Persius duskywing or frosted elfin become Federally-listed in the future, TNC may request an amendment to its Federal permit to include these species.

3. Cooperator agrees to undertake, or to allow TNC to undertake on Cooperator's property, for a period of [X] years from the date of this Agreement the following activities that are designed to contribute to the conservation of the Karner blue butterfly (details are set forth in Exhibit B attached hereto) as are indicated by the Cooperator's initials immediately preceding the description of the applicable activities [may be more than one]:
 - _____ a) maintain or enhance currently occupied habitat at the locations designated as "existing occupied habitat" on the attached map (Exhibit A) through management activities specified in Exhibit B, and maintain such habitat for a period of [X] years from the date of this Cooperative Agreement.

 - _____ b) protect and maintain suitable habitat that is currently unoccupied at the locations designated as "suitable unoccupied habitat" on the attached map (Exhibit A) through management activities specified in Exhibit B, and maintain such habitat for a period of [X] years from the date of this Cooperative Agreement.

_____ c) restore or create new suitable habitat at the locations designated as “proposed restoration sites” on the attached map (Exhibit A) through management activities specified in Exhibit B, and maintain such habitat for a period of [X] years from the date of this Cooperative Agreement.

_____ d) translocate any of the three species of butterfly, with the concurrence of the Service and the State and in accordance with applicable State and Federal laws, to suitable habitat on to Cooperator’s property from elsewhere.

_____ e) translocate any of the three species of butterfly from the Cooperator’s property to locations elsewhere, with the concurrence of the Service and the State and in accordance with applicable State and Federal laws, where they are needed for conservation purposes in the judgment of the Service and the State.

_____ f) **[INITIALS REQUIRED FOR ALL]** allow an assessment/establishment of the baseline, notify TNC prior to significantly modifying the habitat, and allow the State/Service access to capture and translocate individuals of the three butterfly species off the property that would be expected to be adversely affected by those habitat modifications.

But for Cooperator’s commitments as set forth in Section 3, TNC would not enter into this agreement.

4. In consideration of the foregoing, TNC has issued to the Cooperator the attached Certificate of Inclusion under TNC’s permits. This Certificate authorizes the Cooperator:

- a) to take the three species of butterflies incidental to implementing the management activities set forth in this Cooperative Agreement;
- b) after initiation of and consistent with such management activities, to carry out any other lawful activity that is compatible with the Cooperative Agreement but that may cause the incidental taking of the three species of butterflies on the Cooperator’s property. Compatible uses include those uses that do not impair the quantity and quality of the butterfly habitat, including but not limited to, the use of existing trails on the property and walking throughout the entire property. No off-trail motorized vehicle use (unless part of habitat management) or any construction within butterfly habitat is considered compatible.
- c) to be afforded the following assurances, so long as the TNC permit and this Cooperative Agreement are being properly implemented:
 - (i) The Service and the Cooperator, through TNC, may agree to revise or modify the management measures set forth in a Cooperative Agreement if the Service determines that such revisions or modifications do not change the prior determination that the Cooperative Agreement is reasonably expected to provide a net conservation benefit to the listed species. However, the Service may not require additional or different management activities to be undertaken by the Cooperator or TNC without their consent. Additionally, nothing in this

Cooperative Agreement is intended to limit or constrain the Service, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in the Cooperative Agreement. 50 C.F.R. §§ 17.22(c)(5 & 6), 17.32(c)(5 & 6).

- ii) The Cooperator who enters into a Cooperative Agreement and later wishes to return enrolled property to the baseline conditions (described Section 6) needs to demonstrate that the agreed upon baseline conditions were maintained and that activities identified in the Cooperative Agreement as necessary to achieve the net conservation benefit were carried out for the duration of the Agreement. If the Cooperator carried out the management actions and complied with the permit and the Agreement conditions, the Cooperator would be authorized to use the property in any manner that does not result in moving the enrolled property to below baseline conditions. These assurances run with the enrolled property and are valid for as long as the Cooperator is complying with the Cooperative Agreement and TNC is complying with its permit. Part 7 of the Service's Safe Harbor Policy (64 Fed. Reg. 32717, 32724). The Cooperator may return the enrolled property to baseline conditions even if its management activities have not been fully implemented, only if it can demonstrate circumstances beyond its control, and give TNC notice prior to carrying out any activity likely to result in the taking of the covered species.

As used in this Cooperative Agreement, "incidental" take refers to the unintentional or unavoidable killing or injuring of the butterfly species in the course of carrying out otherwise lawful activities. Nothing in this Cooperative Agreement authorizes the Cooperator to capture, collect, or deliberately kill or injure any such butterflies. But for the commitments set forth in this paragraph, the Cooperator would not enter into this agreement.

5. In instances where the term of the Cooperative Agreement is less than that of TNC's permit, TNC shall inform the Cooperator of its ability to extend the incidental take coverage provided by renewing the Cooperative Agreement. Doing so will ensure that benefits conferred by the Certificate of Inclusion remain current and no additional obligations are expected of the Cooperator.

Should the Cooperator elect not to renew this Agreement, the following conditions will survive its expiration for whatever period remains in TNC's permit:

- a) the Cooperator agrees to give TNC at least 60 days written notice prior to commencing any change in land use likely to eliminate or reduce the amount of occupied habitat, and
 - b) in such event, the Cooperator agrees to allow TNC, the Service, and the State the opportunity to translocate butterflies from the Cooperator's land to avoid their incidental taking.
- [list any additional obligations and TNC tasks]

6. The Cooperator and TNC agree that at the time that this Cooperative Agreement was signed, [none of the three butterfly species occurred on the property and, therefore, there are no baseline responsibilities applicable to the property]

OR

[Habitat occupied by [the Karner blue butterfly] AND/OR [the Persius duskywing] AND/OR [the frosted elfin butterfly] occur(s) on the property. The amount of occupied habitat present on the property is approximately X acres and its location is delineated on the attached map (Exhibit A). That amount and the quality of occupied habitat shall be considered the "baseline habitat" applicable to the property. To assist the Cooperator in knowing where and how much occupied habitat exists on the Cooperator's property in the future, TNC will, upon the request of the Cooperator, identify the amount and location of such habitat within a reasonable period after such request. TNC's butterfly survey of the property upon which the above baseline determination was made is attached hereto.

7. The Cooperator's successors and assigns may incur the responsibilities and benefits of this Agreement by becoming a party thereto in writing. If the Cooperator decides to sell or otherwise transfer ownership of all or part of the property delineated on the map labeled Exhibit A, the Cooperator agrees to give TNC written notice of such decision at least 60 days prior to the intended sale or transfer. The Cooperator shall give the purchaser or transferee notice of this Cooperative Agreement so that the purchaser or transferee may become a party to it if he or she so wishes. The Cooperator will provide TNC and the purchaser or transferee with contact information so they may discuss the options available under the Safe Harbor program.

8. The Cooperator shall grant TNC access to the Cooperator's property to verify that the conditions of the Cooperative Agreement are being upheld, to assess the condition of the habitats being managed under the Cooperative Agreement, and to monitor and mark individual butterflies as appropriate. TNC shall give the Cooperator reasonable advance notice of these visits and shall arrange with the Cooperator to be accompanied either by the Cooperator or a representative of the Cooperator if the Cooperator so desires. The Cooperator also agrees, upon the request of the Service or the State made through TNC, to grant either or both access to the Cooperator's property for the purpose of evaluating the suitability of the property for butterfly translocations to or from it, or for the purpose of evaluating the effectiveness of the management activities carried out on such property. The Service or the State shall be accompanied by TNC and either the Cooperator or a representative of the Cooperator if the Cooperator so desires.

9. The Cooperator may terminate the Cooperative Agreement for reasons outside of its control at any time by giving 60 days written notification to TNC, in which case the Cooperator or the Cooperator's successors or assigns shall retain the right to incidentally take Karner blue, Persius duskywing, or frosted elfin butterflies as previously provided. If the Cooperative Agreement is terminated for any other reason, nothing in this Cooperative Agreement shall confer the authority to incidentally take any of the species of butterfly. TNC may terminate this Cooperative Agreement if it notifies the Cooperator in writing of a significant failure to comply with the terms thereof and the Cooperator fails to correct the failure within 90 days of receiving such notification. This Agreement can be renewed or extended at any time subject to both the Cooperator's and TNC's approval.

10. The Cooperator and TNC agree with respect to liability and indemnification for injuries to persons or property arising out of this Agreement as follows: [details may vary from agreement to agreement].

11. Dispute Resolution. The Parties agree to work together in good faith to resolve any disputes, and may elect to use dispute resolution procedures agreed upon by all Parties.

12. This Cooperative Agreement, which constitutes a written, binding contract, shall be interpreted in accordance with the laws of the State of New York. In ascertaining the intent of the parties, the Service and State permits issued to TNC, and referenced in Section 2 and Exhibit B, as well as the [date] Safe Harbor Agreement between TNC, the Service, and the State, shall be further evidence of this contract.

13. This Cooperative Agreement shall take effect upon execution and shall remain in effect for [X] years (not to exceed the number of years remaining in TNC's permits), unless terminated earlier pursuant to Section 9.

The Nature Conservancy _____, Cooperator

By _____ By _____

Date _____ Date _____

Exhibit A

[map of the property subject to the cooperative agreement]

Exhibit B

[specifications for management actions to be carried out]

EASTERN NEW YORK
SAFE HARBOR AGREEMENT

CERTIFICATE OF INCLUSION

This certifies that the property described as follows [DESCRIPTION], owned by [NAME OF COOPERATOR], is included within the scope of Permit No. ____ issued by the U.S. Fish and Wildlife Service on [DATE] and Permit No. ____ issued by the New York State Department of Environmental Conservation, each for a period of __ years to The Nature Conservancy, under the authorities of Section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1539(a)(1)(A), and Part 182 of Title 6 of the New York Code of Rules and Regulations, respectively. Such permits authorize certain activities by participating landowners as part of a safe harbor program to restore and enhance habitat for the Karner blue, Persius duskywing, and frosted elfin butterflies. Pursuant to those permits and this certificate, the holder of this certificate is authorized to engage in activities on the above described property that may result in the incidental taking of Karner blue, Persius duskywing, or frosted elfin butterflies, subject only to the terms and conditions of such permits and the cooperative agreement entered into pursuant thereto by The Nature Conservancy and [NAME OF COOPERATOR] on [DATE].

Name and Title of Representative of The Nature Conservancy

Date: _____