



United States Department of the Interior

NATIONAL PARK SERVICE

Fort Raleigh National Historic Site Wright Brothers National Memorial

Cape Hatteras National Seashore

1401 National Park Drive

Manteo, NC 27954

252-473-2111



IN REPLY REFER TO:

N1621 (CAHA)

July 30, 2007

revised August 2, 2007¹

Pete Benjamin
Field Supervisor
U.S. Fish and Wildlife Service
Raleigh Fish and Wildlife Office
P.O. Box 33726
Raleigh, NC 27636-3726

Dear Mr. Benjamin:

These comments are submitted by the National Park Service (NPS) in response to the U.S. Fish and Wildlife Service's (USFWS) proposal to designate critical habitat for wintering piping plovers at four units within Cape Hatteras National Seashore (CAHA). We request that CAHA be excluded from the designation of critical habitat for wintering piping plovers for the following reasons:

1) **Section 3(5)(A) of the Act** defines critical habitat as the specific areas within the geographical area occupied by the species on which are found those physical or biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection. Areas within the geographical area occupied by the species that require no special management or protection are not, by definition, critical habitat.

There are two NPS management plans that may be sufficient to conserve the species. Collectively, the plans would protect the Primary Constituent Elements (PCEs) essential to the conservation of the wintering population of the piping plover, protect foraging and roosting areas, provide controls for recreational access and allow natural coastal processes to occur within the proposed units. The plans, as a whole may provide a similar level of protection that designation of critical habitat would provide. The plans are as follows:
A) The **General Management Plan** (1984) for Cape Hatteras National Seashore provides for the perpetuation of natural shoreline processes. The plan states that the overall planning objective for the national seashore is to preserve the cultural resources and the flora, fauna, and natural physiographic condition, while providing for appropriate recreational use and

¹ The letter was revised to delete the last four sentences on page 4, paragraph beginning with 2) **Subsection 4(b)(2) of the Act**. The deleted sentences referred to habitat conservation plans (HCPs), which apply to non-federal entities. The HCP reference was incorrectly included in the final draft of the July 30, 2007 letter and missed during the editing process. We regret the error.

public access to the oceanside and soundside shores in a manner that will minimize visitor use conflict, enhance visitor safety, and preserve park resources. The ocean / beach unit extends almost the entire length of the seashore and is described as the area from the ocean to the dune line. It is characterized by constantly shifting sands, frequent overwash, and limited grass vegetation on the dunes. The planning objectives for the ocean/beach unit are to allow natural processes to continue unhampered. No construction would be allowed in this unit. The plan requires NPS to cooperate with USFWS and the National Marine Fisheries Service in the management of endangered or threatened species and to contact said agencies again concerning possible newly listed species or other information relating to protected species prior to the construction of planned developments.

B) In January 2006, CAHA released the **Interim Protected Species Management Strategy** (Strategy) and Environmental Assessment following the NPS National Environmental Policy Act (NEPA) process. The Strategy was developed to protect the piping plover and other species while providing for recreational use at the seashore until a long-term off-road vehicle (ORV) management plan and regulation is developed using the negotiated rulemaking process.

In January 2006, NPS entered into formal consultation with USFWS on the Strategy. On August 14, 2006 the USFWS, Raleigh Field Office, issued a biological opinion (BO) stating that implementation of the Strategy as proposed, is not likely to jeopardize the continued existence of the piping plover. The BO also stated the USFWS's conference opinion that implementation of the Strategy is not likely to destroy or adversely modify proposed critical habitat. On April 24, 2007, USFWS amended the biological opinion to assimilate annual performance measures proposed by NPS; however, the biological opinion and conference opinion remained as stated previously.

On July 13, 2007, NPS Regional Director Patricia Hooks approved a Finding of No Significant Impact (FONSI) to finalize the Strategy. The Strategy provides a conservation benefit to the species, assurance that the conservation management strategies and actions will be implemented, and assurance that the conservation strategies and measures will be effective. The Strategy has been finalized and NPS is actively implementing it.

The Strategy will remain in effect until supplemented or superseded by an off-road vehicle (ORV) management plan and regulation. On December 11, 2006, NPS published a Notice of Intent to develop an ORV management plan and environmental impact statement (EIS) following the NEPA process. The initial public scoping period ended March 16, 2007. On June 28, 2007, NPS published a Notice of Intent to establish a negotiated rulemaking committee to develop an ORV regulation for CAHA. The public comment period closes July 30, 2007.

Development of the ORV management plan and regulation will require the NPS to conduct formal consultation with USFWS under Section 7 of the Endangered Species Act. In addition, the USFWS, Raleigh Field Office, is a proposed participant in the negotiated rulemaking process and will be integrally involved in the development of the plan/regulation.

The level of USFWS involvement in these processes will provide additional assurance that the future ORV plan fully considers protection of habitat for wintering piping plovers at CAHA.

The Strategy includes the following actions and conservation measures, subject to funding and personnel availability:

- Restrict off-road vehicles (ORVs) to a 150 foot access corridor in locations open to ORV use. Provide areas of ocean and sound shoreline that are closed to ORV access.
- Close suitable interior habitats at Bodie Island Spit, Cape Point, Hatteras Spit, and Ocracoke South Spit (i.e., the four sites proposed for critical habitat) year-round to all recreational use to provide resting and foraging areas for piping plovers and other shorebird species. Such suitable habitats include ephemeral ponds, moist sand flats and areas subject to overwash. Actual locations of suitable resting and foraging habitat may change periodically due to natural processes.
- 36 CFR 2.15 requires that pets must be crated, caged, restrained on a leash, or otherwise physically confined at all times in all areas of the seashore.
- 36 CFR 2.38 prohibits use of fireworks in the seashore.
- Kite flying and ball and Frisbee tossing are prohibited within all piping plover closures year round.
- Develop and implement a predator management plan to manage the impacts of predators on piping plovers and other species in shoreline habitat areas.
- Develop and implement a proactive outreach and compliance program that includes: provide information about endangered species at park visitor centers; provide periodic patrols to enforce ORV regulations, resource closures, and regulations on proper trash disposal and prohibition on feeding wildlife; and provide information to the public pertaining to species protection and natural history via e-mails, press releases, and other means.
- Observe abundance and distribution of known wintering piping plovers through specific winter surveys,
- Identify how migrating and wintering piping plovers utilize foraging habitat through observation and data collection on the frequency of feeding and distances traveled to foraging areas.
- Provide piping plover observation data to USFWS so that the information may be combined with data from other monitoring efforts to determine the significance of CAHA wintering population segments to the state, region, or Atlantic coast wide population changes and trends.
- Document the levels of ORV, pedestrian traffic, and leashed and unleashed pets in piping plover habitat.

- Seek funds for intensive research studies and surveys on piping plovers to address the following: Identify factors limiting the quantity and quality of habitat or its use at specific wintering sites. Collect information which characterizes wintering piping plover foraging and roosting habitat and determine level of site fidelity by birds. Identify factors that limit the size and distribution of non-breeding populations. Survey to determine the response of piping plovers to recreational disturbances.

2) **Subsection 4(b) (2) of the Act** allows USFWS to exclude areas from critical habitat designation where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in extinction of the species. In the 2001 Final Determination of Critical Habitat for Wintering Piping Plovers, FWS states that the principal benefit of any designated critical habitat is that Federal activities in such habitat that may affect it require consultation under section 7 of the act.

The Interim Protected Species Management Strategy is now finalized and in effect. NPS believes that the Strategy provides greater conservation benefits to the species than would result from critical habitat designation and meets the requirements for an exclusion under Subsection 4(b) (2) of the Act. The four units proposed for critical habitat designation at CAHA are currently occupied by the species; therefore, any action proposed by NPS that might adversely impact the species, including habitat modification, would require NPS to consult with USFWS even without the critical habitat designation. USFWS will be involved in the CAHA ORV management plan (formal consultation) and negotiated rulemaking processes (participation on the committee). The NEPA process, and related public involvement, used to develop the Strategy, and the similar public involvement processes that are being used to develop the ORV plan and regulation have generated tremendous public interest (e.g., over 4,000 comments submitted during initial public scoping for the ORV plan). We believe that the potential education benefits which might arise from critical habitat designation have already been largely generated as the result of the significant public outreach and environmental impact reviews required under NEPA.

Considering the level of consultation involved with development of the Strategy and the pending development of the ORV plan and regulation, exclusion of CAHA from critical habitat designation would avoid any additional regulatory costs and allow NPS to direct available funding towards implementation of the Strategy and completion of the ORV plan and regulation. NPS has expended and continues to expend considerable financial resources on implementation of the Strategy and development of the ORV plan and regulation. The NPS Environmental Quality Division (EQD) expended an estimated \$273,000 for contractor support to prepare the Strategy/EA documents. In 2006 the CAHA Resources Management (RM) Division spent an estimated \$414,782 to implement the Strategy. This included \$245,848 in project funds for temporary staffing and \$168,934 in permanent staff time. In addition, EQD has budgeted an estimated \$1,204,000 to develop the ORV management plan, environmental impact statement (EIS), related economic analysis, and prepare the regulation; and \$600,000 for contractor support of the negotiated rulemaking process.

For the reasons stated above, we request that Cape Hatteras National Seashore be excluded from the designation of critical habitat for wintering piping plovers.

Thank you for your consideration.

Sincerely,

Michael B. Murray

Michael B. Murray
Superintendent