

which an object can be distinguished from its surroundings. Because most fatal multi-vehicle crashes involving motorcycles are the result of a right-of-way violation in the proximity of an intersection, three intersection-type test scenarios were utilized to examine potential conspicuity improvements to a motorcycle equipped with the forward facing portion of the "stroboscopic lighting system". The test scenarios included a gap acceptance test that was initiated with the motorcycle taking a position in the adjacent, opposing traveling lane. The other two were right side and left side peripheral field-of-view scenarios.

Since the majority of motorcycle fatalities involve other vehicles impacting the motorcycle from the front, the agency evaluated the front portion of Mr. Fairall's system. This evaluation involved three intersection-type tests. The agency did not find any safety benefits in a speed-spacing judgment test (gap acceptance test) nor in a peripheral detectability test involving motorcyclists at 90° to a stationary vehicle driver's line-of-sight. While potential limited benefits were associated with the system in a peripheral detectability test at 45°, it is unclear whether they would outweigh safety disbenefits such as the system providing a false sense of security to motorcyclists and the impact on the driving behavior of other drivers who may react to the strobing light in unexpected manners. A common concern with auxiliary lamps and lighting systems is their potential to distract other drivers sharing the roadway from understanding and responding to the lighting devices requires by the standard. In order to initiate rulemaking to allow a system such as the one identified by Mr. Fairall, the agency would need clear data demonstrating safety benefits.

#### Agency Conclusion

After a thorough review of Mr. Fairall's petition, the agency has decided to deny Mr. Fairall's petition for rulemaking. The agency notes that the limited data the petitioner provided, consisting of the petitioner's own experiences in driving approximately 11,000 miles as well as anecdotal evidence, are insufficient to support a rulemaking. Despite the petitioner's attempt to demonstrate the effect of the new lighting system, NHTSA would require substantially more data demonstrating the effectiveness of such a system to initiate a rulemaking.

A "stroscopic" or flashing lighting system operated by the motorcyclist near intersections to increase his or her

conspicuity is an interesting concept. Our preliminary evaluation showed that the recommended "stroboscopic lighting system" does not appear to enhance motorcycle conspicuity if the driver of the car is directly observing the motorcycle, or if the motorcycle approaches the car at 90 degrees or greater to the driver's line of sight. While limited improvements were found in motorcycle conspicuity when the motorcyclist approaches a vehicle at approximately 45 degrees to the driver's line of sight, the data are insufficient to warrant rulemaking activity. Therefore, the agency is denying the petition.

The agency remains interested in finding effective ways to increase motorcycle conspicuity and reduce the number of crashes involving motorcycles.

Dated: May 23, 2007.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

[FR Doc. 07-2693 Filed 5-30-07; 8:45 am]

**BILLING CODE 4910-59-M**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

**RIN 1018-AU48**

#### **Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis and draft environmental assessment, and announcement of public hearing.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft economic analysis and draft environmental assessment, the reopening of the public comment period, and a public hearing on the proposed revised designation of critical habitat for the wintering population of the piping plover (*Charadrius melodus*) under the Endangered Species Act of 1973, as amended (Act). We are reopening the public comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule and the associated draft economic analysis and draft environmental assessment. The draft economic analysis finds that costs associated with conservation activities

for the wintering population of the piping plover in North Carolina are forecasted to range from \$0 to \$12.2 million in lost consumer surplus and \$0 to \$21.1 million in lost trip expenditures in undiscounted dollars over the next 20 years, with an additional \$32,000 to \$79,000 in administrative costs. Discounted impacts are estimated to range from \$0 to \$6.2 million in lost consumer surplus and \$0 to \$10.6 million in lost trip expenditures over 20 years using a real rate of seven percent, with an additional \$17,000 to \$42,000 in administrative costs. This amounts to \$0 to \$503,000 in lost consumer surplus and \$0 to \$861,000 in lost trip expenditures, annually. Using a real rate of three percent, discounted impacts are estimated at \$0 to \$8.9 million in lost consumer surplus and \$0 to \$15.4 million in lost trip expenditures over the next 20 years, with an additional \$24,000 to \$59,000 in administrative costs. This amounts to \$2,000 to \$600,000 in lost consumer surplus and \$0 to \$1.0 million in lost trip expenditures, annually. The draft environmental assessment finds that designation of critical habitat would not impose any physical alteration of the physical or biological communities used by the wintering population of the piping plover, nor would it alter any social, cultural, or recreational resources or the use of such resources beyond current conditions or existing management strategies. Comments previously submitted need not be resubmitted as they will be incorporated into the public record and fully considered in preparation of the final rule.

**DATES:** *Written comments:* We will accept public comments until July 30, 2007.

*Public hearing:* We will hold a public hearing on the proposed revised designation of critical habitat, and the draft economic analysis and draft environmental assessment, from 5 p.m. to 7 p.m. on June 20, 2007. The public hearing will be preceded by a public information session from 4 p.m. to 5 p.m. at the same location (see *Public hearing* under **ADDRESSES**).

**ADDRESSES:** *Written comments:* If you wish to comment, you may submit your comments and information concerning this proposal, identified by "Attn: Wintering Piping Plover Critical Habitat," by any one of the following methods:

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

2. Hand-deliver to Raleigh Field Office, 551-F Pylon Drive, Raleigh, NC 27606.

3. Electronic mail (e-mail) to [ncplovercomments@fws.gov](mailto:ncplovercomments@fws.gov). Please see the "Public Comments Solicited" section under **SUPPLEMENTARY INFORMATION** for file format and other information about electronic filing.

4. Fax to 919-856-4556.

5. Federal eRulemaking Portal at: <http://www.regulations.gov>. Follow the instructions for submitting comments.

**Public hearing:** The public hearing on the proposed revised critical habitat designation, draft economic analysis, and draft environmental assessment will take place at the Fessenden Center, 46830 Highway 12, Buxton, Dare County, North Carolina. Maps of the proposal and other materials will be available for public review.

**Availability of supporting documentation:** Comments and materials received, as well as supporting documentation used in the preparation of the proposed rule, will be available for public inspection by appointment during normal business hours at the Raleigh Field Office (see addresses above).

**FOR FURTHER INFORMATION CONTACT:** Pete Benjamin, Field Supervisor, U.S. Fish and Wildlife Service, Raleigh Field Office, telephone 919-856-4520 extension 11, fax 919-856-4556. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Comments Solicited**

We intend that any final action resulting from the proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the proposed rule, draft economic analysis, and draft environmental assessment are hereby solicited. Comments particularly are sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of wintering piping plover habitat in North Carolina, and what areas should be included in the designation that were occupied at the time of listing that contain the

features that are essential for the conservation of the species and why, and what areas that were not occupied at the time of listing are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed revised designation and, in particular, any impacts on small entities;

(5) Any foreseeable environmental impacts directly or indirectly resulting from the proposed revised designation of critical habitat;

(6) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding or to assist us in accommodating public concerns and comments;

(7) Whether our determination of areas identified as not being in need of special management is accurate;

(8) Information to assist the Secretary of the Interior in evaluating habitat with physical and biological features essential to the conservation of the piping plover on Cape Hatteras National Seashore, administered by the National Park Service, based on any benefit provided by the Interim Protected Species Management Strategy/ Environmental Assessment to the conservation of the wintering piping plover;

(9) Whether the draft economic analysis identifies all State and local costs attributable to the proposed revised critical habitat designation, and information on any costs that have been inadvertently overlooked;

(10) Whether the draft economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes that would be imposed as a result of the designation of revised critical habitat;

(11) Whether the draft economic analysis correctly assesses the effect on regional costs associated with any land use controls that may derive from the designation of the proposed revised critical habitat;

(12) Whether the draft economic analysis appropriately identifies all costs and benefits that could result from the proposed revised designation; and

(13) Whether there is any information to suggest that beach recreation might increase as a result of this designation, and whether the effects of any such increased visitation can be quantified.

If you wish to comment, you may submit your comments and materials

concerning the proposal by any one of several methods (see **ADDRESSES**). Please note that comments merely stating support or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations to be made "solely on the basis of the best scientific and commercial data available." If you submit comments electronically, include "Attn: Wintering Piping Plover Critical Habitat" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your electronic message, contact us directly by calling the Raleigh Field Office at 919-856-4520. Please note that the e-mail address [ncplovercomments@fws.gov](mailto:ncplovercomments@fws.gov) will be closed at the termination of the public comment period.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Copies of the draft economic analysis and draft environmental assessment and the revised proposed rule for critical habitat designation are available on the Internet at <http://www.fws.gov/nc-es> or from the Raleigh Field Office at the address and contact numbers above.

Our final determination on the designation of revised critical habitat will take into consideration all comments and any additional information we received during both comment periods. Previous comments and information submitted during the initial comment period on the June 12, 2006, proposed rule (71 FR 33703) need not be resubmitted. On the basis of information received during the public comment periods, we may, during the development of our final revised critical habitat determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of including a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. We may

exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

### Background

We first designated critical habitat for the wintering population of the piping plover on July 10, 2001 (66 FR 36038). In 2004, the U.S. District Court for the District of Columbia remanded to us the 2001 designation of four units located at the Cape Hatteras National Seashore in Dare and Hyde counties, North Carolina (*Cape Hatteras Access Preservation Alliance v. U.S. Department of the Interior*, 344 F. Supp 2d 108). On June 12, 2006, we published a proposed rule to designate revised critical habitat for the wintering population of the piping plover in North Carolina (71 FR 33703). That proposed rule describes four coastal areas (units), totaling approximately 1,827 acres (ac) (739 hectares (ha)) within Cape Hatteras National Seashore, as critical habitat for the wintering population of the piping plover. These four units contain a contiguous mix of intertidal beaches and sand or mud flats (between annual low tide and annual high tide) with little or no emergent vegetation, and adjacent areas of unvegetated or sparsely vegetated dune systems and sand or mud flats above annual high tide.

In our June 12, 2006, proposed rule, we also proposed excluding from the units the islands DR-005-05 and DR-005-06 (Dare County) and DR-009-03/04 (Dare and Hyde counties), owned by the State of North Carolina, and about 237 ac (96 ha) of Pea Island National Wildlife Refuge (Dare County). Based on a determination following our analysis under sections 4(b)(2) and 3(5)(A) of the Act, these areas were proposed for exclusion from critical habitat because they are either protected by existing habitat conservation plans or do not require special management considerations or protection.

The four proposed revised units, combined with the areas proposed for exclusion, constitute our best assessment of those areas containing features essential to the conservation of the species. We will submit for publication in the **Federal Register** a final revised critical habitat designation for the wintering population of the piping plover on or before January 16, 2008.

Critical habitat is defined in section 3 of the Act as the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological

features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the revised proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

### Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic or any other relevant impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis based on the June 12, 2006, proposed rule (71 FR 33703) to revise critical habitat for the wintering population of the piping plover.

The draft economic analysis estimates the foreseeable economic impacts of conservation measures for the wintering population of the piping plover within the proposed revised critical habitat designation on government agencies and private businesses and individuals. Specifically, the analysis measures how management activities undertaken by the National Park Service to protect wintering piping plover habitat against the threat of off-road vehicle (ORV) use may affect the value of the beaches to ORV users and the region. In this analysis, it is assumed that the primary management tool employed for wintering piping plover conservation could be the implementation of closures of certain portions of the beach. The Service believes, however, that additional closures due to wintering piping plovers are unlikely. These closures are considered as reducing the opportunity for recreational activities, such as ORV use. At this time, the National Park Service is not undertaking any other activities on which it expects to be required to consult in the future. Other than recreational activities, the Park Service also does not know of any projects or activities, such as U.S. Army Corps of Engineers dredging, that could potentially be affected by critical habitat. The analysis, therefore, focuses on the effect of public closures of beaches on ORV use and the potential

administrative costs to the National Park Service resulting from additional section 7 consultations and other administrative duties caused by designation of critical habitat. Our analysis reflects that recreation may be affected under one of two possible scenarios: The high-end scenario estimates a percentage of ORV trips to proposed revised designated critical habitat areas would be lost, and the low-end scenario assumes no trips would be lost.

The draft economic analysis forecasts that costs associated with conservation activities for the wintering population of the piping plover in North Carolina would range from \$0 to \$12.2 million in lost consumer surplus and \$0 to \$21.1 million in lost trip expenditures in undiscounted dollars over the next 20 years, with an additional \$32,000 to \$79,000 in administrative costs. Discounted forecast impacts are estimated to range from \$0 to \$6.2 million in lost consumer surplus and \$0 to \$10.6 million in lost trip expenditures over 20 years using a real rate of seven percent, with an additional \$17,000 to \$42,000 in administrative costs. This amounts to \$0 to \$503,000 in lost consumer surplus and \$0 to \$861,000 in lost trip expenditures, annually. Using a real rate of three percent, discounted forecast impacts are estimated at \$0 to \$8.9 million in lost consumer surplus and \$0 to \$15.4 million in lost trip expenditures over the next 20 years, with an additional \$24,000 to \$59,000 in administrative costs. This amounts to \$2,000 to \$600,000 in lost consumer surplus and \$0 to \$1.0 million in lost trip expenditures, annually. Of the four units proposed as critical habitat, unit NC-2 is calculated to experience the highest estimated costs (about 40 percent) in both lost consumer surplus (\$0 to \$4.9 million, undiscounted) and lost trip expenditures (\$0 to \$8.4 million, undiscounted). Units NC-4, NC-5, and NC-1 account for about 26, 20, and 14 percent, respectively, of the total potential impacts.

The draft economic analysis considers the potential economic effects of all actions relating to the conservation of the wintering population of the piping plover, including costs associated with section 7 of the Act and those costs attributable to designating critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the wintering population of the piping plover in proposed revised critical habitat areas. The draft analysis considers both

economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect lost economic opportunities associated with restrictions on land use (opportunity costs). This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this draft analysis looks retrospectively at costs that have been incurred since the date the species was listed as threatened and considers those costs that may occur in the 20 years following the revision of critical habitat.

As stated earlier, we solicit data and comments from the public on this draft economic analysis, as well as on all aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period.

#### National Environmental Policy Act

The court decision ordering us to revise the critical habitat designation also ordered us to prepare an environmental analysis of the proposed designation under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). To comply with the court's order, we have prepared a draft environmental assessment pursuant to the requirements of NEPA as implemented by the Council on Environmental Quality regulations (40 CFR 1500–1508) and according to the Department of the Interior's NEPA procedures. The draft environmental assessment is based on the June 12, 2006, proposed rule (71 FR 33703). The scope of the environmental assessment includes an evaluation of the impact of the proposed designation of the four revised critical habitat units (Units NC–1, NC–2, NC–4, and NC–5) for the wintering population of the piping plover. The draft environmental assessment presents the purpose of and need for critical habitat designation, the No Action and Preferred alternatives, and an evaluation of the direct, indirect, and cumulative effects of the alternatives. Within the analysis is the option to designate only some of the units or some portion of the units identified in the proposed rule. Following the analyses of sections 4(b)(2) and 3(5)(A) of the Act, the consideration of impacts and special

management or protection at a unit level may result in alternative combinations of proposed habitat that may or may not ultimately be designated as critical habitat. For a more complete description of the application of section 3(5)(A) and exclusions under section 4(b)(2) of the Act, see our proposed rule (June 12, 2006; 71 FR 33703).

The environmental assessment will be used by the Service to determine if critical habitat should be designated as proposed, if the Action Alternative requires refinement, or if further analyses are needed through preparation of an Environmental Impact Statement. If the Action Alternative is selected as described, or with minimal changes, and no further environmental analyses are needed, then the Service will conclude the NEPA process by issuing a Finding of No Significant Impact.

As stated earlier, we solicit data and comments from the public on this draft environmental assessment, as well as on all other aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period.

#### Required Determinations—Amended Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget did not formally review the proposed rule.

Further, Executive Order 12866 directs Federal agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A–4, September 17, 2003). Pursuant to Circular A–4, once it has been determined that the Federal regulatory action is appropriate, the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement under the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of

critical habitat provided that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. We believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

#### Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city, town, and county governments that serve fewer than 50,000 residents (for example, Dare and Hyde counties), as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities, including Dare County and Hyde County governmental entities, are significant, we considered in our economic analysis the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result.

In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed revised critical habitat designation for the wintering population of the piping plover would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (for example, residential and commercial development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies.

In our draft economic analysis, we evaluated the potential economic effects on small business and governmental entities resulting from conservation actions related to the proposed revised designation of critical habitat for the wintering population of the piping plover. This analysis estimated prospective economic impacts due to the implementation of wintering piping plover conservation efforts in two categories: Recreation (particularly ORV use), and section 7 consultation undertaken by the National Park Service. We determined from our analysis that impacts of section 7 consultation are not anticipated to affect small business or governmental entities because the costs of consultation are borne entirely by the National Park Service. The loss of trips would impact local businesses that serve the area, because lost trips would have generated visitor expenditures on such items as food, lodging, shopping, transportation, entertainment, and recreation. See “Economic Analysis” section above and the draft economic analysis for a more detailed discussion of estimated discounted impacts.

Approximately 93 percent of businesses in affected industry sectors in both counties are small. Assuming that all expenditures are lost only by small businesses and that these expenditures are distributed equally across all small businesses in both counties, each small business may experience a reduction in annual sales of between \$349 and \$3,429, depending on its industry. Specifically, the entertainment industry may expect a

loss of \$349 if no trips are lost and \$524 if trips are lost. The food industry may expect a loss of \$426 and \$641 for no trips lost and trips lost, respectively. The shopping industry may expect a loss of \$730 and \$1,097, and lodging may expect a loss of \$1,930 to \$2,902 for no trips lost and trips lost, respectively. The transportation industry may expect a loss of \$2,281 if no trips are lost and \$3,429 if trips are lost. If the small business is generating annual sales just under the SBA small business threshold for its industry, this loss represents between 0.01 and 0.04 percent of its annual sales (0.01 percent for food, shopping, and entertainment; 0.03 to 0.04 percent for lodging and transportation). The Service concludes that this is not a significant economic impact.

Assuming that each small business has annual sales just under its SBA industry small business threshold may underestimate lost expenditures as a percentage of annual sales. It is likely that most small businesses have annual sales well below the threshold. However, even if a business has annual sales below the small business threshold for its particular industry, it is probable that lost expenditures still are relatively small compared to annual sales. For example, if a small business has annual sales that are a tenth of its SBA small business threshold, potential losses still only represent between 0.05 and 0.45 percent of its annual sales.

Therefore, we do not believe that the designation of critical habitat for the wintering piping plover would result in a disproportionate effect to small business entities.

#### **Executive Order 13211**

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is considered a significant regulatory action under E.O. 12866 because it raises novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant action, and no Statement of Energy Effects is required.

#### **Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)**

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal

mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments,” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would

critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) As discussed in the draft economic analysis of the proposed revised designation of critical habitat for the wintering population of the piping plover, we believe that impacts to small governments are not expected because only Federal lands are proposed for designation. As such, it is unlikely that small governments will be involved with projects involving section 7 consultations for the wintering population of the piping plover within their jurisdictional areas. Consequently, we do not believe that the designation of critical habitat for this species would significantly or uniquely affect these

small governmental entities. As such, a Small Government Agency Plan is not required.

#### **Takings**

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the wintering population of the piping plover. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or

permits to go forward. In conclusion, the designation of the revised critical habitat for this species would not pose significant takings implications.

#### **Author**

The primary author of this notice is David Rabon of the Raleigh Field Office (see **ADDRESSES**).

**Authority** The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 24, 2007.

**Todd Willens,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E7-10476 Filed 5-30-07; 8:45 am]

**BILLING CODE 4310-55-P**