

From: [Justice, Jesse \(GE Infra, Aviation, US\)](#)
To: [Mr. Basnight](#); [Mr. Hall](#); [Mr. Benjamin](#); [Mr. Murray](#); [Mr. Echols](#)
Subject: STOP designating Critical habitat on Cape Hatteras National Seashore Recreational Area, it's not needed !!!
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The May 15 Federal Register notice "Revised Designation of Critical Habitat for Winter Population of the Piping Plover in North Carolina" is a U.S. Fish and Wildlife Service (FWS) response to a lawsuit and court order that goes back nearly a decade.

The Federal Register gives notice of the FWS intention to designate four popular recreation areas of the Cape Hatteras National Seashore Recreation Area as critical habitats for wintering piping plovers. The notice requests comment on related economic and environmental impact assessments. It seeks feedback from the public by asking a series of leading questions, not about whether the federal government should designate four areas of the national park as critical habitat, but of the economic and environmental benefits of the designation.

Most importantly, this latest designation notice adds 215 acres of critical habitat to two previously proposed areas of the park.

This critical habitat designation for winter populations has some significant implications for the national park, the public, and the villages on the Outer Banks.

* The critical habitat designation for a single bird species establishes a legal framework that limits National Park Service management discretions and options in how the designated areas are altered and used. The designation will ultimately deny or reduce public access and use of the four most popular recreational beaches in the park.

* The critical habitat designation will add to the cost and further delay the construction of a much-needed Bonner Bridge replacement. The current bridge is rated at an extremely dangerous category 2 on a scale of 100. It is the only evacuation route from a hurricane-prone island that during hurricane season may have tens of thousands of visitors in addition to its full-time residents. The bridge abutments and access road resides in the designated areas that cannot be altered as prescribed by ESA.

* The critical habitat designation will prevent physical alterations of the designation areas, such as with roads, ramps, walkovers, and will reduce management alternatives that might otherwise be effective components of a final ORV management plan that is currently being prepared through a multi-stakeholder regulatory negotiation process.

The origin of the critical habitat designation, along with a revised economic analysis and environmental impact analysis and a question and answer sheet that attempts to explain and justify the proposal in summary form can be found at <http://www.fws.gov/nc-es/piplch/piplch.html>
<<http://www.fws.gov/nc-es/piplch/piplch.html>>

Readers of this article are encouraged to visit and examine the materials found on that Web site and to submit comments and concerns to the U.S. Fish and Wildlife Service by June 16.

ESA and Critical Habitat Designation Background

Section 4 of the Endangered Species Act (ESA) requires the federal government to designate "critical habitat" for any species it lists under the ESA. Most provisions of the ESA revolve around preventing extinction. However, critical habitat is one of the few provisions of ESA that focuses on species recovery.

Critical habitat is defined in Section 3 of ESA as: (1) specific areas within the geographical area occupied by the species at the time of listing, if they contain physical or biological features essential to conservation, and those features may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species if the agency determines that the area itself is essential for conservation.

The purpose of a critical habitat is to set aside land believed to be essential in the recovery of a listed species and to exclude human use and disturbance of that land so that the species might thrive.

Under the critical habitat designation provision, all federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its designated critical habitat.

Supposedly, a critical habitat designation, in a strictly legal sense, does not set up a preserve or refuge, but for all practical purpose, it does.

Concerning this notice for designating portions of the Cape Hatteras National Seashore as critical habitat, it is important to know that there are specific legal requirements that must be followed by the Fish and Wild life Service.

1. Critical habitat designations must be based on the "best scientific information available," in an open public process, within specific timeframes.
2. Careful and accurate consideration must be given to the economic impacts.
3. The designation must comply with the requirements of the National Environmental Policy Act and include an Environmental Assessment that examines, among other things, impacts on national security, local economy, and other relevant environmental impacts of specifying any particular area as critical habitat.
4. The federal government may exclude an area from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless excluding the area will result in the extinction of the species concerned.

Since 1986, critical habitat designation has not often been used by the federal government as the primary mechanism for species recovery. The widely publicized recovery of many species largely has been the result of focused attention to the species and management actions provided by Section 7 ESA. In 1986, the Department of Interior issued a regulation limiting the protective status of

critical habitat. Few critical habitats were designated between 1986 and the late 1990s. In the late 1990s and early 2000s, a series of court orders backed by a ground swell of "politically correct environmentalism" forced FWS to begin to designate critical habitats. Since 2001, FWS has tried repeatedly to designate critical habitat-with considerable attention and effort directed at the four most popular and publicly used beach areas of the Cape Hatteras National Seashore.

In December, 1996, Defenders of Wildlife filed a lawsuit against the Department of the Interior and the Fish and Wildlife Service for failing to designate critical habitat for the piping plover. A similar lawsuit for the Northern Great Plains population of the piping plover was filed in 1997. These lawsuits were combined, and in February, 2000, the court issued an order directing the FWS to publish a proposed critical habitat designation for the Great Lakes and Northern Great Plains populations. Since the FWS could not distinguish the Great Lakes and Great Plains birds on their wintering grounds, it designated critical habitat for all U.S. wintering piping plovers collectively. This was the non-science based, bureaucratic rationale for designation the four areas of the Cape Hatteras National Seashore as critical habitat.

On July 10, 2001, the FWS published a final rule designating 137 areas along the coasts of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas as critical habitat for the wintering population of the piping plover.

In 2003, Dare and Hyde counties and the Cape Hatteras Access Preservation Alliance sued the FWS, challenging the designation of four units of critical habitat on the Cape Hatteras National Seashore. The court ruled in favor of these plaintiffs, and in a November 1, 2004 opinion, the court sent back to FWS the designation of these four areas for reconsideration.

The court found and directed the following:

1. The court directed that FWS show that primary constituent elements -- the physical and biological features essential to piping plover conservation -- exist on areas that are designated. It ordered FWS to clarify whether that these physical and biological features are essential for the recover of the piping plover and may require special management or protection.
2. The court found that the FWS designation of critical habitat must include compliance with the National Environmental Policy Act. The court found that the Environmental Impact Analysis did not comply with the requirements of the National Environmental Policy Act, was incomplete, and possibly contained erroneous information.
3. The court found that the FWS's economic analysis was arbitrary and capricious, in that it considered the impact of off-road vehicles and other human use of beaches, but did not address information in the record about the possibility of closures of the beaches to such use or how off-road vehicle use might be affected by the designation.
4. The court also found that the FWS omitted from the economic analysis the full costs associated with the designation and ordered the FWS to reconsider them.

As in all of the previous notices to designate portions of the Cape Hatteras National Seashore as critical habitat, this current governmental effort is legally flawed and, as in the past, does not comply with federal law or with the court order. In some places, the notice is misleading.

1. The critical habitat designations as indicated in the Federal Register notice are not based on best scientific information available, in an open public process, within specific timeframes.

Without a documented basis in science, the proposed rule to designate four regions of Cape Hatteras National Seashore as critical habitat for the piping plover cannot be shown to be warranted.

In the Federal Register notice, the FWS does not discuss any current scientific basis for the designations. Instead the FWS directs the readers who might be interested to "ecology and biology" of wintering populations of the piping plover to a Federal Register notice published in 2001 (66 FR 36038). When a reader examines that July, 2001, Federal Register notice, the reader finds that only the first half of the notice is posted. When in search of scientific reference in the second half of the notice, the science-minded reader gets the following message: "The requested document is not available." (See http://ecos.fws.gov/docs/federal_register/fr377.pdf <http://ecos.fws.gov/docs/federal_register/fr377.pdf>)

However, in the publicly available first 50 pages of the July, 2001, Federal Register notice (66 FR 36039), the reader finds a very weak and out-of-date science rationale for the critical habitat designation. This statement, published seven years ago, appears to be the primary FWS scientific justification for past and current designation efforts.

"Overall winter habitat loss is difficult to document; however, a variety of human-caused disturbances may affect plover survival or utilization of wintering habitat...." Two 1999 references are indicated with the statement, but the full citation for these references cannot be found in that July, 2001, notice.

Current Knowledge of the Piping Plover

The piping plover was common in the 1800s but on the verge of extirpation by the 1890s and early 1900s because of market hunting, egg collecting, and fashion trends. The Migratory Bird Treaty Act of 1918 protected the bird and allowed plover populations to gradually recover during the 1920s and 1930s. Since World War II, coastal development and use of beaches has been widely believed to contribute plover population declines. There has also been a population increase of mammalian and avian predators. This is a natural process that has received very little attention in the piping plover protection discussion.

In 1986, the Atlantic Coast piping plover population was listed as "threatened" in the United States. A recovery goal of 2,000 pairs was set for the Atlantic Coast population.

Fewer than 2,800 breeding pairs of piping plovers were reported in the U.S. and Canada in 1995. About half of these were in the Great Plains region, and most of the rest were along the Atlantic Coast. The Great Lakes population is classified as endangered, while the other two populations are classified as threatened.

Active monitoring and management of the birds as provided by Section 7 of the Endangered Species Act are the primary integral parts of federal recovery efforts.

Scientific information and knowledge concerning the piping plover, as with any other protected species, is ever changing. Like with all environmental management programs, scientific information used for regulation and management decisions, needs to be updated and reviewed every few years, at least on a five-year basis. Some federal environmental laws have this requirement built into the

statute. The Endangered Species Act does not.

Concerning the current notice of critical habitat designation for piping plovers, there is no up-to-date, science-based evidence that the proposed areas for critical habitat designations are essential for the recovery of the piping plover. In fact, there has been no consideration of recent studies and data suggesting that the piping plover, since listed as threatened in 1986, is well on its way to recovery provided by current environmental practices.

In the current background materials provided by FWS, there is no analysis or discussion of piping plover population changes since the bird was first listed as endangered in the 1980s.. This is a blatant violation of the requirement that critical habitat designations be based on the "best scientific information available." The science basis for proposed designation should address the following question: What are the bird population trends and what is the scientific basis for determining those trends?

Currently, there is available information giving strong indication that the piping plover is recovering throughout North America.

It is well documented that the piping plover has survived, grown in numbers, or has been stable for the past 20 years. This observation of survival and recovery is probably the result of the focused attention encouraged by the Section 7 of Endangered Species Act nationwide.

Since its date of listing as "threatened," the Atlantic Coast piping plover population has increased, growing from 790 pairs in 1986 to 1,386 pairs in 1999 (U.S. Fish and Wildlife Service, 2000). This 10-year data seems to be the most recent data published by FWS.

However, published on a federal government U. S. Geological Survey Web site is a brief abstract and preliminary finding of the 2006 piping plover census (<http://fresc.usgs.gov/products/ppl/> [<http://fresc.usgs.gov/products/ppl/>](http://fresc.usgs.gov/products/ppl/)). The site states that "Overall, winter numbers were very high..." and "Breeding season numbers also appear higher than 2001 in general..."

The final report of the piping plover census is not available for public review. An obvious question is, "Why has this 2006 Piping Plover census not been published and presented for public review as part of the current designation notice?" A South Carolina piping plover census took place from Feb. 7-11 of this year. This year's mid-winter bird count found a record number of piping plovers. South Carolina census teams found 125 piping plovers along the coast, with an additional 10 birds that were known to be present. The 2008 piping plover totals represent the third record-setting effort in a row in South Carolina. During the 2007 census, teams found 114 piping plovers, which followed a then-record 100 plovers found during the 2006 international piping plover census. In Saskatchewan, Canada, recovery is also evident. In 2007, 1,435 piping plovers were observed, the highest number since the survey began in 1991. Saskatchewan is home to 30 percent of the 4,700 piping plovers that live in the prairies and Great Plains. The Canadian goal is to have a stable population of 2,300 birds.

This currently available and recently collected data suggests that the piping plover is "recovering" and in no way suggests that additional designation of critical habitat at the Cape Hatteras National Seashore is essential for the recovery of the bird. The number of birds observed in recent times indicates that conservation efforts are working without the need for critical habitat designation. The data indicate that piping plover populations everywhere are not in decline, as is time and again stated by special interest environmentalist organizations. Piping plover populations are growing or have at least stabilized even in the most extreme and remote regions of their range.

At the Cape Hatteras National Seashore, the interim management plan established in 2005 and published in the federal register last summer, is also producing results. Six breeding pairs of piping plovers were found at in the park the 2007 breeding season. The 2007 count equals that of 2006. This represents three more pairs than were found in 2005 and the most known pairs since 1999. Overall, the piping plover observations in the park are positive and consistent with those found along the South Carolina coast.

2. There has been no careful consideration given to the economic impacts. The revised economic analysis is once again greatly flawed and is based on discredited information.

The reissued "Economic Analysis of Critical Habitat Designation for the Wintering Piping Plover" remains greatly flawed, especially in the face of a government funded peer review. The draft economic analysis does not respond to the court mandate to do a comprehensive economic impact analysis, nor does it follow federal government guidelines for this kind of impact study.

The economic analysis was prepared and reissued in response to a court order. The draft economic analysis is a contracted "paper study" prepared by Industrial Economic, Inc. (IEC) and relies heavily on the unpublished "Cape Hatteras National Seashore Visitor Use Study, August 2003" (Vogelsong study). The 2003 park usage study has been time and again criticized as biased in terms of its survey questions and very limited in terms of actual ORV counts. It greatly undercounts both ORV and beach usage. The analytical methodology is flawed to the point it would never pass a peer review process. The draft economic analysis is flawed to such an extent that it is now, for the third time, a demonstrated waste a public funds.

After five years of repeated criticisms by a number of qualified reviewers, the Vogelsong study was this past year submitted for formal peer review by the Park Service as part of the negotiated rulemaking process to develop a long-term ORV management plan. A copy of the peer review report can be found on the document list at: <http://parkplanning.nps.gov/projectHome.cfm?parkId=358&projectId=10641> [<http://parkplanning.nps.gov/projectHome.cfm?parkId=358&projectId=10641>](http://parkplanning.nps.gov/projectHome.cfm?parkId=358&projectId=10641)

Five peer reviewers, all recognized experts, were asked the fundamental question: "How suitable is the science of the (Vogelsong) study for use in the planned role in decision-making?"

Four of the five reviewers concluded that the Vogelsong study did not provide a sound scientific basis for estimating ORV use at Cape Hatteras National Seashore or the economic impact of visitor spending associated with ORV use. All reviews concluded that the information provided in the report insufficient for making a decision regarding limiting or prohibiting the use of ORVs at the national park. All five reviewers were unanimous in their concern about the lack of detail on research methods provided in the report.

As did previous reviewers of the study, the government-chartered peer reviewers, found the following shortcomings:

- * The Vogelsong study includes no estimates of turnover rates throughout the day and no discussion of weekday-weekend or seasonal variations that would be required to arrive at an overall annual estimate of ORV use.
- * Information is lacking on the number of days ORV sites were observed and the times of the day

that observations were made.

* The sampling of sites for ORV counts may not constitute a representative probability sample.

* The spending averages in the Vogelsong report are generally consistent with averages from similar parks if it's assumed that the figures apply to overnight visitors staying in motels, hotels, and other commercial rental housing

* The report failed to tie the economic impact data to overall ORV use at the national seashore park, and the focus was entirely on direct expenditures.

Even with the deficiencies of the Vogelsong study well documented and known to government decision-makers, the flawed Vogelsong study remains as a primary source of information in the economic analysis used to by the FWS to justify the designation of critical habitat at the park.

3. The Environmental Assessment required by the National Environmental Policy Act is also flawed.

The document that is titled "Environmental Assessment" is actually a regulatory impact analysis. The document contains only limited referenced science associated with the piping plover. The primary reference to science is Cornell University's online database, which requires payment for access -- this is not an available or suitable reference for an open public review process. In addition, the Piping Plover Fact Sheet and Frequently Asked Question Sheet posted on the U.S. Fish and Wildlife Service Web site are undated, contain no references, and fail to indicate any level of peer review.

The review materials do not properly indicate the fact that the four proposed sites for critical habitat designation are currently very healthy and sustainable ecosystems, as indicated by the diverse number of interactive species (350-plus) that they contain. These four habitats are currently successfully managed and protected by the cooperative efforts of government agencies, non-governmental organizations, and the concerned public without the special designation of critical habitat.

The analysis does not indicate that the four areas currently proposed for the critical habitat designation are very small in area, constantly altered by storms, and have not been shown through peer-reviewed science to be essential for the recovery of the piping plover population, especially on a national basis.

Finally, and most discrediting, the Environmental Analysis also uses the discredited Vogelsong Study as the major reference and basis for analysis of economic impact.

4. There has been no forthright discussion of the implications of the designation to ORV management and construction of a much-needed Bonner Bridge.

As indicated by the Endangered Species Act, a critical habitat designation is a statute-based declaration by the federal government indicating need for special management attention for species recovery. This special designation, by specific language in the statute, automatically limits the discretionary management options of the Park Service and other government agencies, especially with regard to public participation and negotiated rulemaking for a long-term ORV plan.

The critical habitat designation opens wide the door for lawsuits that will obviously focus on the banning of ORVs and public access to the shoreline. This has been the stated objective of environmental activist organizations for the past 30 years. The purpose of Endangered Species Act is to promote the protection of species, not regulate ORVs.

The U.S. Fish and Wildlife Service should be very clear and open to the actual and probable impact of the critical habitat designation, especially about very likely lawsuits suits that can lead to the banning of ORVs from designated beaches.

In the notice, the FWS uses contradictory language when it states of page 28088:

"If implemented, these closures would reduce the opportunity for recreational activities such as ORV use. The Service believes, however, that additional beach closures due to designation of critical habitat for wintering piping plovers are unlikely."

Given the legal framework put in place regarding critical habitat designation, the FWS is at least naive in believing that litigation will not be forthcoming from environmental activists organizations that exist for the sole purpose of litigating and driving the public away from the national seashore. Currently, even without the critical habitat designation, thousands of citizens arrive at the Cape Hatteras National Seashore only to find beaches closed for public use. In the face of critical habitat designation, the public anxiety about future beach closures and ORV prohibition will increase greatly.

One of the most disturbing sections of the critical habitat designation notice is the statement that the FWS makes related to the Bonner Bridge. The FWS "...plans to consult with the Federal Highway Administration on the replacement of the Bonner Bridge. At this time, it is unclear if these projects will affect the proposed revised critical habitat; therefore, this analysis does not include administrative costs associated with these projects."

This particular statement indicates that the FWS has not fully assessed the public safety aspects of the critical habitat designation impact, let alone the economic full costs of the designation. It is governmentally irresponsible to place humans at risk in the name of protecting a single bird species, which is otherwise being successfully protected through thoughtful management processes that have been shown to be effective without the special legal designation of critical habitat.

Once again, it must be emphasized: The replacement of the Bonner Bridge is essential to the protection of human life and the economy of Hatteras Island. The critical habitat designation will add to the cost, and delay the construction of the much-needed Bonner Bridge.

(Dr. Michael A. Berry served as any Army officer in Vietnam in the 1960s. After returning to civilian life, he earned a Doctorate in Public Health and worked in the U.S. Environmental Protection Agency, where, as a senior manager and scientist, he served as the Deputy Director of National Center for Environmental Assessment at Research Triangle Park, N.C. During his 28-year career with EPA, he had extensive interactions with environmental organizations, local governments, the federal courts, U.S. Congress, universities worldwide, and institutions, such as the National Academy of Sciences, the World Health Organization, and the North Atlantic Treaty Organization. For more than 20 years, Dr. Berry taught public health, environmental science, and business and environment courses at the University of North Carolina. He is currently a writer and part-time consultant, specializing in the evaluation of environmental quality and human health effects, environmental management strategies and policy.)

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