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• **U.S. mail or hand-delivery:** Public Comments Processing, Attn: FWS-R8-ES-2008-0067; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all submissions on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the "Information Solicited" section below for more details).

**FOR FURTHER INFORMATION CONTACT:**

Susan Moore, Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, CA 95825; telephone 916-414-6600; facsimile 916-414-6712. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service at 800-877-8339

**SUPPLEMENTARY INFORMATION:**

**Information Solicited**

We are soliciting information during this reopened information solicitation period on the status of delta smelt (*Hypomesus transpacificus*). We published a 90-day finding on a petition to reclassify the delta smelt from threatened to endangered in the **Federal Register** on July 10, 2008 (73 FR 39639), which was made available to the public on the Federal eRulemaking Portal: <http://www.regulations.gov> on July 10, 2008. If you submitted information previously on the status of delta smelt during the previous information solicitation period, please do not resubmit it. This information has been incorporated into the public record and will be fully considered in the preparation of our 12-month finding.

You may submit your information and materials concerning the 90-day finding by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and materials we receive, as well as supporting documentation we used in preparing the 90-day finding for delta smelt, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

**Background**

On July 10, 2008, we published a notice in the **Federal Register** (73 FR 39639) announcing the availability of the 90-day finding on a petition to reclassify the delta smelt (*Hypomesus transpacificus*) from threatened to endangered. Due to an unintentional error on Regulations.gov, information was not able to be submitted electronically by the public during the initial 60-day information solicitation period. Therefore, we are reopening the information solicitation period to allow all interested parties to submit information and materials on the status of delta smelt.

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly commence a status review of the species.

It is important to note that the "substantial information" standard for a 90-day finding is in contrast to the Act's "best scientific and commercial data" standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is

warranted is not made until we have completed a thorough status review of the species, which is conducted following a positive 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a positive 90-day finding does not mean that the 12-month finding also will be positive.

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

Dated: November 24, 2008.

**Deputy Director,**

U.S. Fish and Wildlife Service.

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[FWS-R2-ES-2008-0055; 92210-1117-0000-B4]

RIN 1018-AV46

**Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover (*Charadrius melodus*) in Texas**

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

**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis and draft environmental assessment, correction, and amended required determinations.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed revised designation of critical habitat for the wintering population of the piping plover (*Charadrius melodus*) in Texas under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) and a draft environmental assessment of the proposed critical habitat designation and a corrected area estimated for 19 critical habitat units vacated by the court, and amended required determinations. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated DEA, the draft environmental assessment, the corrected acreage figures, and our amended required determinations. Comments previously submitted on this rulemaking do not need to be resubmitted, as they will be

incorporated into the public record and fully considered when preparing our final determination.

**DATES:** *Written Comments:* We will accept comments received or postmarked on or before January 8, 2009. Any comments received after the closing date may not be considered in the final designation of critical habitat.

**ADDRESSES:** You may submit comments by one of the following methods:

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

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018-AV46, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Allan Strand, Field Supervisor, U.S. Fish and Wildlife Service, Corpus Christi Ecological Services Field Office, 6300 Ocean Drive TAMU-CC, Unit 5837, Corpus Christi, TX 78412; telephone 361/994-9005; facsimile 361/994-8262. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**Public Comments**

We will accept written comments and information during this reopened comment period on our May 20, 2008, proposed revised critical habitat designation for the wintering population of the piping plover (*Charadrius melodus*) in Texas (73 FR 29294), the DEA of the proposed revised designation, the draft environmental assessment of the proposed revised designation, the corrected acreage estimates provided in this document, and our amended required determinations for the proposed revised designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

- (1) Specific information on:
  - The amount and distribution of wintering piping plover habitat in the 19 court-vacated units and areas adjacent to those 19 units in Texas, and
  - What areas occupied at the time of listing, but located within or adjacent to

these specific units, are essential to the conservation of the species and why.

- (2) Information on the effects of Hurricane Ike in 2008, if any, on the status of the wintering piping plover and its habitat in coastal Texas from Brazoria County to Cameron County and information on the impact of hurricanes in general on future development and beach cleanup following hurricanes.

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

- (4) Information on whether the DEA identifies all State and local costs and benefits attributable to the proposed revised critical habitat designation, and information on any costs or benefits that we have overlooked.

- (5) Information on whether the DEA uses appropriate methods and assumptions to estimate the impacts of future oil and gas development, including the frequency, type, location, and amount of seismic activity and drilling activity. In particular:

- Whether the conclusions of the DEA are sufficiently reliable to be useful in assessing the benefits of excluding particular areas from the final designation, and

- Information that would allow us to make a more reliable prediction of the impacts on future oil and gas development of designation of any particular area as critical habitat.

- (6) Any foreseeable economic, national security, or other potential impacts resulting from the proposed revised designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

- (7) The appropriateness of the possible exclusion of approximately 28,474 acres (ac) (11,523 hectares (ha)) of wintering piping plover habitat from the final designation based on the benefits to the conservation of the species and its habitat provided by the Comprehensive Conservation Plans (CCPs) being drafted for National Wildlife Refuge (NWR) lands (see the Areas Considered for Exclusion Under Section 4(b)(2) of the Act section for further discussion). Specifically:

- (a) The benefits to the conservation of the species provided by a CCP;

- (b) How the CCPs address the physical and biological features in the absence of designated critical habitat;

- (c) The specific conservation benefits to the wintering piping plover that would result from designation;

- (d) The certainty of implementation of the CCPs; and

- (e) The benefits of excluding from the critical habitat designation the areas covered by the CCPs.

We are particularly interested in knowing how existing or future NWR partnerships may be positively or negatively affected by a designation, or through exclusion from critical habitat;

- (8) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

- (9) Whether there are areas we previously designated, but are not proposing for revised designation here, that we should include in our critical habitat designation.

- (10) The existence of any conservation or management plans being implemented by public or private land management agencies or owners on lands proposed for designation that we should consider in connection with possible exclusion of those lands from the designation under section 4(b)(2) of the Act. Please include information on any benefits (educational, regulatory, etc.) of including or excluding lands from this proposed designation. We are interested in knowing how partnerships may be positively or negatively affected by a designation, or through exclusion from critical habitat, and costs and other relevant impacts associated with the designation.

- (11) Whether we should exclude any other areas from critical habitat, and why, including an analysis of the benefits of including and excluding any such area from the designation.

- (12) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed revised designation and, in particular, any impacts on seismic studies for oil and gas drilling, and the benefits of including or excluding areas that exhibit these impacts.

If you submitted comments or information during the initial comment period from May 20, 2008, to July 21, 2008, on the proposed rule, they need not be resubmitted. Comments previously submitted are included in the public record, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised designation of critical habitat for the wintering population of the piping plover in Texas will take into consideration all written comments we receive and any additional information we receive during the comment period. On the basis of public comments, we may, during the development of our

final determination, find that areas proposed do not meet the definition of critical habitat, are not essential, or are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning our proposed rule, the associated DEA, the associated draft environmental assessment, the corrected area estimates, and our amended required determinations by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov> your entire comment—including your personal identifying information—will be posted on the Web site. If you submit personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this notice, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Corpus Christi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the revised proposed rule, the DEA, and the draft environmental assessment on the Internet at <http://www.regulations.gov>, or by mail from the Corpus Christi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

### Background

The piping plover was listed as endangered in the Great Lakes watershed and threatened elsewhere in its range on December 11, 1985 (50 FR 50726); critical habitat was not designated at the time of listing. On July 10, 2001, we designated 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 (66 FR 36038). On March 20, 2006, the Texas General Land Office filed suit against the Service challenging designation of 19 of 37 units of critical habitat along the Texas coast. In a July 26, 2006, stipulated settlement agreement and court order, the court vacated and

remanded the designation of Units 3, 4, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 22, 23, 27, 28, 31, 32, and 33 for us develop a new rule. The settlement stipulated that, if prudent, a proposed rule would be submitted to the **Federal Register** for publication on or before May 8, 2008, and a final rule by May 8, 2009.

On May 20, 2008, we published a proposed rule (73 FR 29294) to revise designation for 18 of the 19 vacated units of critical habitat for wintering piping plovers in Texas; we did not repropose Unit TX-17 for designation. (Please refer to our proposed rule for the reason why lands within this unit were not reproposed.) The proposed revised critical habitat is located along nine coastal Texas counties (Cameron, Willacy, Kenedy, Kleberg, Nueces, Aransas, Calhoun, Matagorda, and Brazoria), totaling approximately 138,881 acres (ac) (56,206 hectares (ha)). Units that were not vacated remain as described in the 2001 final designation.

In our 2008 revised proposed rule, we also stated that we intend to consider the possible exclusion of federally owned National Wildlife Refuge lands in units TX-3, TX-4, TX-16, TX-18, TX-19, and TX-31 from the final critical habitat designation under section 4(b)(2) of the Act. These lands are to be covered under Comprehensive Conservation Plans (CCPs) that are currently being drafted. We will further consider the possible exclusion of the areas covered by the CCPs being drafted once the drafts are released and if they are released within a timeframe that is reasonable for evaluation for this final designation. We will also consider exclusions of any other areas identified in the proposed rule, based on comments we receive and our assessments of the benefits of inclusion and the benefits of exclusion of those areas.

The 18 proposed revised units 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 May 8, 2009.

Also, we acknowledge that Hurricane Ike, which struck the Texas coast on September 13, 2008, may have rearranged some critical habitat features essential to the species. We have reviewed recent information, including imagery available from the National

Oceanic and Atmospheric Administration, and found little or no effect of the hurricane on the proposed designated areas. We are requesting additional information from the public on possible changes due to Hurricane Ike.

Section 3 of the Act defines critical habitat as the specific areas within the geographical 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 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, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific 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.

### Corrected Area Estimates for Vacated Critical Habitat Units

By this notice, we are notifying the public of a correction in area estimates vacated by the court. In our 2008 proposed revised critical habitat designation, we published a table (Table 1) showing the number of acres (hectares) in each unit vacated by the court and the area proposed for those units. The area estimates for the vacated units were incorrect. We have revised Table 1 with the correct acres (hectares) that were published in the July 10, 2001, rule designating critical habitat for the wintering population of the piping plover in eight Southeastern states (66 FR 36038). The total acreage proposed remains unchanged.

TABLE 1—ACRES (HECTARES) OF VACATED AND PROPOSED REVISED CRITICAL HABITAT UNITS FOR THE WINTERING POPULATION OF THE PIPING PLOVER IN TEXAS

Unit	Acres (hectares)	
	Vacated	Proposed
TX-03 .....	26,983 (10,924)	107,673 (43,574)
TX-04 .....	12,307 (4,980)	17,218 (6,969)
TX-07 .....	104 (42)	295 (120)
TX-08 .....	239 (97)	620 (251)
TX-09 .....	323 (130)	171 (69)
TX-10 .....	216 (87)	344 (139)
TX-14 .....	481 (194)	590 (239)
TX-15 .....	1,106 (447)	805 (325)
TX-16 .....	463 (187)	1,376 (557)
TX-17 .....	14 (5)	( <sup>1</sup> )
TX-18 .....	7,539 (3,051)	2,467 (999)
TX-19 .....	976 (395)	2,419 (979)
TX-22 .....	1,114 (450)	545 (221)
TX-23 .....	769 (311)	1,808 (732)
TX-27 .....	728 (295)	906 (367)
TX-28 .....	321 (129)	478 (193)
TX-31 .....	410 (166)	399 (161)
TX-32 .....	269 (108)	555 (225)
TX-33 .....	388 (157)	212 (86)
Total .....	54,750 (22,155)	138,881 (56,206)

<sup>1</sup> N/A.

### Draft 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 impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a DEA of the proposed revised critical habitat designation based on our May 20, 2008, proposed revised rule to designate critical habitat for the wintering piping plover in Texas.

The purpose of the DEA is describe and, if possible, quantify the baseline and incremental economic impacts of all potential conservation efforts for the wintering piping plover in Texas in the proposed revised units. Baseline impacts represent the existing state of regulation prior to the designation of critical habitat and include the potential economic impacts of all actions relating to the conservation of the wintering piping plover already accorded the species under the Federal listing (including costs associated with sections 4, 7, and 10 of the Act) and other Federal, State, and local laws that aid habitat conservation in the study area. Baseline costs will occur regardless of whether we designate critical habitat. Incremental impacts are those potential future economic impacts of conservation actions relating to the designations of critical habitat; these impacts would not be expected to occur without the designation of critical

habitat for the wintering piping plover. The DEA describes economic impacts of wintering piping plover conservation efforts on the following categories of activity: (1) Oil and gas development activities, (2) residential and commercial development, (3) recreation, and (4) marine construction and other activities. In addition, analysis of the estimated baseline and incremental impacts include administrative costs of section 7 compliance for all affected activities.

The DEA estimates total pre-designation baseline impacts (1985 to 2007) for all 18 proposed revised units to be equivalent to a present value of \$1.7 to \$3.6 million, assuming a 3 percent discount rate, and \$2.6 to \$5.4 million, assuming a 7 percent discount rate. Post-designation baseline impacts (2009 to 2028) for all proposed revised units are estimated to be \$0.2 to \$1.2 million annually, assuming a 3 percent discount rate, and \$0.2 to \$1.3 million annually, assuming a 7 percent discount rate. Oil and gas industry impacts represent 40 percent of the total high-end, post-designation baseline costs.

The post-designation incremental impacts (2009 to 2028) for all proposed revised units are estimated to range from \$0.6 to \$4.9 million annually, assuming a 3 percent discount rate, and \$0.6 to \$5.1 million annually, assuming a 7 percent discount rate. The majority of incremental impacts associated with the proposed revised rule (98 percent) are anticipated to be associated with oil and gas development activities.

However, no incremental impacts were associated with seismic survey efforts related to those activities. Due to the short-term nature of those impacts, the DEA assigns any costs of seismic survey efforts attributable to plover conservation to the baseline, as those costs would be incurred regardless of the designation of critical habitat.

Because oil and gas development activities make up such a large percentage of the estimated incremental impacts associated with the proposed revised rule, we are specifically seeking comment on whether the estimates in the DEA are sufficiently reliable to be useful in assessing the benefits of including or excluding particular areas from the final designation. As noted in the DEA, the level oil and gas activities generally are highly variable, in part due to fluctuations in the price of oil and gas. Even more difficult to predict is the precise location of oil and gas activities. The figures in the DEA are based on a variety of assumptions, which may turn out not to be true. In particular, the DEA assumes that the number of wells drilled in the next twenty years will be exactly correlated with the wells drilled over the last eighteen years. In addition, the DEA assumes that the distribution of new wells across the proposed critical habitat units will be identical to that of the last eighteen years. To the extent that these assumptions turn out to be incorrect, the cost figures per unit will also be incorrect. We note that it is likely that the reliability of past activity as a surrogate for future activity will

decrease over time. Thus, it may be more likely that oil and gas activity over the next five years will more closely resemble the last eighteen years than will the entire twenty-year period used in the DEA.

Due to the uncertainty of the conclusions of the DEA with respect to oil and gas activities, we also are specifically asking for information that would allow us to make a more reliable prediction of the impacts on future oil and gas development of designation of any particular area as critical habitat.

The DEA considers the potential economic effects of all actions relating to the conservation of the wintering piping plover in Texas over the next 20 years, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of critical habitat. The DEA 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 species in areas containing features essential to the conservation of the species.

The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). The DEA 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. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector.

Finally, the DEA looks retrospectively at costs that have been incurred since we listed the piping plover as threatened on December 11, 1985, and considers those costs that may occur in the 20 years following the revised designation of critical habitat.

As stated earlier, we are soliciting data and comments from the public on this DEA, our draft environmental assessment, and on all aspects of the revised proposed rule and our amended determinations. A copy of the DEA is

available on <http://www.regulations.gov> or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period. Our supporting record will reflect any new information used in making the final designation. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

#### **National Environmental Policy Act (NEPA)**

It is our position that, outside the Jurisdiction of the Tenth Federal Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the ESA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995)). However, a court ruling in *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior* (344 F. Supp. 2d 108 (D.D.C. 2004)) ordered us to revise the critical habitat designation for wintering piping plovers in North Carolina and to prepare an environmental analysis of the proposed revised designation. To comply with that court's order, we prepared an environmental assessment for that action under 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. As an exercise of our discretion, we have chosen to prepare an environmental assessment for the proposed revised critical habitat designation for the wintering population of the piping plover in Texas. The draft environmental assessment is based on the May 2008 proposed rule. The scope of the draft environmental assessment includes an evaluation of the impact of the proposed designation of the 18 revised critical habitat units for the wintering population of the piping plover in Texas. 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.

The environmental assessment will be used by the Service to determine if critical habitat should be revised 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 proposed revision. A copy of the draft environmental assessment is available on <http://www.regulations.gov> or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period.

#### **Required Determinations—Amended**

In our May 20, 2008, proposed rule, we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders was available in the DEA. We have now made use of the DEA to make our determinations. In this document we affirm the information contained in the proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the information within the DEA, we revise our required determinations concerning E.O. 12866, the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

#### *Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this proposed revised rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual economic effect of \$100 million or more on the economy or adversely affect an economic sector, productivity,

jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule will raise novel legal or policy issues.

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

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2) (SBREFA)), 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 (*i.e.*, small businesses, small organizations, and small governmental 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. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this analysis as part of our final rulemaking.

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 and town governments that serve fewer than 50,000 residents, 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 are significant, we considered 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 wintering piping plovers in Texas would affect a substantial number of small entities, we considered the number of affected small entities within particular types of economic activities (*e.g.*, residential and commercial development, agriculture, oil and gas production). In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant impact on a substantial number of small entities, we consider each industry or category individually. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small business entities resulting from the implementation of conservation actions related to the proposed revision to critical habitat for the wintering population of the piping plover in Texas. The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in chapters 2 through 6, and evaluates the potential for economic impacts related to activity categories including oil and gas activities, residential and commercial development, recreation activities, and marine construction and other activities. The DEA concludes that small oil and gas businesses are unlikely to be involved in future oil and gas projects over the next 20 years because currently they represent only 2 percent of the oil and gas industry in that area. Few economic impacts on recreational beach use are anticipated with the majority of the impacts borne by cities carrying out beach maintenance activities. Only two of the cities in the affected area, Port Aransas and South Padre Island, are small enough to be considered small entities under SBREFA. Annually, the impacts related to beach maintenance activities for these two cities are estimated to be \$5,850 to

\$9,290 because these maintenance activities require permits from the U.S. Army Corps of Engineers, resulting in the Service entering into section 7 consultations with that Federal agency. Thus, most of the increased impacts on beach maintenance activities will not be borne by Port Aransas and South Padre Island. Over the next 20 years, the economic impact of designating critical habitat to small residential and commercial developers is estimated to range from \$10 to \$337 annually. Overall, small business entities are expected to incur some costs; however, we do not expect those costs to have a significant impact on those small entities.

In summary, we have considered whether the proposed revised rule would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we believe that, if promulgated, this revised proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

*Executive Order 13211—Energy Supply, Distribution, or Use*

On May 18, 2001, the President issued 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. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. The DEA (Appendix A) finds that three of these criteria are relevant to this analysis: (1) Reductions in crude oil supply in excess of 10,000 barrels per day; (2) reductions in natural gas production in excess of 25 million Mcf per year; and (3) increases in the cost of energy production in excess of one percent. Based on conservative estimates derived from 2007 production rates, the DEA estimates the maximum amount of oil production that could be affected by the critical habitat designation is 282 barrels of oil per day and the maximum amount of natural gas production that could be affected by the critical habitat designation is 3.4 million Mcf per year. Both amounts are well below the respective thresholds in the OMB guidance. In addition, the DEA estimates that the relatively minor costs of project modifications (\$0.2 million to \$1.8 million per well) are unlikely to increase energy costs by more than one percent. Thus, we do not expect the

incremental impacts associated with critical habitat designation for the wintering population of the piping plover in Texas to be of sufficient magnitude to affect energy production or delivery, and the energy-related impacts are not considered a "significant adverse effect." As such, we do not expect that, if made final, the proposed revised designation of critical habitat for the wintering population of the piping plover in Texas to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not 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), we make the following findings:

(a) This rule would 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. "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."

Critical habitat designation 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. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, permits, or that

otherwise require approval or authorization from a Federal agency. 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 onto State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The proposed revised designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. As such, a Small Government Agency Plan is not required.

*Executive Order 12630—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 in Texas in a takings implications assessment. Our takings implications assessment concludes that this proposed revision to critical habitat for the wintering populations of piping plover in Texas does not pose significant takings implications.

**References Cited**

A complete list of all references we cited in the proposed revised rule and this rulemaking is available on the Internet at <http://www.regulations.gov> or by contacting the Corpus Christi Ecological Services Field Office (see **FOR FURTHER INFORMATION** section).

**Author(s)**

The primary authors of this rulemaking are staff members of the Corpus Christi Ecological Services Field Office.

**Authority**

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

Dated: November 25, 2008.

**David M. Verhey,**

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

[FR Doc. E8-28752 Filed 12-8-08; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 226**

**RIN 0648-AV74**

**Endangered and Threatened Species; Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of two public hearings.

**SUMMARY:** We, NMFS, will hold two public hearings in Florida in January of 2009, to receive public comments on the proposal to designate critical habitat for the endangered U.S. distinct population segment (DPS) of smalltooth sawfish that published on November 20, 2008.

**DATES:** The hearings will be held from 7 to 9 p.m. on January 5, 2009, in Naples, FL and on January 14, 2009, in Cape Coral, FL.

**ADDRESSES:** The January 5, 2009, hearing will be held at the Port of the Islands Hotel, 25000 Tamiami Trail E, Naples, FL; and the January 14, 2009, hearing will be held at the Hampton Inn and Suites, 619 SE 47<sup>th</sup> Terrace, Cape Coral, FL.

You may also submit comments, identified by the Regulatory Information Number (RIN) 0648-AV74, by any of the following methods:

Mail: Assistant Regional Administrator, Protected Resources Division, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Facsimile (fax) to: 727-824-5309.

Electronic Submissions: Submit all electronic comments to [www.regulations.gov](http://www.regulations.gov) by clicking on "Search for Dockets" at the top of the screen, then entering the RIN in the "RIN" field and clicking the "Submit" tab.

Instructions: All comments received are considered part of the public record and will generally be posted to <http://www.regulations.gov>. All Personal Identifying Information (i.e., name, address, etc.) voluntarily submitted may