

Finding of No New Significant Impact

Amended Massachusetts Piping Plover Habitat Conservation Plan and Incidental Take Permit

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I. Introduction and Background

This Finding of No New Significant Impact (FNNSI)¹ evaluates the effects of the Service issuing an amended incidental take permit (ITP) under section 10(a)(1)(B) of the Federal Endangered Species Act (87 Stat. 884, as amended: 16 U.S.C. 1531, et seq.) (ESA) to the Massachusetts Division of Fisheries and Wildlife (MADFW) reflecting an amended version of the “Massachusetts Division of Fisheries and Wildlife Habitat Conservation Plan for Piping Plover” (HCP or Plan) (MADFW 2016) and associated incidental take of the federally threatened piping plover in Massachusetts associated with beach management activities. We are incorporating by reference the MADFW’s 2016 HCP and the Service’s 2016 environmental assessment (EA)(Service 2016). This FNNSI was prepared by the U.S. Fish and Wildlife Service (Service) pursuant to the National Environmental Policy Act (42 United States Code [U.S.C.] §§ 4321–4370, et seq.)(NEPA), the Council on Environmental Quality (CEQ) NEPA-implementing regulations (40 Code of Federal Regulations [CFR] 1500–1508), and the Department of the Interior’s complementary NEPA-implementing regulations (43 CFR Part 46) (see EA section 1.3).

The piping plover population in Massachusetts has increased almost five-fold over the last 30 years, and this has led to management challenges in balancing recreational use with the need to avoid take of piping plover nests, eggs, or chicks when they occur on recreational beaches. In 2015, to increase flexibility for beach owners/managers and enhance recreational opportunities, the MADFW completed an HCP and applied for an ITP from the Service for incidental take of piping plovers as part of a statewide plover management program. On July 8, 2016, the Service issued ITP number TE01281C-0 to the MADFW for incidental take of the piping plover during activities covered in the HCP. The MADFW is the primary permit holder and extends incidental take authorization to individual beach owners/managers through certificates of inclusion (COI).

The 2016 Plan’s stated purpose is to advance piping plover conservation and recovery in Massachusetts while maintaining and improving recreational beach access and beach operations. To achieve plover conservation and provide flexibility for recreational beach management and operations, the Plan identified broad program goals including (1) a framework to maintain a “viable and robust” piping plover population in Massachusetts, (2) community support for piping plover conservation, and (3) streamlining the permitting process in compliance with State and

¹ “An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a “finding of no *new* significant impact.” (43 CFR 46.140(c))

Federal Endangered Species Act regulations for site-level management flexibility (HCP section 1.1.1).

In 2017, after a partial season (2016) and a full season (2017) of implementing the HCP, the MADFW determined that, at some point within the 26-year term of the ITP, previously unforeseen limitations of the 2016 HCP would likely hinder or preclude the MADFW's ability to alleviate beach access restrictions at certain sites within the Plan area. Specifically, the limitations could preclude those potential applicants that have sites with fewer than seven piping plovers or sites with many plovers clustered near beach access points from securing a COI. Therefore, in January 2018 the MADFW submitted an application to amend the 2016 HCP with provisions that would address these access situations. Pursuant to section 10(a)(2)(A) of the ESA, the MADFW's application for an amended ITP included an HCP amendment detailing proposed changes to the 2016 HCP, and anticipated impacts of the amendment and the incidental take allowed by the ITP on covered species.

The MADFW proposes a modest adjustment to its process for allocating annual statewide take exposure among participating beach owners/managers. The 2016 HCP generally limits take exposure from covered activities to 15 percent of breeding pairs present at a particular site. The 2016 HCP includes a limited exception allowing the MADFW to increase take exposure to 30 percent of breeding pairs at up to five sites statewide. The proposed action (proposed Plan amendment) would allow the MADFW to raise the number of excepted sites to eight statewide, with a maximum exposure of 75 percent, instead of 30 percent. The amendment would not change the annual cumulative limits on statewide take exposure described in section 3.3.2.1 of the 2016 HCP and would apply only to a subset of the Plan's covered activities: "Use of Roads and Parking Lots in the Vicinity of Unfledged Chicks" and "OSV Use in the Vicinity of Unfledged Chicks."

All other aspects of the existing HCP would be unchanged:

- The MADFW would remain the section 10(a)(1)(B) permit holder and would continue to extend its take authorization by issuing COIs to MADFW-approved landowners and beach managers, including other State agencies (hereafter referred to as Plan participants), who (1) engage in the covered activities described in the Plan; (2) meet the COI eligibility and application requirements described in the Plan; and (3) agree to implement the Plan, required ITP conditions, and the MADFW conservation and management permit;
- The Plan Area would be unchanged;
- Recreational activities on federally owned beaches are not covered by the Plan, because they are required to undergo a separate consultation with the Service under section 7 of the ESA;
- The covered activities (HCP chapter 3) including how they are implemented and required avoidance and minimization measures would be unchanged;
- Activities associated with "Recreation Management and Beach Operations" including site-specific limits on impacts. Therefore, the limits on habitat/broods/pairs that can be affected through reduced proactive fencing described in section 3.2.2.2 of the 2016 HCP would be unchanged;

- The Plan’s conservation/mitigation strategy (HCP chapter 4), including the mitigation described in section 4.3.2 of the HCP, required to satisfy ITP issuance criteria in the ESA would be unchanged;²
- The MADFW’s process to assure funding for the Plan (HCP chapter 5) would be unchanged; and
- The 26-year permit term starting July 8, 2016, and expiring July 7, 2042, would be unchanged.

The Service’s proposed action is issuing an amended ITP in response to the MADFW’s proposed changes to how it intends to allocate site-specific exposure of piping plovers to take. The 2016 Plan generally limits site-specific take exposure by these two covered activities to 15 percent of breeding pairs except that MADFW may allow take exposure of 30 percent of breeding pairs at up to five sites. The amendment would deal only with the exception to the general take exposure of 15 percent, increasing the maximum exposure to 75 percent at eight sites statewide. The deviation in maximum exposure would only occur in association with the “Use of Roads and Parking Lots in the Vicinity of Unfledged Chicks” and “OSV Use in the Vicinity of Unfledged Chicks” Sites with fewer than seven pairs are allowed take exposure of one breeding pair. Under the amended HCP, the general maximum allowable take exposure would remain at 15 percent; however, at up to eight sites, the MADFW could allow take exposure of up to 75 percent of breeding pairs, including at sites with fewer than seven pairs.

Table 1. Comparison of take exposure limits between 2016 HCP and proposed amendment

	General Limit: % of pairs exposed to take per site	Limited Exception: Maximum % of pairs exposed	Limited Exception: Number of sites subject to maximum %	Sites with fewer than 7 pairs can expose...
2016 HCP	15 percent	30 percent	5	1 pair
2018 HCP amendment	15 percent	75 percent	8	Up to 75 percent

² The MADFW, however, applies a different legal standard when administering the Massachusetts Endangered Species Act. As a result, when issuing COIs, the MADFW may require additional avoidance, minimization, and/or mitigation measures of Plan participants beyond what is required under the ESA and the Service-issued permit. For instance, MADFW may, on a site-specific basis, require additional avoidance, minimization, and/or mitigation requirements beyond those envisioned in the HCP or the proposed amendment. But as those are determined later in time, and at the discretion of MADFW under state law, this FNNSI does not analyze potential impacts, which would be beneficial to the piping plover and other species sharing its habitat.

Table 2. Maximum take exposure limits at sites with fewer than 7 pairs under amended HCP

Number of pairs at site	1	2	3	4	5	6
Max number exposed	1	1	2	3	4	5

Approval of the amendment would result in the Service issuing an amended ITP to the MADFW. Issuance of an ITP constitutes a discretionary Federal action by the Service and is subject to NEPA, which requires that all Federal agencies assess the effects of their action(s) on the human environment.

This FNNSI satisfies the Service’s obligations under NEPA and discloses the effects of the proposed action on the human environment. The Service evaluated the MADFW’s proposal as well as any new information that had become available since we issued the permit in 2016. The abbreviated format of the FNNSI reflects the limited nature of the MADFW’s proposed changes to its Plan, coupled with the fact that the underlying activities have not changed. Additionally, all other conservation commitments in the original HCP would be unchanged by the proposed action, and were previously analyzed. The sole change requested by MADFW’s relates strictly to the number of plover pairs present at a particular beach site, and no other parameter is at issue. Thus, much of our examination focuses on impacts to piping plovers. Our 2016 EA evaluated how the HCP’s implementation affects other aspects of the human environment. For the reasons provided below, no supplementation of those analyses is required.

The CEQ lists two factors that should be considered in determining the significance of environmental impacts of an action: context and intensity. Context means that the significance of an action must be analyzed in several settings, such as its impact on society as a whole, the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the impacts in the locale rather than in the world as a whole. Both short- and long-term effects are relevant (40 CFR § 1508.27(a)). Intensity refers to the severity of impact, and a number of subfactors are generally considered in evaluating intensity.

II. Statement of Significance per 40 CFR 1508.27

A. Context

The geographic and social context of the proposed action is the same as the 2016 HCP (MADFW 2016) and the Service’s 2016 EA (Service 2016). The Plan Area is unchanged; it includes an approximately 300-yard-wide zone along almost the entire coastline of Massachusetts. This area is intended to capture all currently suitable Massachusetts piping plover breeding habitat, as well as the area within which additional plover breeding habitat could develop in the foreseeable future. In addition, the beach owners/managers and potential HCP participants that may be affected by the proposed action are unchanged. They are limited to cities, towns, and other beach owners/managers in the coastal portions of Essex, Suffolk, Norfolk, Plymouth, Barnstable, Bristol, Dukes, and Nantucket Counties. Federal beach managers remain

unaffected because they are required to undergo a separate consultation with the Service under section 7 of the ESA for incidental take of piping plovers.

Consistent with the scope of analysis in the 2016 EA, the statewide piping plover population is the correct scale at which to evaluate effects of the proposed action on the species. However, we explain how the proposed action could affect individual sites differently than current management under the HCP and how this would affect the Massachusetts piping plover population. In short, the proposed action would result in increased take exposure and associated loss of productivity at up to eight sites; however, the proposed action would not reduce available nesting habitat or the distribution of piping plovers in Massachusetts.

B. Intensity

1. Impacts that may be both beneficial and adverse.

The impacts of implementing the 2016 HCP are described in the Service's 2016 EA, and the Service determined that implementing the 2016 HCP would not have significant beneficial or adverse impacts on the human environment. The proposed action would have minor effects on implementing the HCP and would cause similarly small impacts on the human environment.

The beneficial impacts of the proposed action include facilitating implementation of the HCP, increasing management flexibility for the MADFW and Plan participants, and minimizing workload for the MADFW and the Service from additional HCPs, permits, etc. for beach owners/managers who would not be able to participate in the 2016 HCP in the absence of the proposed action. The proposed action could be the difference between certain beach owners/managers being able to participate in the HCP or not. However, overall these impacts would not be significant, because the proposed action is a minor, largely administrative change that would have a minor effect on how the MADFW implements the HCP; and we expect few beach managers would be precluded from participating in the HCP in the absence of the proposed action. In other words, the proposed action would only increase the number of Plan participants that could exceed the current 30 percent take exposure maximum from five to eight, so relatively few participants would experience increased management flexibility.

Adverse impacts from the proposed action would result from increased take exposure and associated loss of productivity at up to eight sites; however, the proposed action would not reduce the distribution of piping plovers in Massachusetts. The 2016 HCP already allows for five sites to expose a maximum of 30 percent of breeding pairs to take, so the adverse impacts from the proposed action at those sites would be the difference in take exposure from 30 to 75 percent of breeding pairs. The proposed action also would permit exposure of up to 75 percent of breeding pairs at three additional sites. However, the proposed action would apply only to covered activities "Use of Roads and Parking Lots in the Vicinity of Unfledged Chicks" and "OSV Use in the Vicinity of Unfledged Chicks." These covered activities do not include changes to symbolic fencing or other activities that reduce piping plover nesting habitat. Therefore, the proposed action would

not reduce the amount of nesting habitat, which is a primary driver of piping plover distribution, available to plovers at a site from year to year.

Adult plover population size is also a driver of piping plover distribution and dispersal. Adult piping plovers generally return to the same beach or a nearby beach to breed in consecutive years, and while first-time breeding Atlantic Coast plovers are more likely than adults to disperse from their natal sites, they too frequently return to their natal region. Although the proposed activities could reduce productivity at a given site, which could temporarily reduce site-specific density, as explained in the HCP and 2016 EA, the effects of the two subject covered activities (i.e., loss of productivity and a small chance for loss of an adult) would be offset by the HCP's mitigation strategy by increasing productivity/density at mitigation sites. By extension, the mitigation strategy would ensure the proposed action would not reduce the statewide population, and we expect first-time breeding plovers from mitigation sites to disperse to available habitats, thereby countering any impacts of the covered activities on distribution and dispersal. Because the proposed action would not reduce the amount of available nesting habitat or the population/density of plovers, it would not alter the distribution of the piping plover in Massachusetts.

In 2017, two Plan participants requested COIs to exceed 15 percent take exposure, and four participants requested greater than 15 percent take exposure in 2018; however, we expect Plan participants to approach 75 percent of breeding pairs exposed to take infrequently. This is because (1) few beaches experience the conditions that prompted the amendment request—access restriction at a site with fewer than seven piping plovers or at a site with many plovers clustered near beach access points, and/or (2) the cumulative avoidance, minimization, and mitigation costs associated with a high percentage of breeding pairs exposed to take could be prohibitive for some Plan participants.

The proposed action would not affect the annual statewide limits on take exposure. Consider a hypothetical situation in which (1) the statewide plover population remains constant from year to year; (2) the MADFW receives an application from an HCP participant requesting to increase take exposure from 15 to 75 percent of the pairs at the site; and (3) the MADFW has already fully allocated the annual statewide limit of authorized take. To allow a higher number of breeding pairs to be exposed to take at the hypothetical site, the MADFW would have to make a corresponding reduction in the number of pairs exposed to take elsewhere to remain at or below the statewide exposure limit. In other words, the MADFW would have to decline the request to increase take exposure at the hypothetical site until additional take exposure allowances became available through inter-annual COI attrition, reducing allowable take exposure at other participant sites as those COIs mature and participants reapply, or other circumstances. Consistent with the 2016 HCP, if the MADFW has not fully allocated the annual statewide limit of authorized take, allowing a higher number of breeding pairs to be exposed to take at one site would result in an increase in the number of breeding pairs exposed to take overall. As a reminder, the mitigation required for any take exposure is intended to ensure that the statewide piping plover population and its productivity are maintained.

For these reasons, we expect the proposed action to affect implementation of the HCP to such a minor extent that the level of potential beneficial and adverse impacts would be essentially the same as described in the 2016 EA.

2. *The degree to which the proposed action affects public health or safety.*

Potential impacts from implementation of the 2016 HCP are considered in chapter 4 of the EA. Increasing take exposure to piping plover pairs at three additional sites would have no impact on public health or safety beyond those previously analyzed.

3. *Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.*

The geographic, cultural, and environmental area of analysis for the proposed action is the same as that analyzed in chapter 3 of the EA. The proposed action would not impact these elements of the human environment in a different manner or extent than what is described in the EA.

4. *The degree to which the effects on the quality of the human environment are likely to be highly controversial.*

The piping plover is a well-studied species and has been the focus of considerable management since it was listed under the ESA. For instance, the Service first issued its beach management guidelines in 1994. The guidelines' effect on either the species or the human environment is not controversial. Rather, the effects have been well- documented over the past two decades, reflect general best management practices reflective of the best science available, and are reasonably predictable. The covered activities and conservation measures in the 2016 HCP addressed deviations from these guidelines, but evidence from the last season-and-a-half of Plan implementation shows the effects on the human environment have been as-expected or lower than anticipated in the 2016 HCP (Table 3), and to-date these effects have not been controversial. Therefore, given that MADFW proposes a very limited adjustment of the maximum take exposure at an additional three sites statewide, and we expect similarly limited impacts to the human environment, we conclude that the proposed action will not have controversial effects.

Table 3. To-date summary of take exposure allocation, actual exposure, and productivity.

Year	COIs issued	Allocated take exposures	Actual exposures	Productivity anticipated by 2016 HCP	Observed productivity of exposed broods
2016	2	4	3	50-75%	90%
2017	6	13	5	50-75%	100%

5. *The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.*

The possible effects of the proposed action on the human environment are not highly uncertain and do not involve unique or unknown risks. The potential effects of the proposed action are extremely similar to the nonsignificant effects on the human environment described in the 2016 HCP and EA. In addition, the MADFW has implemented the HCP's covered activities since July 2016, providing support for the conclusion of the Service's 2016 EA that the Service issuing an ITP to the MADFW to implement the HCP's covered activities would have nonsignificant effects on the human environment. Therefore, the potential impacts and risks of the proposed action are well known.

6. *The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.*

The Service's 2016 ITP to the MADFW set a precedent for a permit to be issued for incidental take of piping plover in Massachusetts, and the Service's 2016 EA determined the impacts of implementing the HCP would not be significant. Given the limited nature of the proposed action, the proposed action would not set a new precedent for future action with significant effects or a decision in principle beyond those established in 2016. Moreover, given the permit duration, both the MADFW and the Service anticipated the need for periodic amendments, and therefor included a provision in the HCP describing the process to be followed. That MADFW has availed itself of that process is not precedent setting, but rather to be expected. The nature of the proposed change also is not precedent setting, as it is limited in scope and is consistent with statewide take allocation specified on the permit and HCP.

7. *Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.*

The proposed action is related to the 2016 HCP and ITP, which the Service determined would not have significant impacts on the human environment. The proposed action would result in additional impacts at up to eight piping plover breeding sites but would not alter the statewide impacts of the HCP on the piping plover. Given that the relevant scope of analysis for impacts to the species continues to be the statewide population status, the proposed action would not change the impacts resulting from implementing the 2016 HCP described in the 2016 EA. The proposed action is unrelated to any other actions with individually insignificant, but cumulatively significant impacts.

8. *The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.*

In coordination with the State Historic Preservation Officer (Service 2016, Appendix A), the Service's 2016 EA determined issuing an ITP to the MADFW to implement the HCP would cause minimal ground disturbance and would not affect historic properties. Given the administrative nature of the proposed action, and the similarity to the 2016 EA regarding potential impacts to historic resources, we conclude that the proposed action would not impact historic places or other scientific, cultural, and historical resources.

9. *The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.*

The proposed action would allow the MADFW to increase maximum take exposure of breeding pairs from 30 percent of breeding pairs at up to five sites to 75 percent of breeding pairs at up to eight sites. Adverse impacts from the proposed action would result from increased take exposure and associated loss of productivity at up to eight sites. However, as explained above in Impacts that may be both beneficial and adverse, the proposed action (1) applies only to covered activities "Use of Roads and Parking Lots in the Vicinity of Unfledged Chicks" and "OSV Use in the Vicinity of Unfledged Chicks;" (2) would not contribute to changes in the amount of nesting habitat available to plovers at a site; and (3) would not alter the distribution of the piping plover in Massachusetts. Further, because the proposed action would not affect the annual statewide limits on take exposure or mitigation requirements, the proposed action would have a zero-sum impact on the productivity of the Massachusetts piping plover population. Therefore, on a statewide and rangewide scale, the proposed action would result in impacts to the same degree described in the 2016 EA.

The proposed action would not affect designated critical habitat.

10. *Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.*

The proposed action would not violate a Federal, State, or local law. The purpose of the action is to respond to the MADFW's application and assist the MADFW and beach managers in complying with the ESA.

III. Conclusion and Signature

For the reasons set forth above, I conclude that the Service's 2016 EA for the MADFW's HCP and ITP adequately disclosed the potential impacts of the proposed action, and the proposed action will have no new significant impacts on the human environment, either individually or cumulatively. This FNNSI satisfies the Service's obligations under NEPA and discloses the effects of the proposed action on the human environment. Therefore, the Service does not need to prepare a new environmental assessment or an environmental impact statement.



for
Paul Phifer

Acting
Assistant Regional Director, Ecological Services

6-28-19

Date

IV. Literature Cited

[MADFW] Massachusetts Division of Fisheries and Wildlife. 2016. Massachusetts Division of Fisheries & Wildlife (DFW) habitat conservation plan for piping plover. Prepared by ICF International, Fairfax, Virginia, for Massachusetts Division of Fisheries and Wildlife, Westborough, Massachusetts. June 2016.

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