



United States Department of the Interior



FISH AND WILDLIFE SERVICE

3817 Luker Road
Cortland, NY 13045

July 13, 2010

Mr. Ronald Foley
Regional Director
Long Island Regional Office
New York State Office of Parks, Recreation and Historic Preservation
P.O. Box 247
Babylon, NY 11702-0247

Dear Mr. Foley:

This is in reference to the July 2, 2010, take of the Federally-protected piping plover (*Charadrius melodus*) chicks found dead in the off-road vehicle (ORV) driving area at Robert Moses State Park (Park). The Park is administered by the New York State Office of Parks, Recreation and Historic Preservation (NYSOPRHP). An investigation of this take incident is being conducted by the U.S. Fish and Wildlife Service's (Service) Office of Law Enforcement (OLE).

The piping plover is Federally-listed threatened species under the Endangered Species Act (Act) of 1973, as amended (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*). The "taking" of a Federally-listed species is a Federal offense under the ESA. The term "take" means to harm, harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532[19]). A take of a protected bird species may also result in a violation of the Migratory Bird Treaty Act (MBTA) of 1918, as amended (40 Stat. 755; 16 U.S.C. 703 *et seq.*). The MBTA prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests.

The Service recognizes that the NYSOPRHP has actively participated in the piping plover recovery program by hiring listed species monitors, installing symbolic fencing to protect listed species habitat, hosting seasonal monitor training sessions, and facilitating improved relationships between the Service and the ORV community. However, the take of the two piping plover chicks on July 2, 2010, requires that the Service investigate this incident through its OLE and recommend measures that the NYSOPRHP should implement to avoid the potential for future take of this species within the Park.

BACKGROUND

Management Actions within the Park in 2010

The Park is monitored for threatened species, including the piping plover and the Federally-listed seabeach amaranth (*Amaranthus pumilus*), four to five days a week by both the NYSOPRHP and Citizens Campaign for the Environment (CCE). Citizens Campaign for the Environment is conducting piping plover monitoring as a result of financial support provided by the U.S. Army Corps of Engineers (Corps), as part of the Corps' Section 7 of the ESA responsibilities for the Federal Fire Island Inlet Navigation Project. Each year in late March or early April, the

NYSOPRHP installs symbolic fencing around historic piping plover breeding areas within the Park, with the assistance of the Service, CCE, and the Long Island Beach Buggy Association. In these areas, human-related recreational activities, such as kite-flying, picnicking, ORV driving, etc., are prohibited.

As the season progresses, the NYSOPRHP hires seasonal monitors to observe and record plover breeding activities and to make recommendations to Park management regarding measures to improve protection of this species.

As described in more detail below, ORV use is permitted in certain areas of the Park, specifically Democrat Point and a stretch of beach between the golf course and the Fire Island Inlet Jetty (referred to as the ORV Area).

Breeding Status

Each individual breeding area in the Park is described below, beginning with the easternmost breeding area.

Field Four

This area corresponds to the ocean beach located in the central and eastern portion of the Park. A portion of this area was symbolically fenced in March/April 2010. One pair nested in the area between Field 4 and the water tower, however, the status of this pair was not available at the time this letter was prepared.

Golf Course Area

This breeding site lies on the ocean beach just west of Field 2. The entire section of beach south of the golf course extends for about 1,920 feet (ft). A portion of this area was symbolically fenced in March/April 2010.

One pair of piping plovers nested in this area, producing a four-egg nest. Three of the four eggs hatched on, or about, June 25, 2010 (the fourth egg never hatched). This is the presumed brood of three chicks from which two of the chicks were found crushed in the area open to ORVs located between here and the Fire Island Inlet Jetty. Before July 2, 2010, it did not appear, based on discussions with the NYSOPRHP, as if the brood from the golf course area moved into or through the heavily-used ORV Area.

ORV Area (Between the Golf Course and Fire Island Inlet Jetty)

This area extends from the western boundary of the beach fronting the golf course to the Fire Island Inlet Jetty, a distance of about 4,850 feet. Off-road vehicle driving is permitted in this entire area, with the access road to the beach located adjacent to the western edge of the golf course. This area is open all season long, regardless of the status of unfledged chicks on the beaches south of the golf course or at Democrat Point. It is a popular and heavily-used area for fishing and recreation throughout the summer. Vehicle access to this area is from 5:00 p.m. to 7:00 a.m., although drivers and their vehicles can remain on the beach for up to 48 hours. Approximately 80 ORVs were observed during a site visit on July 3, 2010, as part of the investigation into the take of the two piping plover chicks.

Prior to the take of two piping plover chicks, there was no documentation of piping plovers breeding in the ORV Area, *i.e.*, no nesting, foraging, or chick-rearing area behaviors were ever formally observed by piping plover monitors in this area.

Democrat Point

This area is characterized as an accreting spit and is located just west of the Fire Island Inlet Jetty. It is the major piping plover breeding area within the Park. Breeding areas are present throughout the site while adjacent tidal flats provide optimal foraging habitat.

A large portion of Democrat Point is symbolically fenced for piping plovers. Within these fenced areas no recreational activities are permitted including ORV driving, kite-flying, sunbathing, walking, etc. Up until the point that chicks hatch, ORV driving is permitted around the perimeter of the fence, beginning at the Fire Island Inlet Jetty and extending all the way west and to the north side of Democrat Point. Once chicks begin to hatch, driving is then prohibited until the chicks fledge.

Nine pair of plovers nested at Democrat Point in 2010. As of July 3, 2010, five pairs were either still incubating nests or brooding chicks; the remaining four pairs had apparently abandoned the site (the status of these pairs is pending, following receipt of an Incident Observation Report from the NYSOPRHP plover monitor). At Democrat Point, two pairs had chicks that were approximately one week old, the same age as the three chicks from the golf course pair.

Discovery of Dead Chicks

On Friday, July 2, 2010, CCE and the NYSOPRHP discovered two dead piping plover chicks in tire tracks within the ORV Area in proximity to the Fire Island Inlet Jetty.

On Saturday, July 3, 2010, the Service (both Ecological Service and OLE) conducted a site inspection of Democrat Point and the ORV Area with the NYSOPRHP and The Nature Conservancy in an attempt to locate the remaining chick from the brood from the golf course area. Two separate pairs of plovers were each observed with a single week-old chick at Democrat Point. There was a possibility that either of the week-old chicks and their adults observed at Democrat Point could have been from the golf course beach, but this was not deemed to likely as the Service, State, and TNC did observe one pair of plovers in the ORV Area when exiting Democrat Point. It was suspected that this was the golf course pair, and that it had lost its entire brood, with two confirmed deaths due to ORVs and one unknown cause of death, as this pair did not exhibit any parental behaviors. This ultimately led us to the conclusion that it was unlikely that they were nesting, or leading chicks through or into the ORV Area at that time. As a result, the NYSOPRHP decided to keep the ORV Area open, and agreed to monitor the site to ensure that no broods with unfledged chicks were present. In the event that any chicks were observed, the NYSOPRHP would prohibit any further vehicle entry in the ORV Area and escort all of the ORVs present on the beach to the exit road.

Recommendations

The take of two piping plover chicks is a serious matter requiring immediate attention from the NYSOPRHP. The subject taking demonstrates that the plovers nesting at golf course beach have entered the ORV area, and the NYSOPRHP's recent practice of allowing ORV access in such close proximity to plover breeding areas is not a measure that will avoid the potential for adverse affects or mortality of adults, chicks, or their nests. Consequently, the actions recommended below are intended to assist the NYSOPRHP to avoid take, by undertaking measures which are more consistent with the Service's "Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act," found in the Revised Atlantic Coast Piping Plover Recovery Plan (U.S. Fish and Wildlife Service 1996).

We note that both short- and long-term actions are recommended to address this issue, as there are immediate actions which should be implemented to address the conflicts between permitted ORV use and plover protection for the remainder of this season, as well as into the future.

Recommended immediate actions

- The Service recommends that the NYSOPRHP monitor the ORV area seven days a week until the last chick is able to fly to determine if any broods from Democrat Point migrate into the ORV area. Monitoring should vary between early morning and early afternoon and should encompass different tidal cycles.

In regard to protection of the broods at Democrat Point, it is recommended that the western portion of the ORV Area be closed so that no driving occurs within 200 meters of the Fire Island Inlet Jetty. The Service has learned that plover family groups have been observed in and around the Fire Island Inlet Jetty in 2010. Therefore, this recommendation is being made to provide protection for plover chicks that may transit or occupy into this area as a result of intra-specific competition with other plover family groups at Democrat Point or in expanding their own territory to include more foraging area. Implementing this action would be consistent with the recommendations found in the Service's "Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to Avoid Take under Section 9 of the Endangered Species Act." Please note that herding broods or otherwise attempting to move them away from their foraging or roosting locations may be constitute harassment (take) as defined under 50 CFR 17.3).

The results of the increased monitoring efforts on brood mobility will be incorporated into discussions between our agencies in a meeting to be convened as soon as possible; any decisions by the Park management to reduce this 200 meter buffer zone should be deferred until the aforementioned meeting is held. However, should the increased monitoring efforts demonstrate that there are highly mobile broods at Democrat Point, venturing substantially into the 200 meter zone, then the buffer zone should be increased to afford them the necessary level of protection to avoid direct adverse impacts and mortality from ORVs.

Recommended future actions

To avoid the potential for future take of listed species, the Service recommends the following:

- A meeting should be convened among the NYSOPRHP, the Corps, the Service, and the New York State Department of Environmental Conservation to discuss future management of the ORV Area, as well as Democrat Point. We look forward to a productive meeting in which we can explore alternatives to avoid future take. Our goal would be to develop a formal long-term management plan to avoid take.
- If take of piping plovers associated with Park management cannot be avoided, we recommend the NYSOPRHP submit an incidental take permit application pursuant to Section 10 (a)(1)(B) of the ESA. A habitat conservation plan (HCP) must accompany an application for an incidental take permit. The purpose of the HCP process associated with the permit is to ensure that the Park adequately minimizes and mitigates the effects of the authorized incidental take. It is the applicant's decision whether to pursue an incidental take permit. While Service personnel may provide detailed guidance and technical assistance throughout the HCP development process, the development of a HCP is the responsibility of the applicant. More information on the

ESA Habitat Conservation Planning Process can be found at the Service's website at <http://endangered.fws.gov/hcp/index.html>.

We look forward to working with you to develop either an HCP or formal management agreement that addresses the management of listed species within the Park. We will contact you in the near future to schedule a meeting to discuss this further. In the interim, if you have any questions or require additional information, please contact Mr. Steve Sinkevich or Mr. Steve Papa of the Long Island Field Office at (631) 776-1401.

Sincerely,



David A. Stilwell
Field Supervisor

References

U.S. Fish and Wildlife Service. 1996. *Piping Plover (Charadrius melodus)*, Atlantic Coast Population, Revised Recovery Plan. Hadley, MA.

cc: NYSOPRHP, Wantagh, NY (A. McIntyre, E. Wintenberger)
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