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United States Department of the Interior

NATIONAL PARK SERVICE

Fort Raleigh National Historic Site Wright Brothers National Memorial

Cape Hatteras National Seashore

1401 National Park Drive

Manteo, NC 27954

252-473-2111



IN REPLY REFER TO:

L34 (CAHA)

July 31, 2007

George E. B. Holding, United States Attorney
Eastern District of North Carolina
310 New Bern Avenue, Suite 800
Terry Sanford Federal Building & U.S. Courthouse
Raleigh, NC 27601

Dear Mr. Holding:

On July 17, 2007, U.S. District Court Judge Terrance W. Boyle issued a court order based on a beach driving traffic violation case (*United States v. Vasile Matei*, No. 2:07-M-1075-BO). The order stated that without authorizing regulations and an off-road vehicle (ORV) plan, ORV use at Cape Hatteras National Seashore (CAHA) is prohibited and it is a violation to operate an ORV on CAHA without prior authority from the Department of the Interior (DOI) or its designee. This letter summarizes steps the National Park Service (NPS) is taking to address the ORV requirements at CAHA.

BACKGROUND

Consisting of more than 30,000 acres distributed along 64 miles of shoreline, CAHA was officially authorized in 1937 as the nation's first national seashore. Federal land ownership extends from ocean to sound across three barrier islands—Ocracoke, Hatteras, and Bodie, with eight village enclaves excluded from the seashore boundaries.

Before 1954, local residents and visitors used the beaches for vehicle routes as there were few formal roads in this remote area. ORVs were used primarily for transportation, to facilitate commercial net fishing from the beach, and to access productive recreational fishing areas such as Cape Point or the inlets. North Carolina Highway 12 (NC-12) was paved in 1954 providing a formal transportation route. Completion of the Bonner Bridge across Oregon Inlet in 1963 and the introduction of the State Ferry system to Ocracoke Island facilitated visitor access to the islands and resulted in increased vehicle use on beaches for recreational purposes. In 2005 CAHA received more than 2.2 million visitors, a 12-fold increase in visitation over the past 50 years. Today ORVs are used to facilitate beach access for a wide variety of activities including commercial and recreational fishing, sightseeing, bird watching, swimming, and water sports.



Executive Order 11644, *Use of Off-Road Vehicles on the Public Lands* (1972), as amended by Executive Order 11989, *Off-Road Vehicles on Public Lands* (1977), defines off-road vehicles as “any motorized vehicle designed for or capable of cross-country travel on or immediately over...natural terrain.” The orders direct federal agencies to develop and issue regulations and administrative instructions to provide for designation of areas and trails where the use of ORVs may and may not be permitted. ORVs may be allowed only in locations where there will be no adverse impacts on the area’s natural, cultural, scenic, and esthetic values, and in consideration of recreational uses. The orders direct agencies to immediately close a designated ORV route whenever the use is causing or will cause unacceptable impacts to resources.

NPS issued two draft ORV management plans for CAHA in the 1970’s, following the issuance of the executive orders. Though never finalized, the draft plans identified ORV management concepts that have guided ORV management at CAHA since then. These concepts include:

- Consolidation and designation of beach access routes or “ramps”;
- Identification of permitted ORV travel area (or “corridor”) on the beach from the toe of the dune to the ocean;
- Speed limits, and license requirements for vehicles and operators;
- Protection of vegetation and sea turtle and bird nesting area;
- Designation of summer seasonal ORV closures in front of villages;
- Signage to notify users of the above.

In 1984 NPS issued a *General Management Plan / Environmental Assessment* (GMP) for CAHA. The GMP set forth the basic philosophy to guide management and use of the seashore. It stated that “selected beaches will continue to be open for ORV recreational driving and in conjunction with surf fishing;” however, it did not set forth an ORV management plan or regulation.

NPS has implemented the executive orders in 36 CFR § 4.10, which requires units of the National Park System allowing ORV use to designate use areas and routes by special regulation. CAHA submitted draft ORV regulations in 1973 and 1990 through the Southeast Regional Office (SERO) to the Washington Office; however, the regulations were never completed.

In 1999 and 2004, environmental organizations submitted petitions to DOI and NPS requesting rulemaking for CAHA. In 2004, CAHA’s superintendent issued Superintendent’s Order 07, *ORV Management*, to adopt portions of the 1978 draft interim ORV management plan as park guidance pending development of a long-term ORV management plan and regulation.

In response to the petitions for rulemaking, in 2005 NPS contracted for a feasibility assessment, the first step in a negotiated rulemaking process (AKA regulatory negotiation or RegNeg) to develop the CAHA ORV regulation. The assessment team interviewed fifty-five (55)

stakeholders who held a range of views on ORV management at CAHA, and began preparation of a feasibility report.

In May 2005, Defenders of Wildlife (Defenders) issued a notice of intent to sue (NOIS) the NPS arguing that it violated the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Migratory Bird Treaty Act (MBTA), the NPS Organic Act, and CAHA's enabling legislation (1937) by continuing to allow ORV use at CAHA without completing a plan and regulation and conducting the associated ESA and NEPA compliance.

NPS has identified a three-phased approach to address the executive orders and regulatory requirements. First, NPS would develop an interim strategy and environmental assessment to protect sensitive species and provide for recreational use until a long-term ORV management plan/environmental impact statement (EIS) and regulation can be completed. Second, NPS would begin the development of an ORV management plan/EIS. Third, NPS would use the negotiated rulemaking process to develop the ORV regulation.

RECENT AND CURRENT ACTIONS

I entered on duty as Superintendent of CAHA in December 2005. Since my arrival, we have taken the following steps to address ORV management issues:

1) Interim Protected Species Management Strategy: In January 2006, CAHA released the Interim Protected Species Management Strategy (Strategy) and environmental assessment (EA) for public review. The Strategy focuses on protection of wildlife and plant species that are specifically affected by recreational use within the Seashore and are federally or state listed as threatened, endangered, or species of special concern, or are of special concern to the Seashore. These include piping plover, American oystercatchers, colonial waterbirds, sea turtles, and seabeach amaranth. Although the Strategy is not an ORV management plan, much of it relates to ORV use.

On August 14, 2006, the U.S. Fish & Wildlife Service (USFWS), Raleigh Field Office, issued a biological opinion (BO) stating that implementation of the Strategy as proposed is not likely to jeopardize the continued existence of the piping plover and is not likely to destroy or adversely modify proposed critical habitat. On April 24, 2007, USFWS amended the biological opinion to incorporate annual performance measures proposed by NPS. The biological opinion satisfies the Section 7 consultation requirements of the Endangered Species Act. On July 13, 2007, NPS Regional Director Patricia Hooks signed a Finding of No Significant Impact (FONSI) (copy enclosed) to finalize the Strategy, including the annual performance measures.

The Strategy/EA and FONSI satisfy NEPA compliance requirements. The Strategy is an adaptive management plan that prescribes resource monitoring and resources protection measures (e.g., closures based on buffer distances) to be implemented or modified in response to actual observed conditions on the ground. The Strategy includes biological monitoring and management actions to protect breeding piping plovers, American oystercatchers, and colonial waterbirds during the pre-nesting, courtship and mating, nesting, and unfledged chick stages of

the breeding cycle. CAHA staff also survey for wintering piping plover, American oystercatcher, red knot and Wilson's plover; survey beaches daily from May 1 – September 15 to locate and protect sea turtle nests; and survey for and protect seabeach amaranth, a threatened plant.

Under the Strategy, prior to April 1 each year NPS closes to ORVs and pedestrians recent piping plover breeding habitats at the inlets and Cape Point. In these areas NPS uses carsonite markers to post a 100-foot-wide access corridor, where possible, to provide ORV and pedestrian access around the closures. NPS also uses carsonite markers to post a 150 foot ORV corridor outside of these areas. As the breeding season progresses, CAHA staff implement additional closures as needed to protect breeding, nesting, and foraging birds; chicks until they fledge; sea turtle nests until they hatch; and seabeach amaranth plants that are located outside of existing resource closures. When a resource protection closure is required, NPS considers finding an alternate ORV route or bypass around the closure, when feasible. In areas of reduced corridor width (i.e., narrower than 100 feet) NPS may post a 10 mph speed limit. Outside of the breeding season, ORV and pedestrian access is restricted year-round to a corridor 150 feet duneward of the ocean mean high tide.

NPS began implementation of the Strategy during the 2006 breeding season (April 1 - November 15, 2006). In 2006 the RM staff implemented 331 actions involving the installation, modification and removal of resource closures associated with protected species. These actions included 97 bird closures, closure modifications (expansions and reductions), and removals; and 84 sea turtle nest closures, 75 modifications in preparation for hatching, and 75 closure removals. Additionally, CAHA law enforcement (LE) staff provides enforcement support of the Strategy through periodic beach patrols to monitor compliance with closures and other regulations, and by responding to reports from RM staff of significant violations.

2) Public Information: To support implementation of the Strategy, NPS provides information on resource values, beach driving regulations, closures, and ORV access status to the public through a variety of measures including, but not limited to:

- ORV Vehicle Use information sheet (copy enclosed) is available at park visitor centers, ranger stations, Dare County welcome centers, on the CAHA website, and posted on bulletin boards at various ORV access ramps.
- Signs (both text and graphic) and labeled carsonite posts provide regulatory, safety and closure information at ORV access ramps, and along ORV use areas (“corridors”), and identify areas open or closed to ORV use.
- From April – October, CAHA issues a weekly Beach Access Report (example enclosed) that provides information on NPS resource protection measures and identifies areas open to ORV use, as well as areas closed to ORV use due to seasonal, safety or resource protection closures. These are sent to a large e-mail list of news media, public officials, stakeholder organizations, local businesses and individuals. The report is also posted on the CAHA website and on many stakeholder organization websites.
- From May-September, CAHA issues a weekly Resources Management report (example enclosed) to provide information about resource observations and to promote the protection and appreciation of CAHA's natural resources.

- A community liaison employee functions April – October to keep local stakeholders and businesses informed of ORV requirements and issues, access status, and resource closures.
- Park personnel, including law enforcement and management, attend meetings of various local organizations to provide information and updates on ORV management issues and requirements.

3) Law Enforcement (LE): CAHA LE staff actively patrol the beaches and enforce a variety of regulations (see Appendix 1) in support implementation of the Strategy. In 2006 CAHA had 17 commissioned law enforcement positions, with several of the positions being less than year-round or vacant for a part of the year due to retirements or transfers. CAHA expended \$1,383,176 in 2006 on LE staffing and related costs, which provided for 15.49 full-time equivalents (FTE) of LE personnel.

In 2006, CAHA LE staff documented 957 violations of park regulations (see Appendix 2) and RM staff documented 47 violations of bird-related resource closures and 23 violations of sea turtle-related closures for a total of 1,027 violations related to ORV use or human conduct in ORV use areas. While the number of violations is high, it is helpful to put the number in the context of visitation numbers. In 2003 Dr. Hans Vogel song, East Carolina University, conducted a visitor use study that focused, in part, on ORV use at CAHA. Dr. Vogel song estimated that approximately 10% (225,000) of CAHA visitors use ORVs. Many people consider Dr. Vogel song’s estimate to be conservative (or low). Based on the number of documented violations in 2006 and Vogel song’s estimate of the number of ORV visitors annually, it is estimated that less than one-half of one percent (0.46%) of ORV users (1027/225,000) committed violations in 2006; and 99.54% of ORV users (223,973/225,000) complied with posted regulations.

While these numbers are estimates, it supports our observations that the vast majority of ORV users are responsible individuals who comply with existing regulations. To further improve the level of compliance, CAHA must improve its existing education and enforcement efforts and focus those efforts more directly on the small minority of users who commit the violations.

4) Negotiated Rulemaking Feasibility Report: In April 2006 the negotiated rulemaking assessment team issued its findings and recommendations in the *Cape Hatteras National Seashore: Negotiated Rulemaking Feasibility Report*. The team recommended a variety and total of 28 stakeholder organizations be appointed to the negotiating committee. The team determined that “consensus-based negotiation to develop a management plan and proposed implementing regulations can be convened, can yield important benefits even if agreement is not reached, and has a modest chance of success.”

5) Superintendent’s Order # 07 - ORV Management: In May 2006 CAHA updated Superintendent’s Order # 07 (SO-7) (copy enclosed) to complement the Strategy until a long term ORV plan and regulation can be developed. SO-7 provides criteria for identification and marking of ORV use areas or “corridors,” seasonal closures, and safety closures; and establishes speed limits, and emergency and safety closure notification procedures. Under the Strategy and SO-7, the amount of beach open to ORV use varies throughout the year, depending on current

resource and physiographic conditions. For example, during the winter season of 2006-07, of 64 miles of beach at CAHA approximately 14.5 miles (22.6%) were closed to vehicles (safety + resource resources) and 49.7 miles (77.4%) were open to ORV use. During peak summer season in mid-July 2006, beach access status was as follows:

- 15.0 miles (23.4%) seasonally closed to ORVs (e.g. in front of villages)
- 9.9 miles (15.4%) closed to ORVs for safety reasons (e.g., narrow beach)
- 4.8 miles (7.5%) closed to ORVs and pedestrians for resource protection
- 34.5 miles (53.7%) were open to ORV use

6) ORV Management Plan/EIS Notice of Intent (NOI): On December 11, 2006, NPS published an NOI (copy enclosed) to develop an ORV management plan and environmental impact statement, and to open the initial public scoping period. NPS then issued an informational newsletter (copy enclosed) about ORV management issues and the planning process, and conducted a series of public scoping meetings. The public scoping period ended March 16, 2007 and NPS received over 4,000 comments. Based on the public input, NPS will begin to develop conceptual alternatives for further analysis.

7) Negotiated Rulemaking NOI: On June 28, 2007, NPS published a NOI (copy enclosed) to establish a negotiated rulemaking committee to develop the ORV regulation for CAHA. The public comment period for the NOI closed on July 30, 2007. The NOI identified a broad cross-section of stakeholder organizations as proposed participants on the negotiating committee. The proposed participants have participated in two 2-day workshops in February and May 2007 to prepare them to function effectively once the committee is formally established. Another preparatory workshop is scheduled for October 2007. The negotiated rulemaking process is designed to be completed within a fixed time, running concurrently with the National Environmental Policy Act (NEPA) process used to develop the ORV management plan/EIS. We expect the committee to be established in the Fall of 2007. Then it is expected to take 18-24 months to complete the negotiation process.

ADDITIONAL ACTIONS: Subsequent to the court order (July 17, 2007), we have identified additional actions related to ORV management and resources protection at CAHA. These are as follows:

1) Enhanced Information/Education: CAHA is considering the following actions:

- Redesign signing at the ORV beach access ramps to clearly communicate applicable regulations and applicable penalties. A professional sign planner from the NPS Harpers Ferry Center is visiting CAHA the week of July 30, 2007 to develop a plan for new signs at ORV access points.
- Redesign the CAHA beach driving brochure to concisely communicate the regulations and potential penalties for violations.
- Improve the distribution of CAHA beach driving information to ensure a higher percentage of ORV users know the rules. In addition to NPS personnel, ranger stations, visitor centers and websites providing the information, we will also provide the information through a variety of non-NPS means including websites, welcome centers,

and businesses. The following organizations have committed to distributing printed and/or electronic CAHA beach driving information: Dare County, Hyde County, Outer Banks Chamber of Commerce, Outer Banks Visitors Bureau, North Carolina Beach Buggy Association, Outer Banks Preservation Association, Cape Hatteras Anglers Club, American Sportfishing Association, Ocracoke Civic and Business Association, NC Marine Fisheries Commission, Watersports Industry Association, United Four Wheel Drive Associations, The Nature Conservancy, Coalition of NPS Retirees, Hatteras Landing Homeowners Association, Ocracoke Preservation Society, Ocracoke Civic and Business Association, numerous Outer Banks property management realtors, and numerous Outer Banks tackle shops and small businesses.

- Use CAHA's new Beach Ambassador program, a volunteer program developed to distribute water safety information, to also distribute ORV and resource protection information on the beach and at special events.
- Establish a Park Watch program to encourage citizen reporting of illegal activities and unsafe conditions. Peer pressure and self-policing are keys to effective deterrence and improving compliance. Dare County has committed to providing the 24-hour dispatching support for this program.
- Increase NPS uniformed (non-LE) presence on beaches during summer holiday weekends, in addition to increased LE. This may include staffing temporary beach information stations at the entrances to the most popular area(s) such as Bodie Island Spit to provide the regulatory information to all ORV users accessing the beach.
- *The Outer Banks Angler*, which provides televised fishing programming for the local cable channel (Channel 12) will develop a 10-15 minute segment on CAHA beach driving rules and etiquette that will reach 50,000 homes and 250,000 people throughout the Outer Banks area. The preliminary plan is for the program to air every 1-2 hours on Hatteras Island and 3-4 times a day north of Oregon Inlet.

2) Enhanced Law Enforcement: Following the 2007 Memorial Day holiday weekend, CAHA requested additional NPS LE personnel from other parks and received two additional LE rangers during the week of the Fourth of July 2007. In the short term, we will continue to request additional LE personnel from other NPS units to supplement the CAHA LE staff on summer holiday weekends. The current 2008 NPS budget proposal being considered by Congress provides an additional \$282,000 for increased LE staffing for the Outer Banks Group. Positions may include permanent, subject-to-furlough, temporary or seasonal law enforcement personnel.

3) Address Safety Concerns at Popular ORV Use Locations: CAHA is considering the following actions:

- Lower the speed limit from 25 mph to 15 mph for vehicles on all CAHA beaches between May 15 and September 15 to coincide with the period of peak visitation and peak breeding season resource protection activities. Speed limit during the off-season would remain 25 mph.
- Require ORV users to deflate tires to 20 psi or less. Lower air pressure provides better traction in sand at lower speeds and reduces the tendency of inexperienced or uninformed drivers to speed to keep from getting stuck. Much of the rutting of the beach described in

the court order was caused by vehicles with inadequately deflated tires. (20 psi is currently a recommendation, not an enforceable requirement.)

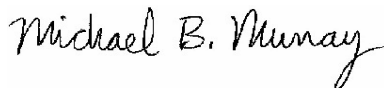
- Establish a policy, enforceable under 36 CFR § 1.5, that during periods of high and concentrated visitation, when additional ORV traffic may pose an increased and unacceptable risk to pedestrians and other beach users and may compromise resources protection measures, CAHA LE personnel may temporarily close those areas with the concentrated visitation to additional traffic. The additional traffic will be directed to less congested beach areas.
- Use the park plane to monitor holiday weekends use levels at popular sites and provide earlier detection of crowding and encroachments in resource protection areas, so that appropriate action to manage the situation is implemented.

4) Address Other Beach Related Enforcement Problems: Using its authority under 36 CFR § 1.5, CAHA is considering prohibiting all beach fires between the hours of 11:00 p.m. and 6:00 a.m. to reduce the number of bonfire-related law enforcement and resource protection problems.

SUMMARY

NPS has not met the long-standing requirements for an ORV management plan and special regulation at CAHA. During the past 18 months, under new leadership at CAHA, NPS has made tangible, substantive progress in addressing these concerns and has initiated the processes to develop an ORV plan and regulation. The measures summarized in this letter—the Interim Protected Species Management Strategy, existing policies and regulations, enhanced information and LE programs, and the additional measures described above—provide the guidance and controls necessary to manage ORV use at CAHA until the ORV management plan and regulation can be completed. Work on both the ORV plan and the special regulation has formally begun and is ongoing. We will provide your office with quarterly progress reports to keep you apprised of the status.

Respectfully yours,



Michael B. Murray
Superintendent

Enclosures

Appendix 1 – Applicable Regulations

The following federal regulations relating to ORVs and beach use are currently applicable on CAHA beaches and are enforced by CAHA law enforcement ranger staff:

36 CFR 1.5(f) Closures and Public Use Limits:

- Posted bird nesting areas are closed to all public use & entry.
- Posted turtle nesting areas are closed to all vehicles & pedestrians.
- Vehicles are prohibited during May through September in front of villages, park campgrounds, life guarded beaches, or other posted areas.
- Unauthorized vehicles and pedestrians are not permitted on the aircraft parking ramps or runways of Billy Mitchell airstrip (Frisco) or the Ocracoke airstrip.

36 CFR 4.2 State Law Applicable (Vehicles and Traffic Safety):

- Vehicles operated on park roads, parking areas, routes designated for off-road use, and all other areas of the park must meet all requirements including all vehicle equipment, licenses and registration, to operate legally on state highways where the vehicles is registered.
- Vehicle operators shall have a valid state driver's license.

36 CFR 4.10 Travel on Park Roads and Designated Routes:

- Operating on undesignated roads, parking areas and off road vehicle use areas.
- Vehicular access to beach or sound-side vehicle areas by other than marked and maintained vehicle access routes is prohibited.

36 CFR 4.14 (b) Open Container of Alcoholic Beverage:

- Carrying or storing a bottle, can or other receptacle containing an alcoholic beverage that is open or seal is broken.

36 CFR 4.21 Speed Limits:

- Maximum speed limit on CAHA beaches is 25 mph.

36 CFR 4.22 Unsafe Operation:

- Operating a motor vehicle without due care or at a speed greater than that which is reasonable and prudent.

36 CFR 4.23 Operating Under the Influence of Alcohol or Drugs:

- DUI to a degree that renders the operator incapable of safe operation.
- Alcohol concentration in the operator's blood or breath exceeds 0.08.
- Refusal to take alcohol test (admissible in court).

36 CFR 2.13 Fires:

- Fire in undesignated area.

- Ground fires permitted only on the beach within Cape Hatteras and Cape Lookout National Seashores seaward of the ocean dune below the high tide mark, but in no case less than 100 feet from a vegetated area. No ground fires in posted bird or turtle nest areas.

36 CFR 2.3 Fishing:

- Adoption of non-conflicting state laws for fishing.
- Authorized rangers may check tackle, license, permits and catch.

36 CFR 2.10 Camping and Food Storage:

- Camping only permitted in designated campgrounds.

36 CFR 2.15 Pets:

- Failure to crate, cage, or restrain pet on 6 ft. leash.
- Failure to comply with pet excrement/disposal.

36 CFR 2.32 Interfering with Agency Function

- Interference.
- Lawful order.
- False Information.
- False Report.

36 CFR 2.34 Disorderly Conduct:

- Fighting, threatening, violent behavior.
- Offensive or abusive utterance, gesture, obscene act, etc.
- Unreasonable noise.
- Creation/maintains hazardous or offensive condition.

36 CFR 2.35 Alcoholic Beverages and Controlled Substances:

- Sale or gift of an alcoholic beverage to underage person.
- Possession by underage person (under 21).
- Open alcohol container after consuming alcohol.
- Possession and consumption of fortified wine, spirituous liquor, or mixed beverage.
- Bodie Island hunting blinds are closed areas for the consumption, and possession of alcohol.
- Unlawful delivery/sale of controlled substance.
- Unlawful possession of controlled substance/marijuana.

36 CFR 2.38 Explosives:

- Unauthorized use/possession of fireworks.

18 USC 13 Assimilative Crimes Act – North Carolina Laws Applicable:

- Possession of Drug Paraphernalia.
- Indecent Exposure.

Appendix 2 – 2006 Law Enforcement Statistics

In 2006 the following numbers and types of violations were documented by CAHA law enforcement staff related to ORV use or human activities in ORV use areas:

Selected Vehicle and Beach Use Violation Totals for 2006

<u>Violation</u>	<u>Arrests</u>	<u>Citations</u>	<u>Warnings</u>	<u>(Sub-Total)</u>
Driving in a Closed Area	0	36	52	(88)
Driving without a License	0	11	4	(15)
DUI	27	27	0	(54)
Open Container	1	49	27	(77)
Unsafe Operation	0	32	51	(83)
Disorderly Conduct	2	3	0	(5)
Unrestrained Pets	0	30	207	(237)
Entering a Resource Closure	0	10	17	(27)
Fireworks	0	11	54	(65)
Fires	0	3	13	(16)
Camping	0	71	83	(154)
Controlled Substances	11	15	0	(26)
Paraphernalia	0	12	0	(12)
Public Intoxication	1	3	0	(4)
Underage Possession of Alcohol	0	60	25	(85)
Weapons	0	5	4	(9)
TOTALS	42	378	537	(957)

Enclosures

Finding of No Significant Impact (FONSI) for Interim Protected Species Management Strategy

CAHA ORV Vehicle Use brochure

CAHA Weekly Beach Access Report

CAHA Weekly Resources Management Report

Superintendent's Order # 07, ORV Management (2006)

Notice of Intent to Develop an ORV Management Plan / Environmental Impact Statement

CAHA Off-Road Vehicle Management Plan newsletter

Notice of Intent to Establish a Negotiated Rulemaking Committee