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**To:** [Mike Murray](#); [JASON.WAANDERS@sol.doi.gov](mailto:JASON.WAANDERS@sol.doi.gov); [Mike.Stevens@sol.doi.gov](mailto:Mike.Stevens@sol.doi.gov); [Paul Stevens](#); [Jami Hammond](#); [AJ North](#)  
**Cc:** [David Jacob](#)  
**Subject:** CAHA proposed rule  
**Date:** 01/04/2011 12:03 PM  
**Attachments:** [CAHA Draft PR 1-4-2011.docx](#)  
[Communications Plan CAHA ORV Prop Rule NOA 12-20 2010.doc](#)  
[Briefing Statement CAHA ORV Prop Rule NOA 1-4-2010.docx](#)

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Please see the attached proposed rule for CAHA ORV, with revisions based on comments received. Note that there are a few outstanding items that require input from the park.

I've also attached the communications plan and briefing statement that will accompany the rule when it goes to AJ North.

Please send me any final comments and then we can get this going through the process.

Thanks.

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CAHA Draft PR 1-4-2011.docx



Communications Plan CAHA ORV Prop Rule NOA\_12-20\_2010.doc



Briefing Statement CAHA ORV Prop Rule NOA\_1-4-2010.docx

**BUREAU:** National Park Service

**MEMBERS:** Sen Richard Burr (R-NC), Sen Kay Hagan (D-NC), Rep Walter Jones, Jr (R-NC)

**ISSUE:** Publication of a Proposed Regulation for Management of Off-Road Vehicle Use at Cape Hatteras National Seashore

**Key Points:**

- The National Park Service (NPS) signed the Record of Decision (ROD) for the Cape Hatteras National Seashore Off-Road Vehicle Management Plan / Final Environmental Impact Statement (final plan/EIS) on December 20, 2010.
- To implement those portions of the ROD that require a regulation to be effective, the NPS is proposing to amend its special regulation for Cape Hatteras National Seashore (Seashore), North Carolina to designate routes where off-road vehicles (ORVs) may be used. Management of ORVs at the Seashore is controversial and there is a high level of public and Congressional interest. The intended effect of this proposed rule is to carefully manage ORV use at the Seashore to protect and preserve natural and cultural resources and natural processes, to provide a variety of visitor use experiences while minimizing conflicts among various users, and to promote the safety of all visitors.

**Background:**

- Executive Order 11644 of 1972, amended by Executive Order 11989 of 1977, requires federal agencies permitting ORV use on federal lands to publish regulations designating specific trails and areas for this use. The NPS implemented these executive orders in 36 C.F.R. § 4.10, which provides that routes and areas designated for ORV use shall be promulgated as special regulations.
- The “selected action” in the ROD established both ORV routes and vehicle free areas and was designed to provide visitors to the Seashore with a wide variety of access opportunities for both ORV and pedestrian users while protecting shorebirds, sea turtles, seabeach amaranth, and other wildlife species at the Seashore.
- ORV and recreational fishing groups, local businesses that cater to visiting ORV users, and the Dare and Hyde County governments are concerned about possible economic effects from ORV management that would provide both vehicle free areas and areas with ORV routes and that would close certain popular ORV routes during the breeding season for shorebirds and sea turtles. Environmental organizations such as Defenders of Wildlife and North Carolina Audubon Society are concerned that the Seashore may not provide sufficient protection from human disturbance for the Seashore’s federally and state listed species and species of management concern. In addition, the public has expressed polarized views on ORV management at the Seashore.
- Both ORV and environmental interests have been involved in litigation against the NPS and the USFWS over Seashore management of listed species and USFWS designation of critical habitat at the Seashore. We expect litigation on the Plan/EIS and special regulation.

**Current Status:**

- The Seashore is operating under a court order/consent decree until the special regulation is completed. The consent decree deadline for publishing the final regulation is April 1, 2011; however, the NPS has notified the parties to the litigation and the Court that it is not likely to complete the final rule until Summer 2011 with implementation beginning in Fall 2011.
- The proposed special regulation will be published for a 60-day public comment period as soon as possible.

**Contact(s):**

Michael B. Murray, Superintendent, Cape Hatteras NS, 252-473-2111, ext. 148

Date: January 7, 2011

20110104 CAHA Draft PR 1-4-2011

1 [insert billing code]

2 **DEPARTMENT OF THE INTERIOR**

3 **National Park Service**

4 **36 CFR Part 7**

5 **RIN 1024-AD85**

6 **Special Regulations of the National Park Service; Cape Hatteras National Seashore**

7 **Account Number 2310-0089-422**

8

9 **AGENCY:** National Park Service, Interior.

10 **ACTION:** Proposed rule.

11 **SUMMARY:** The National Park Service (NPS) proposes to amend its special regulation for Cape  
12 Hatteras National Seashore (Seashore), North Carolina to designate routes where off-road vehicles  
13 (ORVs) may be used. Under NPS general regulations, the operation of motor vehicles off of roads within  
14 areas of the National Park System is prohibited unless otherwise provided for by special regulation. The  
15 intended effect of this proposed rule is to carefully manage ORV use at the Seashore to protect and  
16 preserve natural and cultural resources and natural processes, to provide a variety of visitor use  
17 experiences while minimizing conflicts among various users, and to promote the safety of all visitors.

18 **DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF  
19 PUBLICATION IN THE FEDERAL REGISTER].

20 **ADDRESSES:** You may submit comments, identified by the number **RIN 1024-AD85**, by any of the  
21 following methods:

- 22 - Federal eRulemaking portal: <http://www.regulations.gov>. Follow the instructions for  
23 submitting comments.
- 24 - Mail or hand delivery to: Superintendent, Cape Hatteras National Seashore, 1401 National  
25 Park Drive, Manteo, North Carolina 27954.

20110104 CAHA Draft PR 1-4-2011

1 - For additional information see “**Public Participation**” under SUPPLEMENTARY  
2 INFORMATION below.

3 Comments will not be accepted by fax, email, or in any way other than those specified above.

4 **FOR FURTHER INFORMATION CONTACT:** Mike Murray, Superintendent, Cape Hatteras  
5 National Seashore, 1401 National Park Drive, Manteo, North Carolina 27954. Phone: (252) 473-2111 (ext  
6 148).

7 **SUPPLEMENTARY INFORMATION:**

8 **Background**

9 **Description of Cape Hatteras National Seashore**

10 Officially authorized in 1937 along the Outer Banks of North Carolina, Cape Hatteras is the  
11 nation’s first national seashore. Consisting of more than 30,000 acres distributed along approximately 67  
12 miles of shoreline, the Seashore is part of a dynamic barrier island system.

13 The Seashore serves as a popular recreation destination where visitors participate in a variety of  
14 recreational activities. Additionally, the Seashore is home to important habitats created by the Seashore’s  
15 dynamic environmental processes, including habitats for several species listed under the Endangered  
16 Species Act (ESA) such as the piping plover, ~~the~~ seabeach amaranth, and three species of sea turtles.

17 These habitats are also home to ~~numerous~~ other protected species, as well as other wildlife generally.

Comment [dw1]: Not sure what this achieves.

18 **Authority and Jurisdiction**

19 By enacting the National Park Service’s Organic Act of 1916 (Organic Act) (16 U.S.C. 1 et seq.),  
20 Congress granted the NPS broad authority to regulate the use of areas under its jurisdiction. Section 3 of  
21 the NPS Organic Act specifically authorizes the Secretary of the Interior, acting through the NPS, to  
22 “make and publish such rules and regulations as he may deem necessary or proper for the use and  
23 management of the parks...”

24 **Off-Road Motor Vehicle Regulation**

25 Executive Order 11644, Use of Off-Road Vehicles on the Public Lands, was issued in response to  
26 the widespread and rapidly increasing off-road driving on public lands “often for legitimate purposes but

20110104 CAHA Draft PR 1-4-2011

1 also in frequent conflict with wise land and resource management practices, environmental values, and  
2 other types of recreational activity.” The Executive Order, issued in 1972 and amended by Executive  
3 Order 11989 in 1977, requires federal agencies that allow motorized vehicle use in off-road areas to  
4 designate specific areas and routes on public lands where the use of motorized vehicles may be permitted.

5 Specifically, section 3 of the Executive Order, as amended, authorizes agencies to designate  
6 specific areas and trails on which the use of ORVs may be permitted, provided the designation of such  
7 areas and trails will be based on protecting resources of public lands, promoting the safety of all users of  
8 those lands, and minimizing conflicts among the various uses on those lands. The NPS has implemented  
9 the Executive Order through its regulations at 36 CFR § 4.10(b), which requires that “routes and areas  
10 designated for ORV use shall be promulgated as special regulations” and that the designation of routes  
11 and areas “shall comply with section 1.5 of this chapter and Executive Order 11644.” It also states that  
12 such routes and areas may be designated only in national recreation areas, national seashores, national  
13 lakeshores, and national preserves.

14 The NPS is issuing this proposed rule to comply with these authorities and with NPS policies.

#### 15 **ORV Use at Cape Hatteras National Seashore**

16 Historically, beach driving at the Seashore was for the purpose of transportation, and not  
17 recreation. Because the area was sparsely populated, the number of ORVs on the beach was much smaller  
18 than it is today. The paving of NC-12, the completion of the Bonner Bridge connecting Bodie and  
19 Hatteras islands in 1963, and the introduction of the State of North Carolina ferry system to Ocracoke  
20 Island facilitated visitor access to the sound and ocean beaches. Improved access, increased population,  
21 and the popularity of the sport utility vehicle have resulted in a dramatic increase in vehicle use on  
22 Seashore beaches.

23 ORV use at the Seashore has historically been managed since the 1970s through various draft or  
24 proposed plans, none of which were ever finalized or published as a special regulation as required by 36  
25 CFR § 4.10(b). Motivated in part by a decline in most beach nesting bird populations on the Seashore  
26 since the 1990s, in July 2007 the NPS finalized the Cape Hatteras National Seashore Interim Protected

20110104 CAHA Draft PR 1-4-2011

1 Species Management Strategy / Environmental Assessment (Interim Strategy) that was to provide  
2 resource protection guidance with respect to ORV and other human disturbance until the long-term ORV  
3 management plan and regulation could be completed. In October 2007, a lawsuit was filed challenging  
4 the Interim Strategy. The lawsuit was resolved by a consent decree in April 2008. ORV use is currently  
5 managed pursuant to the consent decree, which modified aspects of the Interim Strategy. The consent  
6 decree also established deadlines of December 31, 2010, and April 1, 2011, respectively for completion of  
7 an ORV management plan/EIS and a final special regulation.

8 **Description of the Subjects and Issues Involved**

9 NPS is seeking public comment on the proposed rule, which is divided into the following **general**  
10 **categories:**

- 11 1. Definitions
- 12 2. ORV permit
- 13 3. Vehicle and equipment requirements
- 14 4. Vehicle inspection
- 15 5. Motorcycles
- 16 6. All-terrain and utility vehicles
- 17 7. Special use permits for off-road driving, temporary use
- 18 8. Authorized commercial vehicles
- 19 9. Revocation of permit
- 20 10. Superintendent's closures
- 21 11. ORV routes
- 22 12. Rules for vehicle operation
- 23 13. Vehicle carrying capacity

24 **The Proposed Rule**

25 This rule is proposed for the purpose of implementing parts of the selected action (alternative F) described  
26 in the Record of Decision (ROD) for the Cape Hatteras National Seashore Off-Road Vehicle Management

**Comment [JMW2]:** This is odd. Why do these 11 numbered categories, which don't really appear anywhere else, use a different numbering system than the rule? There are 13 numbered provisions in the rule (not counting the prohibition at (c)(14)). Why not just list those here and be consistent?  
  
Or apply this 11-category system to the rule if we think it's better. But we have to pick one!

**Comment [dw3]:** Change made to reflect 13 numbered provisions.

20110104 CAHA Draft PR 1-4-2011

1 Plan / Final Environmental Impact Statement (plan/FEIS), which was signed on December 20, 2010. The  
2 plan/FEIS and other supporting documentation can be found online at <http://parkplanning.nps.gov/caha>.  
3 The proposed rule would amend the special regulations for the Seashore set forth in 36 CFR 7.58 to add a  
4 new paragraph (c) to § 7.58, designating areas where ORVs may be used at the Seashore and establishing  
5 other requirements, including permit, vehicle, and equipment requirements. The following section  
6 explains some of the principal requirements of the proposed rule in a “question and answer” format:  
7

8 *Do I need a permit to operate a vehicle off road?*

9 Yes. To obtain an ORV permit, you must complete a short education program, acknowledge in writing  
10 that you understand and agree to abide by the rules governing ORV use at the Seashore, and pay the  
11 applicable permit fee. Both weekly (7-day, valid from the date of issuance) and annual (calendar year)  
12 ORV permits would be available.  
13

14 *Is there a limit to the number of ORV permits available?*

15 No. There would be no limit to the number of permits that the Superintendent could issue.  
16

17 *Several of my family members have ORVs that we would like to use on Seashore beaches. Do we need to  
18 get a permit for each vehicle?*

19 Yes. You would need to get a permit for any vehicle that you want to use for beach driving on designated  
20 ORV routes. A permit would need to be affixed to all vehicles operating off road within the Seashore.  
21

22 *Where can I operate my vehicle off road?*

23 Once you obtain an ORV permit, you may operate a vehicle off road only on designated routes described  
24 in the table located in § 7.58(c)(11) below. That table also provides dates for seasonal restrictions on  
25 driving on these designated routes. Maps of designated ORV routes would be available in the Office of  
26 the Superintendent and on the Seashore website.

20110104 CAHA Draft PR 1-4-2011

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2 *Does the ORV permit guarantee that all designated ORV routes will be open for me to use?*

3 No. ORV routes are subject to temporary resource and safety closures. Past experience indicates that  
4 substantial sections of the beach designated as ORV routes would remain open for ORV use when other  
5 sections are temporarily closed.

6

7 *Are there any requirements for my vehicle?*

8 Yes. To receive a permit to operate a vehicle on designated ORV routes, your vehicle must be registered,  
9 licensed, and insured for highway use and comply with inspection regulations within the state, country, or  
10 province where the vehicle is registered. It must have no more than two axles and its tires must be U.S.  
11 Department of Transportation-listed or approved. Your vehicle must contain a low-pressure tire gauge,  
12 shovel, jack, and jack stand.

13

14 *Can I drive my two-wheel-drive vehicle off road?*

15 Yes. Four-wheel-drive vehicles are recommended, but two-wheel-drive vehicles would be allowed.

16

17 *Can I tow a boat trailer off road with my vehicle?*

18 Yes. Towed boat trailers with one or two axles would be allowed. Boat trailers with more than two axles  
19 would be prohibited.

20

21 *Can I tow a travel trailer (camping trailer) off road with my vehicle?*

22 No. Travel trailers (i.e. camping trailers) would be prohibited off road.

23

24 *Can I ride my motorcycle, all-terrain vehicle (ATV), or utility vehicle (UTV) off of Seashore roads?*

25 No. The operation of motorcycles, ATVs, and UTVs off road by the public in the Seashore would be  
26 prohibited.



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*What is the speed limit on designated ORV routes?*

The speed limit would be 15 miles per hour (unless otherwise posted), except for emergency vehicles when responding to a call.

*Are there right of way rules for ORV drivers in addition to those already in effect at the Seashore?*

Yes. Vehicles must yield to pedestrians and must move to the landward side of the ORV corridor when approaching or passing a pedestrian on the beach. When traveling within 100 feet of pedestrians, ORVs must slow to 5 mph.

*Can I drive off-road at night?*

Yes, but not at all times on all routes. ORVs would be allowed on designated ORV routes 24 hours a day from November 16th to April 30. However, from May 1 to September ~~15~~<sup>14</sup>, designated ORV routes ~~in potential sea turtle nesting habitat (ocean intertidal zone, ocean backshore, and dunes)~~ would be closed to ORVs from 9:00 p.m. until 7:00 a.m. ~~From~~ September ~~16-15~~ to November 15, ORV routes with no turtle nests remaining would reopen for night ORV use, subject to terms and conditions of the ORV permit.

NPS decided that it would be more convenient to administer and easier for the public to understand if the night driving dates were consistent with some of the seasonal ORV route dates. Therefore, as described above, night driving would be allowed beginning on September 15 instead of September 16.

*Can I leave my parked ORV on the beach if I don't drive it between 9:00 pm and 7:00 am during the dates night driving restrictions are in effect?*

No. During the restricted hours, all vehicles would be prohibited on the beach, including parked vehicles.

*Is a separate permit required for night driving?*

No. It would be covered by the ORV permit required to drive off-road in the Seashore.

**Comment [JMW4]:** We need to explain both here and in the rule how people are to know which routes these are. Will it be included on the general route maps? Some other map?  
**Comment [dw5]:** Dates changed per public comment.

20110104 CAHA Draft PR 1-4-2011

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2 *I have a family member who is disabled or mobility-impaired. Can I use my ORV to drive that family*  
3 *member to the beach where we are gathering, even if it is not designated as an ORV route?*

4 Yes, this would be allowed in front of villages only, and would be subject to the conditions of a special  
5 use permit. The permit would allow you to transport mobility-impaired individuals to a predetermined  
6 location in a vehicle-free area (VFA) in front of the villages. After transporting the person to the beach,  
7 you would have to immediately return the vehicle to the nearest ORV route or Seashore road.

8 Additionally, you should keep in mind that there would be many miles of beach open to ORVs year-  
9 round or seasonally that will be accessible by ORV for family gatherings and other activities. In those  
10 areas, vehicles may simply be parked in the ORV corridor.

11

12 *Do commercial fishermen need an ORV permit?*

13 No. Commercial fishermen would not need an ORV permit. When actively engaged in commercial  
14 fishing activity, they would be covered under their commercial fishing special use permit.

15

16 *Can commercial fishermen drive in the vehicle-free areas?*

17 Yes. Authorized commercial fishermen actively engaged in commercial fishing activity would be allowed  
18 to enter VFAs, except for resource closures and lifeguarded beaches, as is the case now. Those  
19 commercial fishermen who are actively engaged in authorized commercial fishing activity involving haul  
20 seine and gill nets, and are able to present fish house receipts for the previous 30 days, would also be  
21 allowed to enter the beach at 5 a.m. on days when night driving restrictions are in effect for the general  
22 public.

23

24 **Compliance With Other Laws**

25 **Use of Off-Road Vehicles on the Public Lands (Executive Order 11644)**

20110104 CAHA Draft PR 1-4-2011

1 Section 3(4) of Executive Order 11644 provides that ORV “areas and trails shall be located in  
2 areas of the national park system, Natural Areas, or National Wildlife Refuges and Game Ranges only if  
3 the respective agency head determines that off-road vehicle use in such locations will not adversely affect  
4 their natural, aesthetic, or scenic values.” Since Executive Order 11644 clearly was not intended to  
5 prohibit all ORV use everywhere in these units, the term "adversely affect" does not have the same  
6 meaning as the similar-sounding terms "adverse impact" or "adverse effect" under the National  
7 Environmental Policy Act of 1969 (NEPA) and other similar authorities. Under NEPA, a procedural  
8 statute that provides for the study of environmental impacts, the term "adverse effect" may refer to any  
9 effect, no matter how minor or negligible. Section 3(4) of the Executive Order, by contrast, does not  
10 prescribe procedures or any particular means of analysis. It concerns substantive management decisions,  
11 and must instead be read in the context of the authorities applicable to such decisions. The Seashore is an  
12 area of the national park system. Therefore, NPS interprets the Executive Order term “adversely affect”  
13 consistent with its NPS Management Policies 2006 and other policies that guide such management  
14 decisions. Those policies provide that NPS only allows "appropriate use" of parks, and avoids  
15 "unacceptable impacts." Specifically, this proposed rule will not impede the attainment of the Seashore’s  
16 desired future conditions for natural and cultural resources as identified in the plan/FEIS. It will not  
17 unreasonably interfere with the atmosphere of peace and tranquility, or the natural soundscape maintained  
18 in natural locations within the Seashore. Therefore, the NPS has determined that in the context of  
19 Executive Order 11644 and the resources and values of the Seashore, ORV use on the ORV routes  
20 designated in this special regulation, which are subject to the resource closures and other species  
21 management measures that will be implemented under the selected action in the Record of Decision for  
22 the plan/FEIS, and which are subject to the other provisions of this proposed regulation, will not  
23 adversely affect the natural, aesthetic, or scenic values of the Seashore.

24

25 **Regulatory Planning and Review (Executive Order 12866).**

**Comment [dw6]:** Per DSC Editing Reference Manual 2005, should be lowercase.

20110104 CAHA Draft PR 1-4-2011

In light of the substantial interest and controversy about the proposed rule, the NPS is treating the final rule as significant under Executive Order 12866 and has prepared a cost-benefit analysis for the proposed regulation. Details of potential beneficial and adverse economic effects of the proposed rule can be found in the cost-benefit report entitled "Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore" which is available online at <http://parkplanning.nps.gov/caha>.

**Regulatory Flexibility Act (RFA).**

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the ~~RFA~~ **Regulatory Flexibility Act** (5 U.S.C. 601 *et seq.*). This certification is based on information contained in the report titled "Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore" which is available online at <http://parkplanning.nps.gov/caha>. According to that report, no entities, small or large, are directly regulated by the proposed rule, which regulates visitors' use of ORVs. The courts have held that the ~~Regulatory Flexibility Act~~ **RFA** requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them. Therefore, agencies must assess the impacts on directly regulated entities, but are not required to analyze in a regulatory flexibility analysis the indirect effects from rules on small entities.

**Small Business Regulatory Enforcement Fairness Act (SBREFA).**

This rule is not a major rule under SBREFA, 5 U.S.C. 804(2). This rule:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

**Comment [mbm7]:** Fact check: We currently are planning for the RTI reports to be posted on the RTI website. Do we plan to eventually post the reports on PEPC too (by the time the proposed rule is published)? I am okay with that. Just pointing out that the draft statement is inconsistent with our current thinking about where to post the RTI reports.

**Comment [dw8]:** We should probably post the BCA to PEPC. It could be in addition to RTI.

20110104 CAHA Draft PR 1-4-2011

1 This determination is based on information contained in the report titled “Benefit-Cost Analysis of  
 2 Proposed ORV Use Regulations in Cape Hatteras National Seashore” which is available online at  
 3 <http://parkplanning.nps.gov/caha>. This action will result in increased costs to those visitors desiring to  
 4 operate ORVs on the beach, due to the requirement for an ORV permit. However, the price of the permit  
 5 would be based on a cost recovery system and would not result in a major increase in costs to visitors.  
 6 Businesses operating in the Seashore under a commercial use authorization or special use permit would  
 7 not need an ORV permit.

**Comment [JMW9]:** Why are SUPs mentioned here? When would a business operate under a special use permit? I don't see any provision for that. The SUP provisions apply to NCDOT, fishing tournament participants, and disabled family member drop-offs.

**Comment [dw10]:** Park to respond.

8  
 9 **Unfunded Mandates Reform Act (UMRA).**

10 This rule does not impose an unfunded mandate on State, local, or tribal governments or the  
 11 private sector of more than \$100 million per year. The rule does not have a significant or unique effect on  
 12 State, local, or tribal governments or the private sector. The designated routes are located entirely within  
 13 the Seashore, and will not result in direct expenditure by State, local, or tribal governments on those  
 14 routes. This rule addresses public use of NPS lands, and imposes no requirements on other agencies or  
 15 governments. A statement containing the information required by the ~~Unfunded Mandates Reform~~  
 16 ~~Act~~UMRA (2 U.S.C. 1531 et seq.) is not required.

17  
 18 **Takings (Executive Order 12630).**

19 Under the criteria in Executive Order 12630, this rule does not have significant takings  
 20 implications. No taking of personal property will occur as a result of this rule. Access to private property  
 21 located within or adjacent to the Seashore will not be affected by this rule. This rule does not regulate  
 22 uses of private property. A takings implication assessment is not required.

23  
 24 **Federalism (Executive Order 13132).**

25 Under the criteria in Executive Order 13132, this rule does not have sufficient federalism  
 26 implications to warrant the preparation of a Federalism summary impact statement. This rule only affects

20110104 CAHA Draft PR 1-4-2011

1 use of NPS-administered lands and imposes no requirements on other agencies or governments. A  
2 Federalism summary impact statement is not required.

3

4 **Civil Justice Reform (Executive Order 12988).**

5 This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

6 (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors  
7 and ambiguity and be written to minimize litigation; and

8 (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language  
9 and contain clear legal standards.

10

11 **Paperwork Reduction Act (PRA)**

12 Implementation of an ORV permit system will require Seashore staff to verify the name, address, and  
13 vehicle information from the applicant’s state-issued vehicle registration and driver’s license. OMB  
14 regulations (5 C.F.R. 1320.3(h)) specify a number of items that are generally not “information” under the  
15 ~~Paperwork Reduction Act (PRA)~~PRA. These items include “affidavits, oaths, affirmations, certifications,  
16 receipts, changes of address, consents, or acknowledgments; provided that they entail no burden other  
17 than that necessary to identify the respondent, the date, the respondent's address, and the nature of the  
18 instrument” and “facts or opinions obtained through direct observation by an employee or agent of the  
19 sponsoring agency.” The applicant information required for issuance of an ORV permit is solely for  
20 identification of the applicants and their addresses, which does not trigger the requirements of the PRA.  
21 The vehicle information is a fact obtained through direct observation of an applicant’s state-issued  
22 driver’s license and vehicle registration. Therefore, the permit application process does not impose  
23 information collection requirements within the meaning of the PRA, and a submission under the PRA is  
24 not required for this proposed rule.

25

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

20110104 CAHA Draft PR 1-4-2011

1 In accordance with NEPA, the NPS prepared a Draft Environmental Impact Statement (DEIS) and a Final  
2 Environmental Impact Statement for the Off-Road Vehicle Management Plan (plan/FEIS). The plan/FEIS  
3 was released on November 15, 2010. The NPS Notice of Availability and the EPA Notice of Availability  
4 for the plan/FEIS were published in the Federal Register on November 15 and November 19, 2010,  
5 respectively. The plan/FEIS evaluated six alternatives for managing off-road motorized vehicle access  
6 and use at the Seashore, including two no-action alternatives. A Record of Decision (ROD) selecting  
7 Alternative F was signed on December 20, 2010, and a notice of the decision was published in the Federal  
8 Register on December 27, 2010. This regulation is proposed for the purpose of implementing the selected  
9 action as described in the ROD, as it related to issuing a proposed rule. A full description of the  
10 alternatives that were considered, the environmental impacts associated with the project, and public  
11 involvement is contained in the FEIS which can be found online at <http://parkplanning.nps.gov/caha>.

12

### 13 **Consultation with Indian tribes (Executive Order 13175).**

14 On August 27, 2010, the NPS sent a letter to the Tuscarora Nation requesting information on any  
15 historic properties of religious or cultural significance to the tribe that would be affected by the EIS/ORV  
16 management plan. The Tuscarora Nation has not informed the Seashore of any such properties. Under the  
17 criteria in Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), we  
18 have evaluated this rule and determined that it would have no potential effect on federally recognized  
19 Indian tribes.

20

### 21 **Information Quality Act (IQA)**

22 As listed in the References section in the plan/FEIS, many of the references cited are from peer-  
23 reviewed scientific journals or are official agency publications, such as the U.S. Fish and Wildlife species  
24 recovery plans, which have been reviewed by other scientific experts outside of the recovery teams that  
25 are knowledgeable of particular species. Interim guidance on NPS Director's Order 11-B indicates that  
26 scientific or scholarly information published in peer-reviewed journals does not require additional peer

20110104 CAHA Draft PR 1-4-2011

1 review. Information presented in the plan/EIS is based on a wide range of guidance and scientific data  
2 which was used to determine potential impacts and to develop a range of reasonable alternatives for the  
3 plan/EIS. The NPS gathered hundreds of scientific journal articles and research papers prior to and during  
4 this planning process, and made a concerted effort to obtain reports and studies that were applicable to the  
5 species in question and the ecological characteristics of the Seashore. In sum, the NPS considered a wide  
6 variety of information sources to evaluate potential impacts in the plan/FEIS, the majority of which were  
7 from published peer-reviewed scientific journals or official agency publications, all of which have been  
8 part of the official administrative record for this project. The NPS believes that the information used in  
9 preparing the plan/FEIS and the subsequent decision to issue this proposed rule is of sufficient quality,  
10 objectivity, utility, and integrity to comply with the IQA (Pub. L. 106-554) and the OMB, DOI, and NPS  
11 policies and guidelines that address the IQA.

12

13 **Effects on the Energy Supply (Executive Order 13211)**

14 This rule is not a significant energy action under the definition in Executive Order 13211. A  
15 Statement of Energy Effects is not required.

16

17 **Clarity of this Rule.**

18 We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of  
19 June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- 20 (a) be logically organized;
- 21 (b) use the active voice to address readers directly;
- 22 (c) use clear language rather than jargon;
- 23 (d) be divided into short sections and sentences; and
- 24 (e) use lists and tables wherever possible.

25 If you feel that we have not met these requirements, send us comments by one of the methods  
26 listed in the "ADDRESSES" section. To better help us revise the rule, your comments should be as



20110104 CAHA Draft PR 1-4-2011

1 specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are  
2 unclearly written, which sections or sentences are too long, the sections where you feel lists or tables  
3 would be useful, etc.

4

5 **Public Participation**

6 *Instructions:* All submissions received must include the agency name and Regulatory Information  
7 Number (RIN) for this rulemaking, which is **1024-AD85**. All comments received through the federal  
8 eRulemaking portal at [www.regulations.gov](http://www.regulations.gov) will be available without change at [www.regulations.gov](http://www.regulations.gov).  
9 Before including your address, phone number, e-mail address, or other personal identifying information in  
10 your comment, you should be aware that your entire comment – including your personal identifying  
11 information – may be made publicly available at any time. While you can ask us in your comment to  
12 withhold your personal identifying information from public review, we cannot guarantee that we will be  
13 able to do so.

14 To view comments received through the federal eRulemaking portal, go to [www.regulations.gov](http://www.regulations.gov)  
15 and enter “1024-AD85” in the “Keyword or ID” search box.

16

17 **List of Subjects in 36 CFR Part 7**

18 District of Columbia, National Parks, Reporting and recordkeeping requirements. In  
19 consideration of the foregoing, the National Park Service amends 36 CFR Part 7 as follows:

20

21

22 **PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM**

23 1. The authority for part 7 continues to read as follows:

24 **Authority:** 16 U.S.C. 1, 3, 9a, 462(k); Sec. 7.96 also issued under D.C. Code 10-137(2001) and  
25 D.C. Code 50-2201 (2001).

26 2. Amend § 7.58 by adding paragraph (c) to read as follows:

1 § 7.58 Cape Hatteras National Seashore.

2 \* \* \* \* \*

3 (c) *Off-Road motor vehicle use*

4 (1) *Definitions.* In addition to the definitions found in § 1.4 of this chapter, the following terms  
5 apply in this section:

6 *ORV* means a motor vehicle used off of park roads.

7 ~~*ORV corridor* means the actual physical limits of the ORV route in the Seashore. The ORV~~  
8 ~~*corridor generally runs from the toe of the dune or the vegetation line on the landward side to XXXX on*~~  
9 ~~*the seaward side. The ORV corridor will usually be marked by posts on the landward side (the seaward*~~  
10 ~~*side of the corridor is not posted). ORV corridors on the ocean beach are marked on the landward side by*~~  
11 ~~*posts seaward of the toe of dune or vegetation line to the high tide line (the seaward side of the corridor is*~~  
12 ~~*not posted).*~~

**Comment [JMW11]:** We say the corridor=the physical limits, and that we will mark it on the landward side, but we never actually define or explain HOW we determine or set the physical limits. This seems like a problem: for example, what if someone egregiously drove outside the corridor in an area where our posts were messed up? How could we cite him?

I've suggested language that would work better, assuming it's correct, though someone needs to fill in the seaward boundary description—I forget which line we use.

**Comment [dw12]:** Park to respond.

13 (2) *ORV permit.* A permit issued by the superintendent is required to operate a vehicle off of  
14 roads at the Seashore.

15 (i) Operation of a motor vehicle authorized under an ORV permit is limited to only those routes  
16 designated in this section.

17 (ii) There is no limit to the number of ORV permits that the superintendent may issue.

18 (iii) Annual ORV permits are valid for the calendar year for which they are issued. Seven-day  
19 ORV permits are valid from the date of issuance.

20 (iv) A permit applicant must complete a short education program in person and acknowledge in  
21 writing an understanding of the rules governing ORV use at the Seashore.

22 (v) Each permit holder must affix the ~~permit in a manner and location specified by the~~  
23 ~~superintendent to the vehicle authorized for off-road use in a manner and location specified by the~~  
24 ~~superintendent.~~

**Comment [dw13]:** This seems awkward as revised.

25 (3) *Vehicle and equipment requirements.* The following requirements apply for driving off-road.  
26 Driving a vehicle not meeting these requirements off-road is prohibited.

- 1 (i) The vehicle must be registered, licensed, and insured for highway use and must comply with ~~with~~  
2 inspection regulations within the state, country, or province where the vehicle is registered.
- 3 (ii) The vehicle must have no more than two axles.
- 4 (iii) Towed trailers must have no more than two axles.
- 5 (iv) Travel trailers (i.e., camping trailers) are prohibited.
- 6 (v) Vehicle tires must be U.S. Dept. of Transportation-listed or approved.
- 7 (vi) The vehicle must contain a low-pressure tire gauge, shovel, jack, and jack stand.
- 8 (4) *Vehicle inspection.* Authorized persons may inspect the vehicle to determine whether it  
9 complies with the requirements of paragraphs (c)(3)(i) through (vi) of this section.
- 10 (5) *Motorcycles.* The operation of motorcycles off-road is prohibited.
- 11 (6) *All-terrain and utility vehicles.* The operation of all-terrain vehicles (ATVs) and utility  
12 vehicles (UTVs) by the public in the Seashore is prohibited.
- 13 (7) *Special use permits for off-road driving, temporary use.* The superintendent may issue a  
14 special use permit for temporary off-road vehicle use to:
- 15 (i) Authorize the North Carolina Department of Transportation to use Seashore beaches as a  
16 public way when necessary to bypass sections of NC Highway 12 that are impassible or closed for  
17 repairs;
- 18 (ii) Allow participants in a regularly-scheduled fishing tournament to drive in an area not  
19 designated for off-road use, if off-road use was allowed in that area for that tournament before January 1,  
20 2009.
- 21 (iii) Allow vehicular transport of mobility-impaired individuals via the shortest, most direct  
22 distance from the nearest designated ORV route or Seashore road to a predetermined location in a  
23 designated vehicle-free area in front of a village; the vehicle must return to the designated ORV route or  
24 Seashore road immediately after the transport.

1 (8) *Authorized commercial vehicles.* In addition to the requirements of (c)(3)(i) through (vi) of  
2 this section, use of vehicles off-road under terms of a commercial use authorization or commercial fishing  
3 permit issued by the superintendent will be as follows. A separate ORV permit is not required.

4 (i) When driving off-road, a commercial use authorization holder is restricted to the designated  
5 ORV routes open for use.

6 (ii) A commercial fishing permit holder may drive on designated ORV routes and, when actively  
7 engaged in authorized commercial fishing activities, on beaches not designated for ORV use, except for  
8 resource closures and lifeguarded beaches.

9 (iii) The superintendent may allow commercial fishing vehicles to enter the beach at 5 a.m. on  
10 days when night driving restrictions are in effect for the general public, provided that such vehicles are  
11 actively engaged in authorized commercial fishing activity involving haul seine and gill nets, and that the  
12 permit holders are able to present fish house receipts for the previous 30 days.

13 (9) *Revocation of permit.* The superintendent may revoke an ORV permit, special use permit, or  
14 commercial use authorization for violation of applicable Seashore regulations or terms and conditions of  
15 the respective permit.

16 (10) *Superintendent's closures.* The superintendent may temporarily limit, restrict, or terminate  
17 access to the areas designated for off-road use after taking into consideration public health and safety,  
18 natural and cultural resource protection, and other management activities and objectives, such as those  
19 described in the Off-Road Vehicle Management Plan/Final Environmental Impact Statement. The public  
20 will be notified of such closures through one or more methods listed in § 1.7(a) of this chapter. Violation  
21 of any closure is prohibited.

22 (11) *ORV routes.* The following tables indicate designated ORV routes. The following ramps are  
23 designated as open to ORV use (subject to resource, safety, seasonal, or other closures) to provide access  
24 to ocean beaches: 2.5, 4, 23, 25.5, 27, 30, 32.5, 34, 38, 43, 44, 47.5, 49, 55, 59.5, 63, 67, 68, 70, 72.  
25 Soundside ORV access ramps are described in the table below. Driving off of designated ORV routes or  
26 outside the ORV corridor is prohibited. For a village beach to be open to ORV use during the winter

**Comment [mps14]:** Suggest adding here "such as those described in the Off-Road Vehicle Management Plan/Final Environmental Impact Statement"?

**Comment [JMW15]:** This will be the primary issue for further discussion. I agree with Mike we probably need something more. As currently drafted the rule is very flexible and leaves it to the superintendent to satisfy most of the resource protection mandates through this closure provision, but doesn't articulate any standard other than something like the 1.5 standard.

20110104 CAHA Draft PR 1-4-2011

- 1 season, it must be at least 20 meters (66 feet) wide from the toe of the dune seaward to mean high tide
- 2 line. Maps depicting designated routes and ramps are available in the Office of the Superintendent and on
- 3 the Seashore website.

<b>BODIE ISLAND - DESIGNATED ROUTES</b>	
<b>YEAR ROUND</b>	Ramp 2.5 (0.5 miles south of the southern boundary of Coquina Beach) to 0.2 miles south of ramp 4
<b>SEASONAL September 15 to March 14</b>	0.2 miles south of ramp 4 to the eastern confluence of the Atlantic Ocean and Oregon Inlet
<b>HATTERAS ISLAND - DESIGNATED ROUTES</b>	
<b>YEAR ROUND</b>	<p>1.5 miles south of ramp 23 to ramp 27</p> <p>Ramp 30 to ramp 32.5</p> <p>The following soundside ORV access routes from NC Highway 12 to Pamlico Sound between the villages of Salvo and Avon: <del>commonly known as soundside ramps 46, ramp 48, 52, 53, 54</del> and the ORV access at Little Kinnakeet, <del>ramp 52, ramp 53, and ramp 54</del></p> <p>Ramp 38 to 1.5 miles south of ramp 38</p> <p>The following soundside ORV access routes from NC Highway 12 to Pamlico Sound between the villages of Avon and Buxton: <del>commonly known as soundside ramps 57, ramp 58, ramp 59, and ramp 60</del></p> <p>0.4 miles north of ramp 43 to Cape Point to 0.3 miles west of “the hook” Interdunal route from intersection with Lighthouse Road (i.e., ramp 44) to ramp 49, with one spur route from the interdunal route to the ORV route below</p> <p>Ramp 47.5 to east Frisco boundary</p> <p>One soundside ORV access route from Museum Drive to Pamlico Sound near Coast Guard Station Hatteras Inlet</p> <p>Pole Road from Museum Drive to Spur Road, with two spur routes to Pamlico Sound (one at the terminus of Spur Road and one commonly known as Cable Crossing) and four spur routes to the ORV route below</p> <p>Ramp 55 southwest along the ocean beach for 1.6 miles, ending at the intersection with the route commonly known as Bone Road</p>

**Comment [mps16]:** This is confusing. What does “The following routes” refer to? The ramps listed in the paragraph? Or “Ramp 38 south to 1.5 . . .” Also, why is the ramp listed out of numerical order?

**Comment [JMW17]:** Agree this needs to be clarified. I assume the numerical confusion is because the numbering is different on the sound side, but in any event needs to be clearer.

**Comment [mps18]:** Same comment as mps9.

20110104 CAHA Draft PR 1-4-2011

<b>SEASONAL</b> <b>November 1 to March 31</b>	0.1 mile south of Rodanthe Pier to ramp 23  Ramp 34 to ramp 38 (Avon)  East Frisco boundary to west Frisco boundary (Frisco village beach)  East Hatteras boundary to ramp 55 (Hatteras village beach)
<b>September 15 to March 14</b>	Interdunal route south of the intersection of Pole Road and Spur Road stopping at least 100 meters from the ocean or inlet shoreline
<b>OCRACOKE ISLAND - DESIGNATED ROUTES</b>	
<b>YEAR ROUND</b>	Ramp 59.5 to ramp 63  Three routes from NC Highway 12 to Pamlico Sound located north of the Pony Pens, commonly known as Prong Road, Barrow Pit Road, and Scrag Cedar Road.  1.0 mile northeast of ramp 67 to 0.5 mile northeast of ramp 68  One route from NC Highway 12 to Pamlico Sound located near Ocracoke Campground, commonly known as Dump Station Road.  0.4 miles northeast of ramp 70 to Ocracoke inlet  One route from ramp 72 to a pedestrian trail to Pamlico Sound, commonly known as Shirley's Lane
<b>SEASONAL</b> <b>September 15 March 14</b>	One seasonal route 0.6 mile south of ramp 72 from the beach route to a pedestrian trail to Pamlico Sound  One seasonal route at the north end of South Point spit from the beach route to Pamlico Sound
<b>November 1 to March 31</b>	0.5 mile northeast of ramp 68 to ramp 68 (Ocracoke Campground area)

1

2 (12) *Rules for Vehicle Operation*. The following restrictions apply in addition to the requirements  
3 of Part 4 of this title:

4 (i) *Access*. Individuals who drive off-road must use only designated beach access ramps or  
5 soundside access routes to enter designated ORV routes.

6 (ii) *Pedestrian safety*.

1 (A) Vehicles must yield to pedestrians on all ORV routes.

2 (B) When approaching or passing a pedestrian on the beach, vehicles must move to the  
3 landward side to yield the wider portion of the ORV corridor to the pedestrian.

4 (C) Vehicles must slow to 5 mph when traveling within 30.5 meters (100 feet) or less of  
5 pedestrians at any location on the beach at any time of year.

6 (iii) *Beach parking.* Parking within ORV routes is allowed no more than one vehicle deep, and  
7 only as long as parked vehicles do not obstruct two-way traffic.

8 (iv) *Tire pressure.* When driving on designated routes, tire pressure must be lowered sufficiently  
9 to maintain adequate traction within the posted speed limit.

10 (v) *Speed limit.* The speed limit for off-road driving is 15 mph, unless otherwise posted.

11 (vi) *Hours of operation.* From November 16 – April 30, all designated routes are open 24 hours a  
12 day. From May 1 – November 15, designated routes in sea turtle nesting habitat (ocean intertidal zone,  
13 ocean backshore, dunes) are open 7 a.m. to 9 p.m., except that from September 16 – November 15,  
14 designated routes in sea turtle nesting habitat with no turtle nests remaining, as identified by the  
15 superintendent, are open 24 hours a day.

16 (13) *Vehicle carrying capacity.* The maximum number of vehicles allowed on any particular  
17 ORV route is the linear distance of the route divided by 6 meters (20 feet) per vehicle.

18 (14) Violating any of the terms, conditions, or requirements of paragraphs (c)(1) through (c)(13)

19 of this section is prohibited. Anyone who violates any of the terms, conditions, or requirements of this  
20 regulation will be considered to have committed one separate offense for each term, condition, or  
21 requirement that they violate.

**Comment [JMW19]:** See above comment in preamble. How do people know which routes these are? We need to tell them.

**Comment [dw20]:** Park to respond

**Comment [JMW21]:** See also 36 CFR 7.12(l)(17)(ii). It seems like we may want such a "separate offense" provision here, too.

**Comment [dw22]:** Language from 36 CFR 7.12(l)(17)(ii) added/

Communications Plan  
Cape Hatteras National Seashore  
Proposed Special Regulation

**Issue:** The National Park Service (NPS) is publishing a proposed special regulation for the management of off-road vehicle (ORV) use at Cape Hatteras National Seashore. The proposed special regulation is supported by a Final Off-Road Vehicle Management Plan / Environmental Impact Statement (final plan/EIS) and Record of Decision (ROD). The ROD was signed on December 20, 2010. The “selected action” in the ROD identified ORV routes, vehicle-free areas, and other ORV management measures such as an ORV permit system, vehicle requirements, and night driving restrictions that will be included in the proposed special regulation.

The intended effect of this proposed rule is to carefully manage ORV use at the Seashore to protect and preserve natural and cultural resources and natural processes, to provide a variety of visitor use experiences while minimizing conflicts among various users, and to promote the safety of all visitors.

Executive Order 11644 of 1972, amended by Executive Order 11989 of 1977, requires federal agencies permitting ORV use on federal lands to publish regulations designating specific trails and areas for this use. The NPS implemented these executive orders in 36 C.F.R. § 4.10, which provides that routes and areas designated for off-road vehicle use shall be promulgated as special regulations. ORVs have operated on the Seashore’s beaches since before the park unit was established, but the required regulation has never been issued. As a result of the settlement of litigation on the Seashore’s Interim Protected Species Management Strategy/ Environmental Assessment, the Seashore is providing enhanced resource protection under a court approved consent decree pending the completion of a final regulation for ORV use.

The consent decree deadline for publishing the final regulation is April 1, 2011; however, the NPS has notified the parties to the litigation and the Court that it is not likely to complete the final rule until Summer 2011 with implementation beginning in Fall 2011.

ORV and recreational fishing groups, local businesses, and the Dare and Hyde County governments are concerned about possible economic effects from ORV management that would close certain popular ORV routes during the breeding season to protect nesting shorebirds and sea turtles. They also are concerned about the establishment of vehicle-free areas in the Seashore for the use of visitors who prefer to enjoy the beach without the presence of vehicles. Environmental organizations such as Defenders of Wildlife and the North Carolina Audubon Society are concerned that the Seashore may not provide sufficient protection from human disturbance for the Seashore’s federally and state listed species and species of management concern.

Both ORV and environmental interest groups have been involved in previous litigation against the NPS and the USFWS over Seashore management of listed species and USFWS designation of critical habitat at the Seashore. NPS expects litigation at the conclusion of the rulemaking process.



## Talking Points

1. The Seashore is home to several federally and state listed species and species of management concern. NPS is required to conserve and protect all of these species, as well as the other resources and values of the Seashore.
2. The Seashore provides a variety of visitor experiences. It is a long, essentially linear park, visitation is high, and parking spaces near roads are limited. Some popular beach sites, particularly those near the inlets and Cape Point, are a distance from established or possible parking spaces. ORVs have long served as a primary form of access for many portions of the beach in the Seashore, and continue to be the most practical available means of access and parking for many visitors.
3. NPS respects the diverse interests and values held by members of the public regarding ORV management and wildlife conservation. We believe the proposed special regulation will provide visitors to the Seashore with a wide variety of access opportunities for both ORV and pedestrian users, while ensuring the protection of wildlife at the Seashore.
4. Once it is published, the proposed rule will be open for public comment for 60 days.

## Rollout Strategy and Communications Plan

- This contentious issue had a significant amount of public involvement during public scoping, negotiated rulemaking, and the public comment period on the Draft Plan/EIS. Significant public interest in the issue is expected to continue, and litigation is likely. There will be substantial media coverage at the local level and some regional and national media coverage.
  - When the proposed special regulation is published in the *Federal Register*, the Seashore will publicize it through a press release to be emailed to the Seashore's mailing list and through the NPS Planning, Environment and Public Comment (PEPC) web site for the project.
  - The proposed special regulation will be posted on the federal eRulemaking portal at [www.regulations.gov](http://www.regulations.gov), where the public may submit electronic comments during the 60-day comment period. The Seashore will also make the proposed rule available on PEPC, although electronic comments will not be accepted through the PEPC website. Written comments on the proposed special regulation may be mailed or hand delivered to the Seashore headquarters. Seashore staff will respond to calls from the media as they occur.
- Just before publication of the proposed special regulation in the *Federal Register*, the Seashore will notify the North Carolina Congressional delegation staff, as well as local elected officials, of the imminent publication of the proposed special regulation.