

**From:** [Mike Murray](#)  
**To:** [russ\\_wilson@nps.gov](mailto:russ_wilson@nps.gov)  
**Cc:** [AJ North](#); [Doug Wetmore](#); [jason.waanders@sol.doi.gov](mailto:jason.waanders@sol.doi.gov); [mike.stevens@sol.doi.gov](mailto:mike.stevens@sol.doi.gov)  
**Subject:** final draft  
**Date:** 06/10/2011 10:42 AM  
**Attachments:** [Draft NPS response to SBA comments 060911\\_JMW-rjw-egd-RTI-mbm.docx](#)  
[Final Draft NPS response to SBA comments 061011.docx](#)

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Russ,

I will be out of the office on leave this afternoon. If any questions come up about fine-tuning the language, I defer to Jason's input. If you have any questions of me this afternoon about any of the language, please send me an email with the wording pasted into the email so I can view it and respond on my Blackberry. Otherwise, I'll be back in the office on Monday, if needed.

Attached is the "final draft" showing edits in Tracks Changes that includes the suggestion from Mike Stevens and comments from Carol Mansfield of RTI. Also attached is a clean copy, dated 061011, that incorporates all the changes. As far as I am concerned, the draft is ready for you to move forward with whatever additional review (e.g., John Strylowski) it needs in DC. **Thanks for your help in keeping this moving forward!**



Draft NPS response to SBA comments 060911\_JMW-rjw-egd-RTI-mbm.docx



Final Draft NPS response to SBA comments 061011.docx

Mike Murray  
Superintendent  
Cape Hatteras NS/ Wright Brothers NMem/ Ft. Raleigh NHS  
(w) 252-473-2111, ext. 148  
(c) 252-216-5520  
fax 252-473-2595

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Date

Memorandum

To: Nathan Frey, Office of Management and Budget (OMB), Office of Information and Regulatory Affairs

From: **(John Strylowski or Russ Wilson???)**

Subject: Small Business Administration (SBA) Office of Advocacy Comments Regarding the National Park Service's Proposed Special Regulation for Off-Road Vehicle Management at Cape Hatteras National Seashore

*The following memorandum contains information that falls under the deliberative process privilege and is, therefore, exempt from public disclosure. This response is intended for internal agency review only, and the information falls under exemption (b)(5) of the Freedom of Information Act (FOIA).*

The National Park Service (NPS) appreciates the opportunity to respond to the comments of the SBA Office of Advocacy regarding the pending proposed rule **[RIN 1024-AD85]** for off-road vehicle (ORV) management at Cape Hatteras National Seashore (the Seashore). As acknowledged by the SBA Office of Advocacy in its comments, the rule will not directly regulate small businesses and will have indirect economic effects only. Therefore, a regulatory flexibility analysis is not required. The SBA Office of Advocacy has recommended that the NPS perform a regulatory flexibility analysis anyway, citing concerns of small businesses that will be indirectly affected by the proposed regulation. The purpose of this response is to explain why we do not believe that such an analysis is necessary.

Executive Order 11644 of 1972, amended by Executive Order 11989 of 1977, required 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 Seashore has not previously designated ORV routes, as required, but ORVs have been allowed to access large portions of the Seashore. Regulation and management of ORV use is thus necessary to protect park resources and comply with longstanding federal requirements. NPS management of ORV use led to litigation filed in October 2007, which was settled according to a consent decree in April 2008. The Seashore is operating under this court order/consent decree until a special regulation is completed. The consent decree deadline for publishing the final rule was originally April 1, 2011. On April 12, 2011, the Court approved an order to extend the deadline for completing the final rule until November 15, 2011. The Court is unlikely to react favorably to any further extension requests.

As background, the Seashore is home to several species listed under the Endangered Species Act (ESA) and some species that are listed or recognized by the State of North Carolina. The NPS is required under the NPS Organic Act, the Seashore's enabling legislation, and other federal statutes such as the ESA and Migratory Bird Treaty Act, to conserve and protect all of these

species, as well as the other resources and values of the Seashore. The Seashore also 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 near the inlets and Cape Point are a distance from established or possible parking spaces. These same areas also function as the Seashore's most sensitive wildlife habitat. Although never legally authorized, 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 means of access and parking for many visitors.

In December 2007 the Department of the Interior (DOI) established a negotiated rulemaking advisory committee (Committee) to assist the NPS in the development of the Seashore's ORV plan and special regulation. An objective of the advisory committee was to provide extensive opportunities for stakeholder involvement during the planning process. The Committee consisted of 30 representatives from stakeholder groups including: civic and homeowner associations; commercial fishermen; local, state, regional, and national environmental and natural resource conservation groups; county, state and federal government; tourism, visitation, and business organizations; ORV user groups; open access users; recreational fishing users; and other users. This included representatives from numerous local organizations, such as the Outer Banks Chamber of Commerce, and included numerous individuals affiliated with local businesses such as tackle shops, motels, and realty companies.

The Committee met 11 times from January 2007 through February 2009 (a total of 20 days of formal meetings), and conducted numerous additional subcommittee and work group meetings and conference calls. The Committee discussed and explored options for the full spectrum of ORV management issues covered in the ORV management plan/environmental impact statement (plan/EIS) and ultimately in the proposed rule. As a result of these discussions, the NPS considered a variety of concepts and measures that either originated from Committee members or were discussed during Committee, subcommittee, or work group sessions. Although the Committee as a whole did not reach a consensus on a recommended alternative, in creating the alternatives in the plan/EIS, the NPS made a management judgment as to which combination of concepts and measures would make an effective overall ORV management strategy.

After a lengthy planning process involving both the negotiated rulemaking advisory committee and the public involvement opportunities offered under the National Environmental Policy Act (NEPA) process, the NPS released a draft plan/EIS (DEIS) for public comment in March 2010. During that comment period for the DEIS, the NPS received more than 15,000 pieces of correspondence, including comments from local stakeholders. The comments NPS received were, in general, divided into sharply opposing perspectives. Most commenters preferred ORV management that would either be considerably more restrictive or considerably less restrictive than that described in the NPS preferred alternative, Alternative F.

There are many ORV management elements in the preferred alternative that were significantly influenced by the public input. The NPS fully considered the comments and necessarily made management judgments as to how to address and incorporate them, while still complying with applicable legal authorities, to create an effective overall ORV management strategy. After analyzing and considering the public and agency comments on the DEIS, the NPS revised its preferred alternative, Alternative F, and issued a final plan/EIS (FEIS) in November 2010.

As part of the socio-economic impact analysis for the plan/EIS, and based on suggestions from negotiated rulemaking advisory committee members, the NPS conducted a small business survey, a visitor intercept survey, and a vehicle count study to supplement the existing sources of socio-economic data that were available in the public domain. This information was fully considered in designing the alternatives and in preparing the socio-economic impact analysis for the DEIS and FEIS, and in the benefit-cost analysis for the proposed rule.

Alternative F, the NPS preferred alternative, provides less ORV access to the beach and more vehicle free areas (VFAs) for pedestrians, compared to the no-action alternatives. Under Alternative F, the economy of the two-county Region of Influence (ROI) could experience long-term negligible to minor adverse impacts if visitation declines. Small businesses within the Seashore villages could experience long-term negligible to moderate adverse impacts. All but a few of the businesses in the ROI are small as defined by SBA, and close to 100% of the impacts would fall on these small businesses. Additionally, as discussed in the EIS, there is the potential for larger short-term impacts to a few specific businesses that depend on customers who visit areas of the beach that would be restricted or closed under Alternative F. However, some popular areas, such as Cape Point, South Point, and Bodie Island spit, would have designated year-round or seasonal ORV routes, subject to resource closures under Alternative F. The presence of more VFAs for pedestrians, combined with increased parking for pedestrian access, could increase overall visitation as compared to the no-action alternatives, and thereby increase the probability that revenue impacts would be at the low end of the estimated range rather than the high end.

The Record of Decision (ROD) documenting the Selected Action was issued in December 2010. To implement those portions of the Selected Action pertaining to ORVs, the NPS must amend its special regulation for the Seashore to designate routes where ORVs may be used. As stated in the ROD, among the six management alternatives considered in the final plan/EIS, the Selected Action (Alternative F) best meets the NPS's legal and regulatory requirements and policy guidance for managing park resources and ORVs. It also meets the purpose, needs, and objectives of the plan/EIS. The Selected Action will protect the Seashore's natural and cultural resources and result in progress towards meeting desired conditions for protected species, while effectively providing for a balance of ORV access with vehicle-free areas to support a diversity of visitor experiences.

The Selected Action includes a number of measures designed to mitigate impacts to the volume of visitor use as well as the potential for indirect economic effects on village businesses that have profited from patronage by Seashore visitors using ORVs. These include: new pedestrian and ORV beach access points, parking areas, pedestrian trails, interdunal routes, and ORV ramps to enhance ORV and pedestrian access; a designated year-round ORV route at Cape Point and South Point, subject to resource closures when breeding activity occurs; and pedestrian shoreline access along ocean and inlet shorelines adjacent to shorebird prenesting areas until breeding activity is observed. In addition, NPS will seek funding for an alternative transportation study and consider applications for businesses to offer beach and water shuttle services. These extra efforts to increase overall ORV access and visitor use ~~pedestrian access~~ under the Selected Action, which were developed with extensive public involvement during the negotiated

rulemaking advisory committee and NEPA processes, should increase the probability that the economic impacts are on the low rather than high end of the range.

In closing, the NPS believes that in developing the Selected Alternative, which will be used as the basis for the special regulation, appreciable consideration has been given to the concerns of small businesses that may be indirectly impacted by the rule. While some of these businesses may have benefitted from the relatively unregulated ORV use at the Seashore in the past, that past management was contrary to NPS regulations and also raised potential problems under NPS's statutory mandate and other laws. The transition to a more regulated system will likely cause some indirect impacts on those who benefitted from the prior management system, but it is probably an inevitable result of compliance with the applicable laws and regulations. Where possible, reasonable mitigation measures have been included that are not in conflict with the NPS legal mandate to conserve park resources unimpaired for the enjoyment of future generations. *(Any final sentence needed?)*