

From: [Mike Murray](#)
To: [Doug Wetmore](#); jason.waanders@sol.doi.gov; mike.stevens@sol.doi.gov; [Paul Stevens](#)
Cc: russ_wilson@nps.gov; [AJ North](#); [Darrell Echols](#)
Subject: Please review by COB Tuesday
Date: 09/26/2011 06:50 AM
Attachments: [092611 Summary of Proposed Edits for Final Rule.docx](#)
[SELC.pdf](#)
[092611 First draft edits for Final Rule.doc](#)

Doug, Jason, Mike and Paul,

During the upcoming conference call at 1:00 p.m. EDT on Wednesday, Sept 28, I would like to discuss the following items:

1) Initial thoughts about revisions to incorporate into the Final Rule -

After reviewing a representative sampling of public comments on the proposed rule, there are a number of concerns/issues that I think we can and should address in some manner in the final rule. I'm not sure if the issues would best be addressed solely in the response to comments section (i.e., in the preamble) or if it would be better to address them in the regulation itself.

For the sake of discussion, I have made preliminary draft edits to the regulatory language to address the key topics, issues, or concerns that I think should be addressed. In preparation for our conference call, please review the attached "First draft edits for Final Rule" document and suggest revisions, as appropriate. Ideally, **please review respond with comments in Track Changes by COB on Tuesday and share your comments with ALL addressees listed or copied above.** I will send out the most up-to-date version of our collective edits/comments prior to the conference call and we can use part of the conference call time to discuss the comments or reconcile differences in comments. As background information, also attached is a summary list of the proposed edits with an explanation of the origin of the concern and the objective of each edit. The "list" of proposed edits is not necessarily complete and we should re-evaluate it once we receive and have had a chance to review the complete comment summary report from Louis Berger.



092611 First draft edits for Final Rule.doc



092611 Summary of Proposed Edits for Final Rule.docx

2) SELC comments about NEPA and APA issues. See attached. I would like to have an initial brief discussion during the conference call on Wed about the legal concerns raised by SELC in section 8 starting on p. 12 of their comments. Is there any validity to these concerns and, if so, do we need to consider changes to address the concerns in the final rule (i.e., do we need to consider any changes above and beyond the ones that I am proposing?). Attached are the SELC comments.



SELC.pdf

Mike Murray
Superintendent

0031153

Cape Hatteras NS/ Wright Brothers NMem/ Ft. Raleigh NHS
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----- Forwarded by Mike Murray/CAHA/NPS on 09/23/2011 03:51 PM -----

**Cyndy
Holda/CAHA/NPS**

09/22/2011 02:32 PM

To Cyndy Holda/CAHA/NPS@NPS
cc AJ North/WASO/NPS@NPS, Doug
Wetmore/DENVER/NPS@NPS,
jason.waanders@sol.doi.gov, Mike
Murray/CAHA/NPS@NPS, mike.stevens@sol.doi.gov,
Paul Stevens/CAHA/NPS@NPS, Russ
Wilson/WASO/NPS@NPS, Mike
Murray/CAHA/NPS@NPS, Cyndy Holda/CAHA/NPS@NPS

Subject Re: Please schedule 

To All:

The call has been confirmed for:

Wednesday, September 28th at 1:00 p.m. (ET) 11:00 a.m. (MT)

Dial in #: 866-751-2656

Participant #: 3567872#

Thank you for your assistance to Cape Hatteras National Seashore!

Cyndy M. Holda
Public Affairs Specialist
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▼ Cyndy Holda/CAHA/NPS

**Cyndy
Holda/CAHA/NPS**

To Doug Wetmore/DENVER/NPS@NPS, AJ
North/WASO/NPS@NPS, Russ Wilson/WASO/NPS@NPS,
mike.stevens@sol.doi.gov, jason.waanders@sol.doi.gov,

0031154

09/22/2011 10:45 AM

Paul Stevens/CAHA/NPS@NPS
cc Mike Murray/CAHA/NPS@NPS, Cyndy
Holda/CAHA/NPS@NPS
Subject Please schedule

Good Morning Gentlemen!

As per Mike Murray's request to discuss an issue with all of you next week (see his message below).

May I suggest the following two dates/times:

Wednesday, September 28th at 1:00 p.m. (ET) 11:00 a.m. (MT)

or

Friday, September 30th at 10: a.m. (ET) 8:00 a.m. (MT)

Please weigh in on your availability for either or both and your preference. I will confirm and send dial in #s once confirmed.

Mike will send you information for your review prior to the conference call.

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----- Forwarded by Cyndy Holda/CAHA/NPS on 09/22/2011 10:38 AM -----

**Mike
Murray/CAHA/NPS**

To Cyndy Holda/CAHA/NPS@NPS
cc

09/22/2011 09:46 AM

Subject please schedule

Cyndy,

Please set up a conference call with me to talk next week (approx mid-week is best) with Doug Wetmore, Jason Waanders, Mike Stevens, Paul Stevens, AJ North and Russ Wilson about public comment issues and possible revisions of the ORV proposed rule. We'll need about an hour for the discussion. My plan is to send the participants information and draft revision language a few days before the call so that they can read through it ahead of time and be prepared for a focused

discussion during the call.

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Summary of Proposed Edits in Regulatory Language for CAHA ORV Final Rule

After reviewing a representative sampling of public comments on the proposed rule, there are a number of concerns/issues that should be addressed in some manner in the final rule. I'm not sure if the issues would best be addressed solely in the response to comments section of the preamble or in the wording of the final rule itself. For the sake of getting discussion started, I have made preliminary draft edits to the regulatory language to address the key topics, issues, or concerns that I think should be addressed. My "list" is not necessarily complete and we should re-evaluate it once we receive the comment summary report.

The proposed edits for the Final Rule appear in the regulation in the following order:

Section/topic	(Party) Stated concern(s)	Objective of edit
(1) <i>Definitions: (add) "Nonessential vehicle"</i>	(NPS) <i>Nonessential vehicle</i> is not defined, but used in several locations in the regulation	Provide a definition in the rule that is consistent with the definition in the Glossary for the FEIS
(1) <i>Definitions: (revise) ORV corridor</i>	(SELC) Definition is not sufficiently protective of backshore for wildlife use. They propose edits that would change the width of the corridor intended by NPS	Clarification of wording consistent with the intent of the measures stated in the FEIS and ROD
(1) <i>Definitions: (add) "Vehicle Free Area or VFA"</i>	(CHAPA) Concern that use of "vehicle free area" or "VFA" in preamble implies regulatory status but is nowhere defined	Provide a definition in the rule that is consistent with the definition in the Glossary for the FEIS
(2)(v) (revise) <i>ORV Permits</i>	(CHAPA) Concern that requiring permittees to take the educational program only "in person" will create long waits on Sat-Sun when most weekly cottage rental visitors would likely want to obtain permits. They advocate for having permits available on-line and at other venues, and that permittees only have to take the training once (not every time they get a permit)	By removing "in person", allow the flexibility for the permit issuance procedures to evolve. We could designate the specifics in the Superintendent's compendium. We intend initially to issue them only in person and are planning for the Sat-Sun "rush", but it possible that we may want to transition to on-line permits at some point in the future.
(3)(v) (revise) <i>Vehicle and Equipment Requirements</i>	(???) I recall a comment, but not the source, that said the term "jack stand" normally refers to a manufactured, tripod-like vehicle stand, which is used as a static safety device to "back-up" a hydraulic lift or car jack in case of hydraulic system failure	The term "jack <u>support board</u> " (rather than "jack <u>stand</u> ") accurately describes what we intended (a board to put under the jack so the jack doesn't dig deeply into the sand as it lifts the weight of the vehicle). "Support board" is the term used in the CACO ORV rule
(7)(iii) (revise) <i>Special Use Permits for mobility impaired individuals (revise)</i>	(CHAPA) Concern that requiring the permittee to immediately remove the vehicle from the beach after transport (then have to go get vehicle again when it is time to leave) would create unreasonable logistical and safety concerns, particularly if the mobility impaired person is the vehicle operator	Allow the vehicle to remain accessible for the mobility impaired person, but ensure that the vehicle use is limited to the authorized use for to-and-from transport only, without creating the mis-impression that the permittee is authorized to drive any where they want and as much as they want in the

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		vehicle free area
(8)(i) (revise) <i>Commercial Fishing Vehicles</i>	(SELC) Concern regarding the use of “and” in the proposed rule, rather than “or”	Clarify the wording consistent with the intent of the measures stated in the FEIS and ROD
(9) (revise) <i>ORV Routes</i>	(SELC) Concern that failure to explicitly state that routes and ramps of subject to closure for reasons stated in the FEIS implies that the routes and ramps are always open regardless of other concerns	Clarify of wording consistent with the intent of the measures stated in the FEIS and ROD
(9) (revise) Route Table, Hatteras Island – Year Round	(NPS) Erosion caused by Hurricane Irene has changed the landscape of Hatteras Inlet spit such that only a portion of “Spur Road” remains and appears as more of a continuation of Pole Road than an actual “spur” or side road	The revised wording is a simpler and more accurate description of the current conditions and would support implementation of what was intended in the FEIS and ROD
(9) (delete) Route Table, Hatteras Island – Seasonal, Sept 15 to Mar 14	(NPS) Erosion caused by Hurricane Irene has changed the landscape of Hatteras Inlet spit such the seasonal route is no longer viable or needed	Eliminate unnecessary wording. The parking/access intended by the seasonal route will be accomplished by the revised Spur Road wording above
(9) (revise) Route Table, Ocracoke Island – Year Round	(CHAPA) Concern about NPS implementing the designated ORV route restrictions without having the new access points to support it. Note: They advocate for not implementing any of the regulation until all infrastructure improvements are constructed	The designated year-round route from Ramp 59.5 to ramp 63 is the ONLY designated ORV route that would not have any established access point until <u>after</u> new ramps are constructed. The simplest way to address this is to continue to use Ramp 59 until such time that ramp 59.5 is constructed
(10) (revise) <i>Superintendent’s Closures</i>	(SELC) Concern that unless the Alternative F species management strategies, including buffer distances, are explicitly stated in the rule they would not be enforceable and NPS would not be obligated to implement them as described	Address the concern by indicating in the rule that NPS shall implement the measures as described in the FEIS/ROD, without stating the specific measures, buffer distances, etc. in the rule (i.e., incorporate the resource protection measures, including the desired future conditions and periodic review into the rule by reference). The species management measures, such as the buffer distances, were designed to evolve over longer periods of time through the periodic review process; however, they were not intended to be discretionary or subject to inconsistent implementation or frequent changes based solely on management judgment. I think the proposed edits would solidify the NPS commitment/obligation to follow the plan as written, but allow some measures to be fine-tuned, if

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		appropriate, over time through the periodic review process. Such a change may require additional NEPA compliance and/or reinitiation of consultation with USFWS (if related to T&E species), but ideally would not require a change in the rule itself.
(10) (revise) <i>Superintendent's Closures</i>	(CHAPA) Concern that the focus is solely on closing areas thru Superintendent's closures. They assert that the Superintendent's authority to reopen those areas should be explicitly stated.	By incorporating the reopening criteria in the FEIS into the rule by reference, it would solidify the NPS commitment/obligation to reopen closures in accordance with the criteria stated in the plan

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September 6, 2011

Michael B. Murray
Superintendent, Cape Hatteras National Seashore
National Park Service, Outer Banks Group
1401 National Park Drive
Manteo, NC 27954

Re: Comments on Proposed ORV Rule for Cape Hatteras National Seashore

Dear Superintendent Murray:

These comments on the proposed special regulation to govern off-road vehicle (“ORV”) use at Cape Hatteras National Seashore (the “Proposed Rule”) are submitted by National Audubon Society (North Carolina State Office), Defenders of Wildlife, National Parks Conservation Association, Natural Resources Defense Council, Center for Biological Diversity, Sea Turtle Conservancy, and the Southern Environmental Law Center. Collectively, these organizations represent over 3.7 million members and supporters with an interest in protecting public lands, wildlife, and other natural resources, as well as the experiential, recreational, and educational opportunities that these lands provide. Cape Hatteras National Seashore is one of the last, best places on the East Coast where the public can visit wild beach environments that provide these opportunities.

We support a specific regulation for the use of ORVs within the Seashore. The regulation must include specific, enforceable, science-based protections for wildlife and for pedestrians who wish to visit the National Seashore in a natural, vehicle-free state. As written, the Proposed Rule does not do so. In addition, the Proposed Rule should set aside additional areas for those uses. Finally, certain terms of the Proposed Rule should be modified, as described below.

1. Science-Based Resource Protections – § 7.58(c)(10)

The Proposed Rule, as written, does not contain sufficiently specific and enforceable protections for wildlife and other natural resources. As a result, it does not meet the purpose and need identified by the National Park Service, and it does not comply with controlling law. At the very minimum, the Proposed Rule should mirror the Selected Action from the NPS’s Record of Decision (“ROD”), which was to implement Alternative F from the Final Environmental Impact Statement (“FEIS”) (although we believe that the better alternative remains Alternative D, the

Michael B. Murray
 September 6, 2011
 Page 2

environmentally preferred alternative, which, according to the ROD “best protects the biological and physical environment”). According to the FEIS, the purpose of the Proposed Rule is to

carefully manage ORV use/access in the Seashore to protect and preserve natural and cultural resources and natural processes, to provide a variety of visitor experiences while minimizing conflicts among various users, and to promote the safety of all visitors.

(FEIS at p. 1) The ROD states that the Proposed Rule will, among other things:

- Bring the Seashore in compliance with Executive Orders 11644 and 11989 respecting ORV use, and with NPS laws, regulations (36 CFR 4.10), and policies to minimize impacts to Seashore resources and values.
- . . .
- Provide for protected species management in relation to ORV use
- . . .
- Provide protection for threatened, endangered, and other protected species (e.g., state-listed species) and their habitats, and minimize impacts related to ORV and other uses
- Minimize impacts to wildlife species and their habitats related to ORV use.
- . . .
- Manage ORV use to allow for a variety of visitor use experiences.
- Minimize conflicts between ORV use and other uses.

(ROD at pp. 1-2)

In order to meet that purpose and accomplish those objectives, the Selected Action states that the NPS will implement the terms and conditions of the FEIS’s Alternative F, “as fully described in the final plan/FEIS, with one change” (that change being a requirement to increase protective buffers in response to disturbance of wildlife by kites). (ROD at p. 4) Alternative F, while inadequate to protect the natural resources on the Seashore, includes not only a designation of specific routes and areas that could potentially be open to ORV use (FEIS at pp. 103-108), but also includes very specific, enforceable, science-based measures designed to protect wildlife and other natural resources from ORV impacts. (FEIS at pp. 79-82, 113-144) These protective measures include:

- Pre-nesting closures in specific places at specific times,
- Designated vehicle-free areas that leave areas less disturbed for wildlife,
- Mandatory buffers of predetermined, species-specific sizes to be implemented around nesting birds and turtles, nests, turtle hatchlings, and unfledged chicks, to prevent disturbance of the species by ORVs, and

Michael B. Murray
 September 6, 2011
 Page 3

- Year-round vehicle-free areas for use by migrating and wintering birds for resting, foraging, and roosting.

The FEIS acknowledges that the specific natural-resource-protection measures are the very elements of Alternative F that allow it to meet the objectives listed above. (FEIS at pp. 145-162) Indeed, the FEIS concludes that even full implementation of Alternative F meets the legal requirements for protected species, vegetation, and wildlife only “to a large degree,” but not completely.¹ (FEIS at p. 146) Those conclusions were expressly based on “increased buffer distances . . . and large, pre-determined buffers for breeding/nesting activity [that] would provide proactive (prior to breeding season) protection.” *Id.* Similarly, the NPS’s determination that Alternative F would be beneficial to the threatened piping plover is dependent on the “establishment of prescribed buffers.” (FEIS at p. 150) Yet the Proposed Rule fails to include those specific measures or even to include any mandatory, enforceable measure at all to protect natural resources from ORV-related impacts.

Instead, the section of the Proposed Rule entitled “Superintendent’s closures” (§ 7.58(c)(10)) is vague and permissive rather than mandatory, and is thus unenforceable. It states:

The Superintendent may temporarily limit, restrict, or terminate access to routes or areas designated for off-road use after taking into consideration public health and safety, natural and cultural resource protection, carrying capacity and other management activities and objectives, such as those described in the plan/FEIS. The public will be notified of such closures through one or more of the methods listed in § 1.7(a) of this chapter. Violation of any closure is prohibited.

(Proposed Rule § 7.58(c)(10) (emphasis added))

The use of the term “may” renders the section permissive rather than obligatory. As written, the Proposed Rule seems to allow the Superintendent to choose whether, when, and to what extent to impose any limits or restrictions on ORV routes for resource protection. It allows the Superintendent to choose not to impose any closures at all, even in the presence of, for instance, protected species’ nests or chicks that would warrant imposition of buffers under the FEIS and ROD. By leaving the decision whether, when, and to what extent to limit or restrict ORV routes to the Superintendent’s discretion, the permissive nature of this section’s wording renders the carefully crafted wildlife protections and buffer requirements of the FEIS and ROD moot. The use of “may” in this section stands in marked contrast to the compulsory language used elsewhere in the Proposed Rule, such as “must,”² “is required,”³ and “is prohibited.”⁴ Even

¹ It is essential that the regulation be at least as stringent as Alternative F. As we documented in comments on the DEIS, even Alternative F is not sufficiently protective of wildlife at Cape Hatteras and is not consistent with the applicable law.

² As in § 7.58(c)(3): “(i) The vehicle must be registered, licensed, and insured . . . (ii) The vehicle must have no more than two axles. . . (v) The vehicle must carry a low pressure tire gauge, . . .”

³ As in § 7.58(c)(2)(i): “A permit issued by the Superintendent is required to operate a vehicle on designated ORV routes at the Seashore.

Michael B. Murray
September 6, 2011
Page 4

the section identifying ORV routes says absolutely that they are “designated” as ORV routes, not, for instance, that they “may be designated” in the discretion of the Superintendent. Obligatory, rather than permissive, terms in this section are necessary for the Proposed Rule to implement the selected alternative.

Likewise, the word “temporarily” is vague and subject to interpretation. Its use will likely lead to confusion and perhaps ultimately litigation over whether, for instance, a closure that is in place for a week or a month or a season is truly temporary. We recommend removal of the word “temporarily” from this section.

The words “after taking into consideration” and “such as those described in the plan/FEIS” also render the section permissive, as though none of the issues listed afterwards will give rise to a mandatory closure. They create instead the impression that the list of issues – including public safety and natural resource protection – are merely among those that could, but need not necessarily, be considered by the Superintendent in deciding whether to close an ORV route temporarily. These phrases also imply that, in those instances when the Superintendent chooses to exercise his discretion to impose limits on ORV routes, he is free to impose the exact buffers and other protections from the FEIS/ROD, but that he may also merely use them as a guideline, impose smaller buffers, or even ignore them altogether. Thus, these phrases conflict with the protections described in the FEIS and ROD and must be deleted.

More generally, because the buffer requirements and other wildlife protections are not codified anywhere in the regulation, they can be ignored or changed by the Superintendent without a formal rulemaking process. This section, as written, leaves all aspects of resource closures to the sole discretion of the Superintendent. In contrast, the ORV routes are designated very specifically in a chart, and they are not left to the Superintendent’s discretion; accordingly, they may not be changed except by formal rulemaking procedures. This disparity between the treatment of ORV routes and resource protections creates a critical imbalance between the two competing interests addressed in the ROD and FEIS; to change the ORV routes, a formal rulemaking process would be needed, but to change the wildlife protections and buffers, only a favorably disposed or easily pressured Superintendent would be needed.

Furthermore, having the discretion to dictate resource closures will be an extremely onerous burden on any Superintendent who is dedicated to fulfilling the requirements of federal law through the implementation of the measures described in the FEIS and ROD. Local residents and ORV enthusiasts have already put enormous pressure on Park Service officials over the years to allow them ever greater freedom to drive whenever and wherever they choose. If the Proposed Rule remains as written, that pressure on the Park Service will only increase, as each Superintendent faces recurring demands to exercise his discretion in favor of imposing few resource protection closures or even ignoring the wildlife protection requirements of the FEIS and ROD altogether.

⁴ As in § 7.58(c)(5): “The off-road operation of a motorcycle . . . is prohibited.”

Michael B. Murray
September 6, 2011
Page 5

In addition, there are pending petitions for listing the red knot, a shorebird that uses Cape Hatteras during its spring and autumn migrations, as an endangered species, and the Park Service may need, in the future, to conduct research to determine appropriate conditions to protect red knots from ORV impacts. There may be other species that become listed as endangered, threatened, or a species of concern, and the Park Service will similarly need to conduct research into the needs of those species. It may become necessary, during the course of such research, to close ORV routes temporarily to determine, for instance, the effect of ORVs on the species and to discover which areas the species may be able to use as habitat. The regulation should, therefore, acknowledge that fact, and should include “research” among the considerations that can lead the Superintendent to limit, restrict, or terminate access to a particular route.

Last but not least, the omission of buffers and other resource protections from the Proposed Rule prevents it from fulfilling its purpose, satisfying the objectives listed above, and complying with applicable law. The FEIS statement of purpose and need, Executive Order 11644, 36 C.F.R. § 4.10, and the Consent Decree⁵ all require the NPS to promulgate a special regulation that designates ORV routes and areas in such a way that will protect and preserve wildlife, habitat, and other natural resources from ORV impacts and that will minimize conflicts among uses (for instance, conflicts between ORV use and wildlife protection or between ORVs and pedestrian visitors). By merely designating ORV routes without also including the buffers and other measures described in the FEIS/ROD that limit the routes for the protection of wildlife, the Proposed Rule cannot be said to satisfy any of those requirements.

Unlike the Proposed Rule, the following version of §7.58(c)(10) would uphold the compromise embodied in the FEIS and ROD, with the underlined portions being added and the stricken parts being deleted:

(10) *Superintendent's closures.* The Superintendent ~~may~~ shall temporarily limit, restrict, or terminate access to routes or areas designated for off-road use based on after taking into considerations of public health and safety, natural and cultural resource protection, carrying capacity, minimizing conflicts between users, research, and other management activities and objectives, ~~such as those described in the plan/FEIS.~~ At a minimum, the Superintendent shall enforce the wildlife protection measures, buffer requirements, and other management activities and objectives described for Alternative F on pages 79-82 and 113-144 of the FEIS, including without limitation imposing prenesting closures as described on page 138 of the FEIS and imposing other closures in accordance with the protective buffers described therein, summarized in the following table. The public will be notified of such closures through one or more of the methods listed in §1.7(a) of this chapter. Violation of any closure is prohibited.

⁵ This refers to the Consent Decree entered in the lawsuit Defenders of Wildlife v. National Park Service, 2:07-CV-45-BO (E.D.N.C. April 30, 2008).

Species	Breeding Behavior/ Nest Buffer*	Unfledged Chick Buffer
Piping plover	75 meters	1,000 meters for ORVs 300 meters for pedestrians
Wilson's plover	75 meters	200 meters
American oystercatcher	150 meters	200 meters
Least tern	100 meters	200 meters
Other colonial waterbird species	200 meters	200 meters
Sea turtles	10 meters by 10 meters around nest, then expanded to shoreline approximately 50-55 days into incubation, plus 10-15 meters behind nest, 25 meters wide in vehicle free areas with little pedestrian traffic, 50 meters wide in village beaches and areas with high pedestrian use, and 105 meters wide in areas with ORV traffic	Not applicable

*Buffers will be increased in 50-meter increments if human disturbance occurs.

In the alternative, the section could be re-written to include performance-based standards. For example, the section of the regulation could be amended as follows:

(10) *Superintendent's closures.* The Superintendent may temporarily limit, restrict, or terminate access to routes or areas designated for off-road use after taking into consideration public health and safety, natural and cultural resource protection, carrying capacity, minimizing conflicts between users, research, and other management activities and objectives, such as those described in the plan/FEIS. The public will be notified of such closures through one or more of the methods listed in §1.7(a) of this chapter. Violation of any closure is prohibited. If population or reproduction levels for piping plovers, American oystercatchers, least terns, common terns, gull-billed terns, or black skimmers drop below those levels established in the 2010 breeding season, then ORV use will be prohibited throughout the year in the areas where these species breed, roost, nest, forage, or fledge, or might breed, roost, nest, forage, or fledge, until the species recovers to 2010 levels or higher.

In sum, the section must be amended to include specific details regarding the protective buffers and other wildlife protections described in the FEIS. The language must be amended to clarify that imposition of those protections, or more stringent provisions if future conditions or

Michael B. Murray
 September 6, 2011
 Page 7

recovery goals are not being met, are mandatory as opposed to optional, in order for the section to comply with applicable law and to meet the purpose and need of the project.

2. ORV Routes – § 7.58(c)(9)

Section 7.58(c)(9) affirmatively designates ORV routes without any indication that ORV use in those areas may be occasionally subject to mandatory limitations, restrictions, or prohibitions, for instance, when the beaches are closed for reasons related to natural-resource protection and public health and safety.

This omission ensures that the Proposed Rule will violate controlling law. As discussed above, Executive Order 11644, 36 C.F.R. § 4.10, and the Consent Decree all require the final regulation to include provisions to protect natural resources from ORV impacts. Similarly, section 1.4.3 of the National Park Service’s Management Policies 2006 explains that, “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.” Likewise, the Cape Hatteras National Seashore enabling legislation provides that no “plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing in the area.” 16 U.S.C. § 459a-2. Elevating ORV access above wildlife protections turns these provisions on their heads.

This omission – failing to state explicitly that resource protection may lead to closures of ORV routes – allows the Proposed Rule to be interpreted to contradict the FEIS and ROD and ensures that the regulation will not meet the purpose and need identified by the Park Service. For instance, the FEIS states that “ORV routes and vehicle-free areas under [Alternative F] would still be subject to temporary resource closures established when protected-species breeding behavior warrants” and to protect migrating or wintering birds as they forage, rest, and roost. (FEIS at p. 81; see also ROD at 15)

The section should therefore be amended to clarify that protection of natural resources predominates over access for ORV use. We suggest the addition of the underlined portions, so that the section reads as follows:

(9) *ORV Routes*. The following tables indicate designated ORV routes that may be available for ORV use subject to the mandatory resource, safety, seasonal, and other closures imposed pursuant to subsection (10). The following ramps are designated as potentially open to ORV use (also subject to the mandatory resource, safety, seasonal, or other closures imposed pursuant to subsection (10)) to provide access 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. Soundside ORV access ramps are described in the table below. For a village beach to be open to ORV use during the winter season, it must be at least 20 meters (66 feet) wide from the toe of the dune seaward to mean high tide line. Maps depicting designated routes and ramps are available in the Office of the Superintendent and for review on the Seashore Web site.

Michael B. Murray
September 6, 2011
Page 8

The performance-based standards proposed to be added to § 7.58(c)(10) above could also be added to this section.

In sum, the final regulation must be clear that ORV access is not guaranteed in the designated ORV routes, but rather that the natural resource protections of Alternative F of the FEIS will prevail by limiting the ORV routes and areas.

3. Additional Space for Vehicle-Free Recreation

For the reasons we more fully explained in our comments on the draft environmental impact statement and submitted on May 11, 2010, we believe that the Proposed Rule provides too few areas where ORV use is prohibited year-round for use and enjoyment by pedestrians and other visitors.

As the FEIS documented in detail, the overwhelming majority of visitors to the Seashore prefer not to use a vehicle to access the Seashore's beaches and place little value on ORV access to the beach. (FEIS at pp. 281-322) Yet the Proposed Rule disproportionately sets aside more than half of the Seashore's beaches for either seasonal or year-round ORV use. Although pedestrians can theoretically also use the sections of the beach that are set aside as ORV routes, they cannot practically do so without risking their personal safety and having their experience diminished by vehicle traffic, tire ruts, noise, and exhaust as well as the interruption of views of the natural landscape. More miles should, instead, be set aside for the many visitors who wish to enjoy the National Seashore in its natural state, so that they may enjoy fishing, surfing, swimming, sunbathing, windsurfing, kiteboarding, beachcombing, wildlife-watching, photography, etc., free from ORVs.

Cape Hatteras National Seashore already has too few areas where visitors can experience the Seashore's beaches without impacts from off-road vehicles. There are even fewer areas, arguably none, where a visitor can enjoy the Seashore's beaches without the sight of a vehicle on the landscape, the sound of a vehicle in the distance, and the visual impacts left by vehicles on the beach. Vehicle use jeopardizes the experience for visitors who come to the Seashore for wildlife-viewing and other wildlife-related activities, such as photography and other arts, and for the aesthetic enjoyment of scenic landscapes and the primitive beach environment. As written, the Proposed Rule perpetuates this reality. Even those miles of beach set aside as year-round vehicle-free areas are disproportionately those that are narrower and less scenic than those set aside for beach driving, and are still within sight and sound of ORV sections of the beach.

In particular, the opening of beaches to ORV traffic in front of residential developments eliminates opportunities for people to enjoy the unspoiled beach in front of their residences and rental properties. It also increases the risks to public safety. There have been numerous incidents in which vehicles have come close to striking pedestrians at Cape Hatteras, and a few incidents in which people have been harmed by beach driving, either by being in a vehicle that overturned on the beach or by being struck by an ORV. Many of these incidents have involved children. Nationally, people have been killed by ORVs where vehicles are allowed on beaches

Michael B. Murray
 September 6, 2011
 Page 9

with pedestrians. Recent examples include small children at the Daytona and New Smyrna Beaches in Florida. There is a real fear that the Proposed Rule, by allowing more driving in front of populated areas than has historically been the case, will increase the likelihood of such tragic events.

In sum, we recommend that more miles be set aside for pedestrian-only access.

4. Special Use Permits – § 7.58(c)(7)

Although § 7.58(c)(7), entitled “Special use permits for off-road driving, temporary use,” is taken from page 120 of the FEIS, it has been altered in such a way as to fundamentally change its meaning and effect. The Proposed Rule deleted the final sentence describing Alternative F’s plan for special use permit management, which states, “Temporary non-emergency use by nonessential vehicles would not be permitted within resource closure.” FEIS at 120 (emphasis in original). This final sentence in the FEIS’s description of Alternative F is crucial to the balance between ORV users and wildlife protections, and should be restored in the final regulation.

While special use permits are an important and necessary component of Seashore use for NCDOT, fishing tournaments, and mobility-impaired visitors, the FEIS makes clear that those special needs do not trump resource closures. The final sentence describing Alternative F clarifies that any nonessential ORV users, even those with special use permits, are not allowed within resource closures. Omission of this point in the regulation may lead to confusion in the event of a conflict between a special use and a resource closure. The FEIS and controlling law are clear about which takes priority—resource closures—and the regulation should be, too. As explained above, federal law and Park Service policy dictate that a conflict between conservation and recreation must be resolved in favor of conserving natural resources.

Accordingly, we suggest that the Proposed Rule be amended as follows:

(7) *Special use permits for off-road driving, temporary use.* The Superintendent may issue a special use permit for temporary off-road vehicle use to:

- (i) Authorize the North Carolina Department of Transportation to use Seashore beaches as a public way, when necessary, to bypass sections of NC Highway 12 that are impassable or closed for repairs; or
- (ii) Allow participants in regularly scheduled fishing tournaments to drive in an area if such tournament use was allowed in that area for that tournament before January 1, 2009; or
- (iii) Allow vehicular transport of mobility impaired individuals via the shortest, most direct distance from the nearest designated ORV route or Seashore road to a predetermined location in a designated vehicle-free area in front of a village; *provided that*, the vehicle must return to the designated ORV route or Seashore road immediately after the transport.

Such special use permits are subject to the mandatory resource, safety, seasonal, and other closures imposed pursuant to subsection (10). Temporary non-emergency use by nonessential vehicles is not permitted within a resource closure.

5. Commercial Fishing – § 7.58(c)(8)(i)

Although the spirit of this section of the Proposed Rule is in line with the FEIS, its wording may create an unintended consequence. As worded in the FEIS, Alternative F allows the Superintendent to permit a qualified commercial fishing vehicle to drive on a beach that is “not designated for off-road use, except for resource closures and lifeguarded beaches” – that is, if a beach is closed to driving either for resource protection or because it is lifeguarded, it remains off-limits to commercial fishing vehicles. (FEIS at p. 124; see also FEIS at p. 383: “Commercial fishermen would be able to enter all areas except resource closures and lifeguarded beaches.”)

In rephrasing the exception, the Proposed Rule appears to allow a commercial fisherman with a permit to operate a vehicle on a non-ORV beach in all instances unless the beach is both a resource closure and is lifeguarded. In other words, a beach that is subject to a resource closure would not be off-limits to a commercial fishing vehicle unless it is also lifeguarded. In practice, though, there may be little to no overlap in these two categories. Any beach at the Seashore is unlikely to be both a resource closure and to be lifeguarded, since the two uses are so incompatible.

A small revision will give the section a meaning that is more in line with the reality of Hatteras beaches and with the intent of the FEIS. We suggest amending the section to read as follows:

(8) *Commercial Fishing vehicles.* The Superintendent may authorize a commercial fishing permit holder when actively engaged in authorized commercial fishing to operate a vehicle on a beach:

- (i) Not designated for ORV use, provided the beach is neither~~not~~ subject to a resource closure nor~~and~~ is ~~not~~ lifeguarded; and
- (ii) Beginning at 5 a.m. on days when night driving restrictions are in effect, to set or tend haul seine or gill nets, if the permit holder is carrying and able to present a fish-house receipt from the previous 30 days.

The amendment brings the Rule in line with the intent of the FEIS and ROD, and allows qualified commercial fishermen to enter all areas except resource closures and lifeguarded beaches. That sentence makes clear that fisherman cannot enter resource closures, regardless of whether they are also lifeguarded, and cannot enter lifeguarded beaches, regardless of whether they are also resource closures. The small wording change will have major benefits for the safety of wildlife and pedestrians.

6. Definition of ORV Corridor – § 7.58(c)(1)

Section 7.58(c)(1) defines the term “ORV Corridor” in a way that is not sufficiently protective of wildlife, especially migrating and wintering shorebirds. Although we acknowledge that the definition in the Proposed Rule is similar to the definition in the FEIS, the FEIS also

Michael B. Murray
 September 6, 2011
 Page 11

contained mandatory conditions related to imposing substantial “Species Management Areas,” or “SMAs,” throughout the Seashore, including at the points and spits, which modified the ORV corridors and affected the scope of the definition. References to those SMAs were erroneously omitted from the regulation. As a result, the definition of “ORV corridor” in the Proposed Rule has the effect of setting aside far more area for driving than it did in the FEIS, when it was clearly modified by the establishment of SMAs.

Additionally, throughout the Seashore, space at the toe of the Seashore’s dunes is necessary year-round to give protected shorebird species adequate area to rest, roost, and seek shelter; the ocean intertidal zone, wrack line, and sandy beach landward of the high tide line are important for foraging, resting, and roosting shorebirds. The Park Service appears to have determined that an ORV corridor of 20 meters at the water’s edge is sufficient, as evidenced by the way in which the FEIS and Proposed Rule both define a corridor when the beach is at least 30 meters wide. The definition of “ORV Corridors” should be based on the minimum width necessary, but measured from the high tide line, leaving the habitat at the toe of the dune, the intertidal zone, wrack line and immediately landward of the high tide line undisturbed by vehicles.

We recommend the following revisions:

ORV corridor means the actual physical limits of the designated ORV route in the Seashore. ~~The ORV corridor generally runs from the toe of the dune or the vegetation line on the landward side to the water line on the seaward side.~~ Where the dry sand ocean beach is at least ~~30~~60 meters wide above the high tide line, the landward side of the corridor will be 40 meters landward of the high tide line and the seaward side will be 20 meters from the high tide line.~~10 meters seaward of the toe of the dune.~~ There will be no ORV corridor in areas where the dry sand ocean beach is less than 60 meters wide. The ORV corridor will usually be marked by posts on the landward and seaward side ~~(the seaward side of the corridor usually will not be posted).~~

In addition, we ask that the following sentence be added to the definition of “ORV corridor” or to section 7.58(c)(10), in order to ensure that adequate areas are set aside for use by migrating and wintering shorebirds and other species for foraging, resting, and roosting:

In addition, the Superintendent will establish and manage vehicle-free shorebird species management areas for the protection of migrating and wintering species throughout the Seashore, including at all points and spits and along the ocean shoreline.

7. Carrying Capacity – § 7.58(c)(13)

This section of the Proposed Rule states that the “maximum number of vehicles allowed on any particular ORV route, at one time, is the linear distance of the route divided by 6 meters (20 feet).” According to the FEIS, this equates to 260 vehicles per mile. (FEIS at p. 81) For the

Michael B. Murray
 September 6, 2011
 Page 12

reasons we more fully explained in our comments on the draft environmental impact statement and submitted on May 11, 2010, we believe that the carrying capacity in the final regulation should be much lower. The current limit of 260 vehicles per mile could result in approximately 10,500 ORVs on Seashore beaches at any given time, if the carrying capacity is maximized on all ORV routes. That is approximately four times the highest number of vehicles that has ever been recorded on Cape Hatteras's beaches in any given day.⁶ In addition, as the Proposed Rule is currently written, it is not clear that all those vehicles must be spread throughout the Seashore.

That number of vehicles would result in significant recreational conflicts and increased environmental impacts, including degradation of soil, sand, vegetation, and wildlife habitat in violation of Executive Order 11644, especially if allowed to pack into a few small areas of the Seashore. We recommend a much lower carrying capacity and clarification that the density applies per mile of the beach, and not to the entire National Seashore. We recommend the following revisions:

(13) *Vehicle carrying capacity.* The maximum number of vehicles allowed on any particular ORV route, at one time, is the linear distance of the route divided by ~~612~~ meters (~~2040~~ feet). The density of vehicles on the beach may not exceed 130 vehicles per each mile of beach.

8. NPS's Exclusion of Fixed-Distance, Mandatory Buffers for Resource Protection Creates a New Alternative That Violates the National Environmental Policy Act and the Administrative Procedure Act.

As discussed above, the Proposed Rule departs from the FEIS's Alternative F and the ROD's Selected Action by excluding mandatory resource protections in favor of subjective, discretionary measures. In doing so, the Proposed Rule creates a new alternative, one that takes the unique approach of defining ORV routes and areas, but leaving resource protections undefined and discretionary. None of the alternatives evaluated in the FEIS took this approach; each alternative studied and implemented standardized, obligatory buffers. To be sure, the fixed buffers of Alternative A were woefully inadequate,⁷ but they were consistent with the overall approach of pairing designated ORV routes with fixed buffers related to breeding and nesting behavior. The ROD reflected the dual components, stating that the designation of routes and areas "in conjunction with the species management strategies described in the final plan . . . will provide for species protection . . . using the standard set of buffers." (ROD at 5) The Proposed Rule jettisons this approach, focusing on ORV routes. As a result, it not only fails to protect

⁶ According to one news report, the highest number of drivers ever recorded on a given day (as of the day of that report) was 2,557 on the July 4th holiday in 2008. Irene Nolan, *New dispatches from the beachfront: Access update, getting smart about beach driving, manners and laws, and July 4 report*, ISLAND FREE PRESS, <http://www.islandfreepress.org/2008Archives/07.11.2008-ShootingTheBreezeNewDispatchesFromTheBeachfront.html>.

⁷ The ROD states that Alternative A "has the potential for impairment to sea turtles, common terns, gull-billed terns, and black skimmers" and would "impede the Seashore's desired future conditions for protected species." (ROD at p. 13)

Michael B. Murray
September 6, 2011
Page 13

wildlife on the Seashore, it runs afoul of the National Environmental Policy Act (“NEPA”) and the Administrative Procedure Act (“APA”).

a. The Proposed Rule’s new alternative violates NEPA.

NPS’s decision to adopt a new alternative in the Proposed Rule violates NEPA in three ways. First, the Proposed Rule selects an alternative that is outside the range of alternatives considered within the EIS. Second, by selecting that alternative, the Proposed Rule adopts an alternative that has not undergone the “hard look” required by NEPA. Third, because it was not included in the EIS, NPS has not provided the public or other governmental agencies the opportunity to analyze and substantively comment on the alternative in the Proposed Rule and its implications for wildlife protection. Because of these shortcomings, the new alternative articulated in the Proposed Rule must be fully evaluated in a supplemental EIS before it can legally be finalized.

Under NEPA’s implementing regulations, the selected alternative must be “encompassed by the range of alternatives discussed in the relevant environmental documents.” 40 C.F.R. § 1505.1(e). As described above, the Proposed Rule fails to prescribe any fixed-distance, mandatory buffers for resource protection. Each alternative considered in the EIS, however, included mandatory, fixed-distance buffers.⁸ In contrast, the Proposed Rule provides that the “Superintendent may temporarily limit, restrict, or terminate access,” without requiring any specific restrictions. 76 Fed. Reg. at 39,356. Thus, the Proposed Rule cannot, under any interpretation, be considered to be within the range of alternatives of the EIS or representative of Alternative F as it was selected in the ROD. Nor does it purport to be within that range; it merely states that it “implements portions of the plan/FEIS and ROD.” 76 Fed. Reg. at 39,354. By doing so, it selects an alternative outside of the range of those considered in the FEIS and violates NEPA.

Further, adopting a new alternative in the Proposed Rule frustrates the central purpose of NEPA and the EIS process. The alternatives analysis is often described as the heart of the EIS and requires that agencies take a “hard look” at the environmental impacts of their actions. Nat’l Audubon Soc’y v. Dep’t of the Navy, 422 F.3d 174, 184 (4th Cir. 2005). That analysis “encompasses a thorough investigation into the environmental impacts of an agency’s action and a candid acknowledgement of the risks that those impacts entail.” Id. at 185. It is “surely implicated when the environment that may be damaged is one that Congress has specially designated for federal protection,” as are the wildlife and habitat at the Seashore. Id. at 186-87. There, the “hard look” must “take particular care to evaluate how its actions will affect the unique biological features of th[e] congressionally protected area.” Id. at 187. The Proposed Rule ignores these requirements, extracting the ORV routes and other requirements from Alternative F as described in the FEIS and ROD, yet omitting the mandatory resource protections that would provide the environmental benefits described by Alternative F. The resulting new alternative has not been given the “hard look” required by NEPA and its environmental consequences are, at best, unknown. Its approach to resource protection

⁸ See FEIS at p. 144 (chart showing fixed buffer distances under each alternative).

Michael B. Murray
September 6, 2011
Page 14

drastically differs from each of the alternatives considered in the FEIS and has not been studied to any degree.

Finally, NPS's promulgation of a new alternative in the Proposed Rule also violates NEPA's purpose of providing an opportunity for the public and governmental agencies "to analyze and comment on the action's environmental implications." 422 F.3d at 184. Here, neither the public nor federal and state wildlife agencies had the opportunity to comment on the environmental implications of the alternative reflected in the Proposed Rule.⁹ The FEIS did not forecast that NPS was considering an alternative devoid of mandatory, specified buffers and the public could not have anticipated that such an alternative would be introduced during the rulemaking period. Nor can NPS rely on the inclusion of Alternative F in the FEIS to satisfy NEPA's public notice requirements. The benefits provided by Alternative F, while not adequate to protect all natural resources within the Seashore, rely on fixed, mandatory buffers; they would significantly exceed the environmental benefits, if any, of the Proposed Rule and cannot put the public on notice of its environmental consequences. See Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446-47 (4th Cir. 1996) (stating that misleading representation of benefits can violate NEPA "by skewing the public's evaluation of a project").

The only legal path forward for NPS if it decides to implement the Proposed Rule is first to prepare and disseminate a supplemental EIS that takes a legitimate "hard look" at the consequences of a regulation that contains no mandatory, science-based wildlife protections. A supplemental EIS is required if an "agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9. The exclusion of fixed-distance, mandatory buffers is clearly a "substantial change" that is "relevant to environmental concerns." To be clear, we do not support a supplemental EIS or a regulation without mandatory, science-based wildlife protections; NPS can only comply with the court-ordered deadline to complete this rulemaking by implementing the changes to the Proposed Rule described above and should do so no later than November 15.

b. The Proposed Rule violates notice and comment requirements of the APA.

By implementing a new alternative that was not studied in the FEIS, the Proposed Rule violates the APA's notice and comment requirements. Under the APA, the notice of the Proposed Rule "must be sufficiently descriptive of subjects and issues involved so that interested parties may offer informed criticism and comments." Ethyl Corp. v. EPA, 541 F.2d 1, 48 (D.C. Cir. 1976). The purpose of that description is "to disclose the thinking of the agency and the data relied on." Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1565 (11th Cir. 1985). An agency that fails to reveal the technical basis for its rule "commits serious procedural error." Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982).

⁹ The opportunity to comment on the Proposed Rule does not ameliorate this violation. For major federal actions, like this rule, that opportunity for public comment is only meaningful if it is preceded by a full analysis of the proposed action in an EIS, a step the NPS has failed to take with its new alternative.

Michael B. Murray
September 6, 2011
Page 15

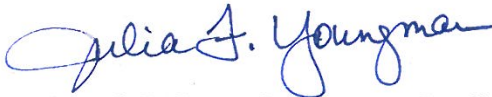
Because the alternative presented in the Proposed Rule was not evaluated in the FEIS, the NPS has not presented an analysis evaluating the environmental impact of the Proposed Rule, provided any scientific evidence for its ORV-route-only approach, or made available any of the data that undergirds this approach, if any exists. Therefore, the Proposed Rule does not “disclose the thinking of the agency” and does not provide sufficient information for the public to allow us to submit “informed criticism and comments” on the analyses and data that purportedly support the Proposed Rule.

Further, adopting this new alternative in a final rule would be arbitrary and capricious. Under the APA, courts “shall . . . hold unlawful and set aside agency action, finding, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Nothing in the record before the agency supports NPS’s conclusion that a purely discretionary resource protection program will provide adequate environmental benefits. To the contrary, the record is replete with evidence that discretionary measures before the creation of the Interim Plan in 2007 and the mandatory measures within the Interim Plan – embodied in Alternative A of the FEIS – were inadequate to protect resources and contributed to declines in breeding shorebirds, water birds, and sea turtles. The ROD makes clear that “[p]rotected species and wildlife mitigation measures []are integral parts of the selected action” that are necessary to mitigate for impacts to wildlife. ROD at 7. Without these “integral parts,” NPS has no basis to claim that the Proposed Rule will protect resources on the Seashore.

Conclusion

We appreciate the opportunity to provide these comments and the hard work and dedication of the National Park Service in preserving the best examples of America’s natural and cultural heritage for future generations. And we look forward to a final regulation that addresses and incorporates our concerns, and restores a balance to the Seashore consistent with NPS’s stewardship obligations to restore and protect the natural resources and leave them unimpaired for future generations.

Sincerely,



Derb S. Carter, Jr., Director, Carolinas Office
Julia F. Youngman, Senior Attorney
Southern Environmental Law Center

Heather Starck, Executive Director/Vice President
Walker Golder, Deputy State Director
National Audubon Society (North Carolina State Office)

Jason Rylander, Senior Staff Attorney
Defenders of Wildlife

Michael B. Murray
September 6, 2011
Page 16

Chris Watson, Program Manager, Southeast Regional Office
National Parks Conservation Association

Charles M. Clusen, Director, National Parks Project
Natural Resources Defense Council

David Godfrey, Executive Director
Sea Turtle Conservancy

Tierra Curry, Conservation Biologist
Center for Biological Diversity

Cc (via U.S. mail):

Jon Jarvis, Director, NPS

Bert Frost, Associate Director, Natural Resource Stewardship and Science, NPS

David Vela, Southeast Regional Director, NPS

9/26/11 mbm - First draft edits for Final Rule

List of Subjects in 36 CFR Part 7

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

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

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

Authority: 16 U.S.C. 1, 3, 9a, 462(k); Sec. 7.96 also issued under 36 U.S.C. 501 -511, D.C. Code 10-137 (2001) and D.C. Code 50-2201 (2001)

2. In § 7.58,

A. Revise the introductory language in paragraph (b)(1).

B. Remove paragraph (b)(1)(ii),

C. Redesignate paragraphs (b)(1)(iii) through (b)(1)(v) as (b)(1)(ii) through (b)(1)(iv).

D. Add paragraph (c)

The revisions to read as follows:

§ 7.58 Cape Hatteras National Seashore.

* * * * *

(b) * * *

(1) *Definitions.* As used in this section:

* * * * *

(c) *Off-road motor vehicle use.*

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

9/26/11 mbm - First draft edits for Final Rule

Nonessential vehicle means a vehicle used by those not operating in an official agency capacity, including all vehicles that are not being operated by the National Park Service, or its agents, to conduct authorized administrative and emergency services activities.

Comment [mbm1]: Since "nonessential vehicle" is used several places later in the regulation (e.g., in the definition of VFA), I think it should be defined in the regulation. This definition is generally consistent with the definition that was provided in the Glossary of the FEIS, p. 661

ORV means a motor vehicle used off of park roads (off-road), subject to the vehicle requirements, prohibitions, and permitting requirements described in this regulation.

ORV corridor means the actual physical limits of the designated ORV route in the Seashore. The ORV corridor on Seashore beaches will usually be marked by posts that are located ~~The ORV corridor generally runs from seaward of~~ the toe of the dune or the vegetation line on the landward side. The corridor runs to the water line on the seaward side, which will usually not be marked by posts. Where the ocean beach is at least 30 meters wide above the high tide line, the landward side of the corridor will be posted at least 10 meters seaward of the toe of the dune. ~~The ORV corridor will usually be marked by posts on the landward side (the seaward side of the corridor usually will not be posted).~~

Vehicle free area or VFA means an area within the Seashore that has not been designated as an ORV route and therefore nonessential vehicles are prohibited from such areas.

(2) *ORV permits.* The Superintendent administers the NPS special park use permit system at the Seashore, including permits for ORV use, and charges fees to recover NPS administrative costs.

(i) A permit issued by the Superintendent is required to operate a vehicle on designated ORV routes at the Seashore.

(ii) Operation of a motor vehicle authorized under an ORV permit is limited to those routes designated in this paragraph (c).

(iii) There is no limit to the number of ORV permits that the Superintendent may issue.

9/26/11 mbm - First draft edits for Final Rule

(iv) Annual ORV permits are valid for the calendar year for which they are issued.

Seven-day ORV permits are valid from the date of issue.

(v) In order to obtain a permit, an applicant must comply with vehicle and equipment requirements, complete a short education program ~~in person~~ in a manner and location specified by the Superintendent, acknowledge in writing an understanding of the rules governing ORV use at the Seashore, and pay the permit fee.

Comment [mbm2]: Does “in a manner and location specified by the Superintendent” wording need to be included or could we just delete “in person”? I included it since I think it would prompt us to specify that information in the Superintendent’s compendium.

(vi) Each permit holder must affix the permit in a manner and location specified by the Superintendent to the vehicle authorized for off-road use.

(3) *Vehicle and equipment requirements.* The following requirements apply for driving off- road:

(i) The vehicle must be registered, licensed, and insured for highway use and must comply with inspection regulations within the state, country, or province where the vehicle is registered.

(ii) The vehicle must have no more than two axles.

(iii) A towed boat or utility trailer must have no more than two axles.

(iv) Vehicle tires must be listed or approved by the U.S. Department of Transportation.

(v) The vehicle must carry a low-pressure tire gauge, shovel, jack, and jack ~~stand~~ support board.

(4) *Vehicle inspection.* Authorized persons may inspect the vehicle to determine compliance with the requirements of paragraphs (c)(3)(i) through (c)(3)(v).

(5) The off-road operation of a motorcycle, all-terrain vehicle (ATV) or utility vehicle (UTV) is prohibited.

(6) The towing of a travel trailer (i.e. camping trailer) off- road is prohibited.

9/26/11 mbm - First draft edits for Final Rule

(7) *Special use permits for off-road driving, temporary use.* The Superintendent may issue a special use permit for temporary off-road vehicle use to:

(i) Authorize the North Carolina Department of Transportation to use Seashore beaches as a public way, when necessary, to bypass sections of NC Highway 12 that are impassable or closed for repairs; or

(ii) Allow participants in regularly scheduled fishing tournaments to drive in an area if such tournament use was allowed in that area for that tournament before January 1, 2009; or

(iii) Allow vehicular transport of mobility impaired individuals via the shortest, most direct distance from the nearest designated ORV route or Seashore road to a predetermined location in a designated vehicle-free area in front of a village, subject to the terms and conditions of the special use permit; *provided that*, the vehicle operator must also have an ORV permit. ~~return to the designated ORV route or Seashore road immediately after the transport.~~

Such special use permits are subject to the resource, safety, seasonal and other closures implemented pursuant to subsection (10). Temporary non-emergency use by nonessential vehicles is not permitted within a resource closure.

(8) *Commercial fishing vehicles.* The Superintendent may authorize a commercial fishing permit holder when actively engaged in authorized commercial fishing to operate a vehicle on a beach:

(i) Not designated for ORV use, provided the beach is not subject to a resource closure ~~and is not or a~~ lifeguarded beach; and

(ii) Beginning at 5 a.m. on days when night driving restrictions are in effect, to set or tend haul seine or gill nets, if the permit holder is carrying and able to present a fish-house receipt from the previous 30 days.

Comment [mbm3]: There were numerous comments/concerns that requiring the vehicle to be immediately removed from the beach would create a hardship by separating the mobility impaired individual from their means of egress. I can think of circumstances in which it would be reasonable to allow the vehicle to remain on the beach, as well as circumstances in which it would make sense to require the vehicle to leave the beach. Rather than have a blanket approach, it may be better to handle it on a case-by-case basis in the SUP terms and conditions (so the terms can be adjusted based on the needs of the permittee). It has been our intent, though it may not be clearly stated, that the vehicle operator would need to have an ORV permit. The SUP would allow the permitted ORV to be driven into the vehicle free area for the limited purpose of transporting a mobility impaired person to join a group that had walked onto the beach.

9/26/11 mbm - First draft edits for Final Rule

(9) *ORV routes*. The following tables indicate designated ORV routes. The following ramps are designated ~~as open to for~~ ORV use ~~(subject to resource, safety, seasonal, or other closures)~~ to provide access 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, and 72. Designated ORV routes and ramps are subject to resource, safety, seasonal and other closures implemented pursuant to subsection (10). Soundside ORV access ramps are described in the table below. For a village beach to be open to ORV use during the winter season, it must be at least 20 meters (66 feet) wide from the toe of the dune seaward to mean high tide line. Maps depicting designated routes and ramps are available in the Office of the Superintendent and for review on the Seashore website.

BODIE ISLAND - DESIGNATED ROUTES	
YEAR ROUND	Ramp 2.5 (0.5 miles south of the southern boundary of Coquina Beach) to 0.2 miles south of ramp 4
SEASONAL September 15 to March 14	0.2 miles south of ramp 4 to the eastern confluence of the Atlantic Ocean and Oregon Inlet

HATTERAS ISLAND - DESIGNATED ROUTES	
YEAR ROUND	1.5 miles south of ramp 23 to ramp 27 Ramp 30 to ramp 32.5 The following soundside ORV access routes from NC Highway 12 to Pamlico Sound between the villages of Salvo and Avon: soundside ramps 46, 48, 52, 53, 54 and the soundside ORV access at Little Kinnakeet Ramp 38 to 1.5 miles south of ramp 38 The following soundside ORV access routes from NC Highway 12

	<p>to Pamlico Sound between the villages of Avon and Buxton: soundside ramps 57, 58, 59, and 60.</p> <p>0.4 miles north of ramp 43 to Cape Point to 0.3 miles west of “the hook”</p> <p>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>A 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, with one spur route, (one at the terminus of Spur Road and one commonly known as Cable Crossing, <u>to Pamlico Sound</u>) 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>
<p>SEASONAL November 1 to March 31</p>	<p>0.1 mile south of Rodanthe Pier to ramp 23</p> <p>Ramp 34 to ramp 38 (Avon)</p> <p>East Frisco boundary to west Frisco boundary (Frisco village beach)</p> <p>East Hatteras boundary to ramp 55 (Hatteras village beach)</p>
<p>September 15 to March 14</p>	<p>Interdunal route south of the intersection of Pole Road and Spur Road stopping at least 100 meters from the ocean or inlet shoreline</p>

Comment [mbm4]: Erosion caused by Hurricane Irene has changed the landscape of Hatteras Inlet spit such that only a apportion of “Spur Road” remains and appears as more of a continuation of Pole road than an actual “spur” or side road. The revised wording is a simpler and more accurate description of the current conditions.

Comment [mbm5]: Erosion from Hurricane Irene has eliminated the location of this proposed seasonal route. Instead of a short seasonal route from the Spur Road to a seasonal parking area (which is what was proposed in Alternative F) we will want to simply establish an ORV parking area along what is left of the Spur Road. The “Year Round” section above adequately designates Spur Road as a route. Not sure if we need to specifically designate a “parking area adjacent to Spur Road” or not.

OCRACOKE ISLAND - DESIGNATED ROUTES

9/26/11 mbm - First draft edits for Final Rule

<p>YEAR ROUND</p>	<p>Ramp 59.5 to ramp 63. <u>Note: Ramp 59 will remain in use for ORV access to this route until Ramp 59.5 is constructed.</u></p> <p>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.</p> <p>1.0 mile northeast of ramp 67 to 0.5 mile northeast of ramp 68</p> <p>A route from NC Highway 12 to Pamlico Sound located near Ocracoke Campground, commonly known as Dump Station Road.</p> <p>0.4 miles northeast of ramp 70 to Ocracoke inlet</p> <p>A route from ramp 72 to a pedestrian trail to Pamlico Sound, commonly known as Shirley's Lane</p>
<p>SEASONAL September 15 March 14</p>	<p>A seasonal route 0.6 mile south of ramp 72 from the beach route to a pedestrian trail to Pamlico Sound</p> <p>A seasonal route at the north end of South Point spit from the beach route to Pamlico Sound</p>
<p>November 1 to March 31</p>	<p>0.5 mile northeast of ramp 68 to ramp 68 (Ocracoke Campground area)</p>

Comment [mbm6]: This route is the only one that has no existing ramp in order to access it. All other designated routes have at least one existing ramp. Should this be addressed here in the Table, or could it be addressed in the preamble?

(10) *Superintendent's closures.* The Superintendent ~~may~~shall temporarily limit, restrict, or terminate access to routes or areas designated for off-road use in accordance with the safety, vehicle carrying capacity and other ORV management criteria, and with the species management strategies, including buffer distances, desired future conditions for threatened, endangered, state-listed and special status species, and periodic review process described for Alternative F in the November 2010 Final ORV Management Plan/EIS,~~after taking into consideration public health and safety, natural and cultural resource protection, carrying capacity and other management activities and objectives, such as those described in the plan/FEIS.~~ The public will be notified of such closures through one or more of the methods listed in § 1.7(a) of this chapter. Violation of

any closure is prohibited. Such closures shall be removed, when appropriate as determined by the Superintendent, based on the criteria described in the final plan/EIS.

(11) *Rules for Vehicle Operation.* (i) Notwithstanding the definition of “Public Vehicular Area” (PVA) in North Carolina law, the operator of any motor vehicle anywhere in the Seashore, whether in motion or parked, must at all times comply with all North Carolina traffic laws that would apply if the operator were operating the vehicle on a North Carolina highway.

(ii) In addition to the requirements of Part 4 of this chapter, the following restrictions apply:

(A) A vehicle operator must yield to pedestrians on all designated ORV routes.

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

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

(D) An operator may park on a designated ORV route, but no more than one vehicle deep, and only as long as the parked vehicle does not obstruct two-way traffic.

(E) When driving on a designated route, an operator must lower the vehicle’s tire pressure sufficiently to maintain adequate traction within the posted speed limit.

(F) The speed limit for off road driving is 15 mph, unless otherwise posted.

(12) *Night Driving Restrictions.*

(i) Hours of operation and night driving restrictions are listed in the following table:

HOURS of OPERATION/NIGHT DRIVING RESTRICTIONS	
November 16 – April 30	All designated ORV routes are open 24 hours a day.

9/26/11 mbm - First draft edits for Final Rule

May 1 – September 14	Designated ORV routes in sea turtle nesting habitat (ocean intertidal zone, ocean backshore, dunes) are closed from 9 p.m. to 7 a.m.
September 15 – November 15	Designated ORV routes in sea turtle nesting habitat (ocean intertidal zone, ocean backshore, dunes) are closed from 9 p.m. to 7 a.m., but the Superintendent may open designated ORV routes in sea turtle nesting habitat (if no turtle nests remain), 24 hours a day.

(ii) Maps available in the office of the Superintendent and on the Seashore’s website will show routes closed due to night driving restrictions, and routes the Superintendent opens because there are no turtle nests remaining.

(13) *Vehicle carrying capacity.* The maximum number of vehicles allowed on any particular ORV route, at one time, is the linear distance of the route divided by 6 meters (20 feet).

(14) Violating any of the provisions of this paragraph, or the terms, conditions, or requirements of an ORV or other permit authorizing ORV use is prohibited. A violation may also result in the suspension or revocation of the applicable permit by the Superintendent.

(15) *Information Collection.* As required by 44 U.S.C. 3501 et seq. The Office of Management and Budget has approved the information collection requirements contained in this paragraph. The OMB approval number is 1024-0026. The NPS is collecting this information to provide the Superintendent data necessary to issue ORV special use permits. The information will be used to grant a benefit. The obligation to respond is required to order to obtain the benefit in the form of the ORV permit.

9/26/11 mbm - First draft edits for Final Rule

Acting Assistant Secretary for Fish and Wildlife and Parks

Date

