

From: [Mike Murray](#)
To: [Doug Wetmore](#)
Subject: draft final rule
Date: 10/21/2011 03:51 PM
Attachments: [102111 Draft CAHA final rule without Comment-Response section.docx](#)

Doug,

I've combined the draft preamble with the draft regulatory section into one document and made some minor edits in the Q&A and reg sections to be consistent with the minor word revisions that I had identified in the draft comment-response document. Once we get Mike Stevens' comments about the Comment-Response section and resolve any questions, then we can insert that into the attached document and review it one last time. Would you please take a look at the attached combined document to see if I've missed anything in terms of minor edits in the Q&A and reg section and would you also make a first attempt at drafting the "Changes to the Final Rule" section that starts on p. 7 of the document (when viewing as the "Final Showing Markup" version). No need to route this to Solicitors for review yet, as I think we should wait to get the Comment-Response section completed and added before we ask the Solicitors to do one last review of the entire document.



102111 Draft CAHA final rule without Comment-Response section.docx

Thanks and have a good weekend!

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DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024-AD85

Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore

AGENCY: National Park Service, Interior.

ACTION: ~~Final~~~~Proposed~~ rule.

SUMMARY: ~~The National Park Service (NPS) proposes to~~This rule designate routes where off-road vehicles (ORVs) may be used within Cape Hatteras National Seashore (Seashore), North Carolina. Under NPS general regulations, the operation of motor vehicles off of roads within areas of the national park system is prohibited unless otherwise provided for by special regulation. ~~This proposed~~ rule would authorize ORV use at the Seashore, manage it to protect and preserve natural and cultural resources and natural processes, and provide a variety of safe visitor experiences while minimizing conflicts among various users.

DATES: This rule becomes effective on [insert date 30 days after publication] ~~Comments must be received on or before midnight (Eastern Daylight Time) Tuesday September 6, 2011. The NPS does not anticipate extending the public comment period beyond the stated deadline due to a court imposed deadline for completing the final rule.~~

ADDRESSES: ~~You may submit comments, identified by the Regulation Identifier Number (RIN) 1024-AD85, by any of the following methods:~~

~~— Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.~~

~~———— Mail or hand deliver to: Superintendent, Cape Hatteras National Seashore, 1401 National Park Drive, Manteo, North Carolina 27954.~~

~~—For additional information see “Public Participation” under SUPPLEMENTARY INFORMATION below.~~

~~Comments submitted through Federal eRulemaking Portal: <http://www.regulations.gov> or submitted by mail must be entered or postmarked before midnight (Eastern Daylight Time) September 6, 2011. Comments submitted by hand delivery must be received by the close of business hours (5:00 p.m. Eastern Daylight Time) September 6, 2011. Comments will not be accepted by fax, email, or in any way other than those specified above, and bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted.~~

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

SUPPLEMENTARY INFORMATION:

Background

Description of Cape Hatteras National Seashore

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

The Seashore serves as a popular recreation destination where visitors participate in a variety of recreational activities. The Seashore also contains important habitat for wildlife created by the Seashore’s dynamic environmental processes. Several species, listed under the

Endangered Species Act (ESA), including the piping plover, seabeach amaranth, and three species of sea turtles, are found within the park.

Authority and Jurisdiction

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

Off-Road Motor Vehicle Regulation

Executive Order 11644, Use of Off-Road Vehicles on the Public Lands, was issued in 1972 in response to the widespread and rapidly increasing off-road driving on public lands “often for legitimate purposes but also in frequent conflict with wise land and resource management practices, environmental values, and other types of recreational activity.” Executive Order 11644 was amended by Executive Order 11989 in 1977, and together they are collectively referred to in this rule as “E.O.”. The E.O. requires federal agencies that allow motorized vehicle use in off-road areas to designate specific areas and routes on public lands where the use of motorized vehicles may be permitted.

Specifically, section 3 of the E.O. requires agencies to develop and issue regulations and administrative instructions to provide for administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, and areas in which the use of off-road vehicles is prohibited. Those regulations shall direct that the designation of such areas and trails will be based upon the protection of the resources of the public lands,

promotion of the safety of all users of those lands, and minimization of conflicts among the various uses of those lands. The regulations shall further require that the designation of such areas and trails shall be in accordance with the following--

(1) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands.

(2) Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats.

(3) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

(4) Areas and trails shall not be located in officially designated Wilderness Areas or Primitive Areas. Areas and trails shall be located in areas of the National Park system, Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.

The NPS regulation at 36 CFR 4.10(b) implements the E.O. and requires that routes and areas designated for ORV use be promulgated as special regulations and that the designation of routes and areas shall comply with 36 CFR 1.5 and the E.O. It also states that such routes and areas may be designated only in national recreation areas, national seashores, national lakeshores, and national preserves. The ~~proposed~~final rule is consistent with these authorities and with NPS Management Policies 2006, available at: <http://www.nps.gov/policy/MP2006.pdf>

ORV Use at Cape Hatteras National Seashore

Following the establishment of the Seashore in 1937, beach driving was primarily for the purpose of transportation, not recreation. Because the area was sparsely populated, the number of ORVs on the beach was much smaller than it is today. The paving of NC Highway 12, the completion of the Bonner Bridge connecting Bodie and Hatteras islands in 1963, and the introduction of the State of North Carolina ferry system to Ocracoke Island facilitated visitor access to the sound and ocean beaches. Improved access, increased population, and the popularity of the sport utility vehicle have resulted in a dramatic increase in vehicle use on Seashore beaches.

Since the 1970s, ORV use at the Seashore has been managed through various draft or proposed plans, none were completed or published as a special regulation as required by 36 CFR 4.10(b). Motivated in part by a decline in most beach nesting bird populations on the Seashore since the 1990s, in July 2007 the NPS completed the Cape Hatteras National Seashore Interim Protected Species Management Strategy/Environmental Assessment (Interim Strategy) to provide resource protection guidance with respect to ORVs and other human disturbance until the long-term ORV management plan and regulation could be completed. In October 2007, a lawsuit was filed by Defenders of Wildlife and the National Audubon Society against the NPS and the US Fish and Wildlife Service, challenging the Interim Strategy. The lawsuit alleged the federal defendants failed to implement an adequate plan to govern off-road vehicle use at the Seashore that would protect the Seashore's natural resources while minimizing conflicts with other users, and that the federal defendants failed to comply with the requirements of the E.O. and NPS regulations regarding ORV use. The lawsuit was resolved in April 2008 by a consent decree agreed to by the plaintiffs, the NPS, and the interveners, Dare and Hyde counties and a

coalition of local ORV and fishing groups. ORV use is currently managed pursuant to the consent decree, which also established deadlines of December 31, 2010 and April 1, 2011, respectively, for completion of an ORV management plan/EIS and a final special regulation. On December, 20 2010, the Cape Hatteras ORV Plan/Final Environmental Impact Statement (plan/FEIS) was completed, and the Record of Decision (ROD) selecting the NPS preferred alternative was signed by the NPS Southeast Regional Director. The public was informed of the availability of the plan/FEIS and ROD through notice in the *Federal Register* on December 28, 2010. The plan/FEIS, the ROD, and other supporting documentation can be found online at <http://www.parkplanning.nps.gov/caha>. The NPS has notified the parties to the litigation and the US District Court for Eastern District of North Carolina (Court) that the final rule will not be completed until late summer 2011 with implementation planned for fall 2011. On April 12, 2011, the Court issued an order modifying the consent decree, extending the deadline for promulgation of the final rule until **November 15, 2011**.

Comment [dw1]: May need updating if not able to meet deadline.

Notice of Proposed Rulemaking

On July 6, 2011, the National Park Service published a Notice of Proposed Rulemaking (NPRM) for the management of off-road vehicles at Cape Hatteras National Seashore (76 FR 39350). The proposed rule for off-road vehicle management was based on the selected action as described in the Record of Decision (ROD) for the Cape Hatteras ORV Plan/Final Environmental Impact Statement. The NPRM was available for public comment from July 6, 2011 through September 6, 2011. However, Hurricane Irene made landfall in the area of the Seashore on Saturday August 27, 2011, resulting in widespread damage along the Outer Banks of North Carolina and along the east coast into New England. Because hurricane damage may have prevented some affected persons from commenting on the rule by the September 6 deadline, the NPS reopened

the public comment period on September 9, 2011 and extended the deadline to midnight on September 19, 2011.

Summary of and Response to Public Comments

The NPS accepted public comments on the proposed rule through the mail, hand delivery, and through the Federal eRulemaking Portal: <http://www.regulations.gov>. The NPS received approximately 21,000 comments on the proposed rule from a wide variety of entities, including government agencies, environmental groups, recreation and access organizations, and private individuals. Of the comments received, approximately 13,000 were individual correspondences and approximately 8,000 were form letters of several varieties.

Insert Comment Summaries and Responses

[General Comments](#)

[Comments Related to ORV Permits](#)

[Comments Related to Vehicle Requirements](#)

[Comments Related to ORV Routes](#)

[Comments Related to Night Driving Restrictions](#)

[Etc.....](#)

Changes to the Final Rule

Based on the preceding comments and responses, the NPS has made the following changes to the proposed rule language with regard to ORV management.

The ~~Proposed-Final~~ Rule

This ~~final~~~~proposed~~ rule establishes a special regulation pursuant to 36 CFR 4.10(b) to manage ORV use at the Seashore. The special regulation will implement portions of the selected action alternative, as described in the ROD, by designating ORV routes at the Seashore, establishing requirements to obtain a permit, and imposing date and time and other restrictions related to operation of ORVs, including vehicle and equipment standards. In addition, the ~~proposed~~~~final~~ rule would correct a drafting error at § 7.58(b)(1) to clarify that the definitions only apply to § 7.58 and not to the entirety of 36 CFR Part 7. Further the rule would delete the definition of permittee at § 7.58(b)(1)(ii) as it is unnecessary and potentially confusing to the public, as the term could be applied to individuals holding different types of permits for different activities. The deletion consequently requires redesignation of the structure of paragraph (b). The addition of paragraph (c) would implement portions of the selected action alternative as described in the ROD, by designating ORV routes at the Seashore, establishing requirements to obtain a permit, and imposing date and time and other restrictions related to operation of ORVs, including vehicle and equipment standards.

The following explains some of the principal elements of the ~~proposed~~~~final~~ rule in a question and answer format:

What is an “Off-Road Vehicle” (ORV)?

For the purposes of this regulation, an “off-road vehicle” or “ORV” means a motor vehicle used off of park roads (off-road). Not all ORVs are authorized for use at the Seashore;

however, all ORVs are subject to the vehicle requirements, prohibitions, and permitting requirements described below in this regulation.

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

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

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

No. There would be no limit to the number of permits that the Superintendent could issue. However, use restrictions may limit the number of vehicles on a particular route at one time.

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

Yes. You would need to get a permit for each vehicle that you want to use for driving on designated ORV routes. The ~~P~~proof of ~~A~~ the permit, such as a color-coded windshield sticker or hang tag for the rear-view mirror, in a manner and location specified by the Superintendent, provided by the NPS, would need to be affixed, in a manner and location specified by the Superintendent, to all vehicles operated on designated ORV routes within the Seashore.

Where can I operate my vehicle off road?

Once you obtain an ORV permit, you may operate a vehicle off road only on designated routes described in the tables located in § 7.58(c)(9). The tables also provide dates for seasonal

restrictions on driving these designated routes. Maps of designated ORV routes would be available in the Office of the Superintendent and on the Seashore website.

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

No. In addition to the referenced seasonal restrictions, ORV routes are also subject to temporary resource and safety closures. However, past experience indicates that substantial sections of the beach that are designated as ORV routes would remain open for ORV use when other sections are temporarily closed.

Are there any requirements for my vehicle?

Yes. To receive a permit to operate a vehicle on designated ORV routes, your vehicle must be registered, licensed, and insured for highway use and comply with inspection regulations within the state, country, or province where the vehicle is registered. It must have no more than two axles and its tires must be U.S. Department of Transportation listed or approved, as described at: <http://www.safercar.gov/Vehicle+Shoppers/Tires/Tires+Rating/Passenger+Vehicles>. You would also be required to carry in your vehicle a low-pressure tire gauge, shovel, jack, and jack [support boardstand](#).

Can I drive my two-wheel-drive vehicle on designated ORV routes?

Yes. Four-wheel-drive vehicles are recommended, but two-wheel-drive vehicles would be allowed if, in the judgment of the vehicle operator, the vehicle is capable of over-sand travel.

Can I tow a boat or utility trailer with my vehicle on designated ORV routes?

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

Can I tow a travel trailer (~~camping~~, i.e., a trailer with sleeping, cooking, and/or restroom facilities) on designated ORV routes?

No. Travel trailers ~~(i.e., camping trailers)~~ would be prohibited on designated ORV routes, as camping at the Seashore is prohibited except in designated campgrounds.

Can I ride my motorcycle off of Seashore roads?

No. The operation of motorcycles would be prohibited on designated ORV routes. Motorcycles are generally not capable of travelling through the deep, soft sand or carrying the requisite equipment for self extraction should they become stuck.

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

No. Vehicles not registered, licensed and insured for highway use, including ATVs and UTVs, cannot lawfully be operated on park roads or designated off-road routes ~~to ORV access points, and adequate parking for trailers or other transport vehicles is not readily available adjacent to ORV access points~~. Further, these vehicles have historically not been allowed to operate within the Seashore, and authorizing such use would limit the capacity for and interfere with the more significant and traditional use of four-wheel drive pick-up trucks, sport utility vehicles and other passenger vehicles for off-road access associated with fishing, picnicking, sun bathing, surfing, wading and swimming.

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 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 on designated ORV routes 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 16 to April 30, subject to the terms and conditions established under an ORV permit. However, from May 1 to November 15, 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. However, from September 15 to November 15, the Superintendent may reopen portions of designated ORV routes at night if there are no turtle nests remaining. This is a minor change to the dates in the ROD. The NPS has decided it would be easier for the public to understand and more convenient to administer if the night driving dates coincided with some of the seasonal ORV route dates. Therefore, as described, night driving may be allowed beginning on September 15 instead of September 16. Routes that are subject to these night driving restrictions, as well as routes identified as having no turtle nests remaining, will be depicted on maps available in the Office of the Superintendent and on the Seashore website.

Can I leave my ORV parked 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 designated ORV routes, including the beach.

Is a separate permit required for night driving?

No. It would be covered by the ORV permit required to drive on the designated ORV routes in the Seashore.

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

Yes, such use would be accommodated on a case-by-case basis, ~~in front of villages only, and would be subject to the conditions of a special use permit issued by the Superintendent.~~ The permit would allow you to transport mobility-impaired individuals to a predetermined location in ~~a beach area in front of a village that is not otherwise open to ORV use, and would be subject to the conditions of a special use permit issued by the Superintendent.~~ ~~an otherwise vehicle-free area (VFA) in front of the villages. After transporting the person to the beach, you would have to immediately return the vehicle to the nearest ORV route or Seashore road.~~ Additionally, you should keep in mind that there would be many miles of beach open to ORVs year-round or seasonally that will also be accessible by ORV for family gatherings and other activities. In those areas, vehicles may simply be parked in the ORV corridor.

Do Commercial Use Authorization holders and commercial fisherman need a separate ORV permit?

No. Commercial Use Authorizations (CUAs) would, as appropriate, also authorize ORV use by the CUA holder but not their clients. ORV use by commercial fisherman who are actively engaged in a commercial fishing activity would be authorized ORV use under the terms of their commercial fishing special use permit.

Can commercial fishermen drive in the vehicle-free areas (VFA)?

Comment [dw2]: Insert language about permits being subject to other closures, etc?

Mbm – I don't think it is necessary to include that here. It would be covered under the "terms and conditions" of the SUP.

Yes. In keeping with the current practice, commercial fishermen when actively engaged in their authorized commercial fishing activity ~~would be allowed to enter VFAs~~ may be allowed to operate an off-road vehicle on a beach that is not otherwise designated for ORV use, provided that the beach is neither subject to a resource closure nor a lifeguarded beach. ~~except for resource closures and lifeguarded beaches.~~ Lifeguarded beaches would be closed seasonally by the Superintendent. Commercial fishing activities and use of associated fishing gear conflicts with the significant, concentrated beach use and associated swimming use of these areas by visitors.

Commercial fishermen while actively engaged in authorized commercial fishing activity and who are able to present a fish-house receipt from the previous 30 days would be allowed to enter the beach at 5 a.m. on days when night driving restrictions are in effect for the general public.

Compliance with Other Laws and Executive Orders

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

Section 3(4) of E.O. provides that ORV “areas and trails shall be located in areas of the National Park system, Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.” Since the E.O. clearly was not intended to prohibit all ORV use everywhere in these units, the term "adversely affect" does not have the same meaning as the somewhat similar terms "adverse impact" or "adverse effect" commonly used in the National Environmental Policy Act of 1969 (NEPA) . Under NEPA, a procedural statute that provides for the study of environmental impacts, the term "adverse effect" refers to any effect, no matter how minor or negligible. Section 3(4) of the E.O. by contrast, does not

prescribe procedures or any particular means of analysis. It concerns substantive management decisions, and must instead be read in the context of the authorities applicable to such decisions. The Seashore is an area of the National Park System. Therefore, the NPS interprets the E.O. term “adversely affect” consistent with its NPS Management Policies 2006. Those policies require that NPS only allows "appropriate use" of parks, and avoids "unacceptable impacts."

Specifically, this rule will not impede the attainment of the Seashore’s desired future conditions for natural and cultural resources as identified in the plan/FEIS. We have determined this rule will not unreasonably interfere with the atmosphere of peace and tranquility, or the natural soundscape maintained in natural locations within the Seashore. Therefore, we have determined that within the context of E.O., the resources and values of the Seashore, ORV use on the ORV routes designated by this rule (which are also subject to resource closures and other species management measures that will be implemented under the selected action in the ROD) will not adversely affect the natural, aesthetic, or scenic values of the Seashore.

Section 8 (a) of the E.O. requires the respective agency head to monitor the effects of the use of off-road vehicles on lands under their jurisdictions. On the basis of the information gathered, such agency head shall from time to time amend or rescind designations of areas or other actions taken pursuant to the E.O. as necessary to further the policy of the E.O. The selected action for the plan/EIS, as described in the ROD, identifies monitoring and resource protection procedures, periodic review, and desired future condition to provide for the ongoing and future evaluation of impacts of ORV use on protected resources. The park Superintendent has the existing authority under both this ~~proposed~~final regulation and under 36 CFR §1.5 to close portions of the Seashore as needed to protect park resources.

Regulatory Planning and Review (Executive Order 12866)

This document is a significant rule and the Office of Management and Budget (OMB) has reviewed this rule under Executive Order 12866. The assessments required by Executive Order 12866 and the details of potential beneficial and adverse economic effects of the ~~proposed~~final rule can be found in the report entitled “Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore” which is available online at <http://www.parkplanning.nps.gov/caha>.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) OMB has determined this rule raises novel legal or policy issues. ORV use at the Seashore has been the subject of litigation in the past; a settlement agreement between the parties was reached in May 2008 and ORV use at the Seashore is currently managed under a court order/consent decree until the final rule is promulgated.

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 (5 U.S.C. 601 et seq.). This certification is based on information contained in the report entitled “Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore”, available for review online at <http://www.parkplanning.nps.gov/caha>. According to that report, no entities, small or

Comment [dw3]: Insert updated title

Comment [dw4]: Insert update title.

large, are directly regulated by the ~~proposed~~final rule, which only regulates visitors' use of ORVs.

As part of the socio-economic impact analysis for the plan/EIS, and based on suggestions from negotiated rulemaking advisory committee members, 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. We carefully considered this information in analyzing the rule's costs, benefits and impact.

While close to 100 per cent of the rule's impacts would fall on small businesses, some popular areas, such as Cape Point, South Point, and Bodie Island spit, would have designated year-round or seasonal ORV routes. The presence of more Vehicle Free Areas (VFAs) for pedestrians, combined with increased parking for pedestrian access, could increase overall visitation and thereby help businesses to recoup some of the revenues lost as a result of ORV restrictions.

The ~~proposed~~final rule includes a number of measures designed to mitigate effect on the number of visitors as well as the potential for indirect economic effects on village businesses that profit from patronage by Seashore visitors using ORVs. These include: new pedestrian and ORV beach access points, parking areas, pedestrian trails, routes between dunes, 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 pre-nesting areas until breeding activity is observed. In addition, we 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 access and visitor use under the Selected Action, which we

developed with extensive public involvement, should increase the probability that the economic impacts are on the low rather than high end of the range.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under the 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.

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

Comment [dw5]: Insert updated title

Unfunded Mandates Reform Act (UMRA)

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. The designated ORV routes are located entirely within the Seashore, and will not result in direct expenditure by State,

local, or tribal governments. This rule addresses public use of NPS lands, and imposes no requirements on other agencies or governments. Therefore, a statement containing the information required by the UMRA (2 U.S.C. 1531 et seq.) is not required.

Takings (Executive Order 12630)

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

Federalism (Executive Order 13132)

Under the criteria in E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This rule only affects use of NPS-administered lands and imposes no requirements on other agencies or governments. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

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

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

Consultation with Indian tribes (Executive Order 13175)

Under the criteria in E.O. 13175 we have evaluated this rule and determined that it would have no potential effect on federally recognized Indian tribes.

On August 27, 2010, the NPS sent a letter to the Tuscarora Nation requesting information on any historic properties of religious or cultural significance to the tribe that would be affected by the plan/FEIS. The Tuscarora Nation has not informed the Seashore of any such properties.

Paperwork Reduction Act (PRA)

This rule does not contain any new collection of information that requires approval by OMB under the PRA of 1995 (44 U.S.C. 3501 et seq.). OMB has approved the information collection requirements associated with NPS special use permits and has assigned OMB control number 1024-0026 (expires 06/30/2013). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

This rule implements portions of the plan/FEIS and ROD which is a major Federal action significantly affecting the quality of the human environment. In accordance with NEPA, the NPS prepared a Draft Environmental Impact Statement (DEIS) and a Final Environmental Impact Statement for the plan/FEIS. The plan/FEIS was released on November 15, 2010. The NPS Notice of Availability and the EPA Notice of Availability for the plan/FEIS were published in the Federal Register on November 15 and November 19, 2010, respectively. The plan/FEIS evaluated six alternatives for managing off-road motorized vehicle access and use at the Seashore, including two no-action alternatives. The ROD, which selected Alternative F, was signed on December 20, 2010, and a notice of the decision was published in the Federal Register on December 28, 2010. ~~The purpose of this is rule is to proposed for the purpose of~~ implementing the selected action as described in the ROD. A full description of the alternatives that were considered, the environmental impacts associated with the project, and public

involvement is contained in the **plan/FEIS available for review online at:**

<http://www.parkplanning.nps.gov/caha>.

Information Quality Act (IQA)

Information presented in the plan/FEIS is based on a wide range of scientific and peer reviewed data which was used to determine potential impacts and to develop a range of alternatives. Studies, surveys, or reports used or referenced are listed in the Reference section of the plan/FEIS, available for review at <http://www.parkplanning.nps.gov/caha>. The NPS believes that the information used in preparing the plan/FEIS and the subsequent decision to issue this ~~proposed~~ rule is of sufficient quality, objectivity, utility, and integrity to comply with the IQA (Pub. L. 106-554).

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

Clarity of this Rule.

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

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

Comment [dw6]: Will the plan be removed at some point? Should we indicate that it's available in limited supply at the park headquarters?

mbm – How long something is posted on PEPC is more of a PEPC administrator question, I think, than a park question. If there is a time limit on how long a project normally remains posted on PEPC, then we could post the FEIS, ROD and final rule on the park's website.

The “Public Participation” section has been deleted that had been in the proposed rule. Is there supposed to be a “Public Participation” section (e.g., summarizing the public participation history) in the 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):

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. On the landward side, the ORV corridor on Seashore beaches will be marked when possible by posts that are located seaward of the toe of the dune or the vegetation line. On the seaward side, the corridor runs to the water line, which will not be marked by posts unless necessary. 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.

(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.

(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 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.

(vi) Each permit holder must affix the proof of permit, in a manner and location specified by the Superintendent, to the vehicle being used off-road.

(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 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., a-camping trailer with sleeping, cooking and/or bathroom facilities) off- road is prohibited.

(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 beach area in front of a village that is not otherwise open to ORV use.

Such special use permits are subject to the resource, safety, ~~seasonal~~, and other closures implemented pursuant to subsection (10), and may only be used in a manner consistent with the terms and conditions of the permit.

(8) *Commercial fishing vehicles.* The Superintendent, when issuing a commercial fishing permit, may authorize the holder, when actively engaged in authorized commercial fishing, to operate a vehicle off-road.

(i) Such authorization may allow off-road driving on a beach that is not otherwise designated for ORV use, provided that the beach is neither subject to a resource closure nor a lifeguarded beach.

(ii) Such authorization may allow off-road driving 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.

(9) *ORV routes.* The following tables indicate designated ORV routes. The following ramps are designated for ~~ORV~~off-road use 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, 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	<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: soundside ramps 46, 48, 52, 53, 54 and the soundside ORV access at Little Kinnakeet</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: 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 to Pamlico Sound, with one spur route, commonly known as Cable Crossing, to Pamlico Sound 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>

OCRACOKE ISLAND - DESIGNATED ROUTES

<p>YEAR ROUND</p>	<p>Ramp 59 to ramp 63. After ramp 59.5 is constructed, it will replace ramp 59 for ORV access and the route will be from ramp 59.5 to ramp 63.</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>
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SEASONAL September 15 March 14	A seasonal route 0.6 mile south of ramp 72 from the beach route to a pedestrian trail to Pamlico Sound A seasonal route at the north end of South Point spit from the beach route to Pamlico Sound
November 1 to March 31	0.5 mile northeast of ramp 68 to ramp 68 (Ocracoke Campground area)

(10) *Superintendent's closures.* The Superintendent will temporarily limit, restrict, or terminate access to routes or areas designated for off-road use in accordance with public health and safety, vehicle carrying capacity and other ORV management criteria, natural and cultural resource protection, applicable species management strategies including buffer distances, and desired future conditions for threatened, endangered, state-listed and special status species. The Superintendent will conduct a periodic reviews of the criteria for and results of these closures to assess their effectiveness. 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 as determined by the Superintendent based on the same criteria.

(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.
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 portions of 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.

Acting Assistant Secretary for Fish and Wildlife and Parks

Date