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**From:** [Mike Murray](#)  
**To:** [Doug Wetmore](#)  
**Cc:** [JASON.WAANDERS@sol.doi.gov](mailto:JASON.WAANDERS@sol.doi.gov); [Mike.Stevens@sol.doi.gov](mailto:Mike.Stevens@sol.doi.gov)  
**Subject:** Re: CAHA Rule suggestions  
**Date:** 11/08/2011 07:37 AM  
**Attachments:** [2011\\_11\\_01 CAHA ORV Final Rule - rev1-mbm.docx](#)

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Doug,

Overall, I think your edits are a big improvement. I made a few additional edits to (hopefully) help distinguish between the overall planning process (i.e., the "plan/EIS") and specific titled documents, such as the "DEIS", "FEIS", and "ROD". I did not respond specifically to all of your comments, but believe the text edits (yours and mine combined) adequately address the consistency issues. If you have no questions about my edits, feel free to send the revised document back to AJ.



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Thanks,

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▼ [Doug Wetmore/DENVER/NPS](#)

**Doug  
Wetmore/DENVER/NPS**

To Mike Murray/CAHA/NPS@NPS,  
JASON.WAANDERS@sol.doi.gov,  
Mike.Stevens@sol.doi.gov

11/07/2011 04:46 PM

cc

Subject CAHA Rule suggestions

I got a call from AJ this morning about a couple "issues" in the final rule. It was suggested that we provide a definition of IMPLAN in response to comment #16. He also suggested that we be more consistent with our use of the terms EIS, DEIS, FEIS, plan/EIS, plan/FEIS, etc.

I've taken a first crack at this and would like your opinions. I tried to

just use "FEIS" or "DEIS" where we reference the specific document and then use "plan/EIS" when we're referring to the overall process. I also added a global comment on the use of the phrase "ORV Management Plan/EIS". We use it as an all-encompassing term to explain the overall planning effort, which I like. However, I'm not sure if it would confuse the public at all. AJ didn't make any specific suggestions for revisions, so I'm not sure if that phrase itself is a cause for concern.

I've also made a few other editorial/context revisions, but nothing remarkable. I want to keep this moving as fast as possible, so I have no problem just ignoring my editorial revisions outside of what AJ called to our attention.

Thanks.

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[attachment "2011\_11\_01 CAHA ORV Final Rule - rev1.docx" deleted by Mike Murray/CAHA/NPS]

CAHA ORV Final Rule

November 1, 2011 DRAFT

**Billing Code 4310-X6**

**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 rule.

**SUMMARY:** This rule designates 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 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 February 15, 2012.

**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 wildlife habitat 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 (E.O.) 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." E.O. 11644 was amended by E.O. 11989 in 1977. These executive orders require federal agencies that allow motorized vehicle use in off-road areas to designate specific areas or routes on public lands where the use of motorized vehicles may be permitted.

Specifically, section 3 of E.O. 11644 requires agencies to develop and issue regulations and administrative instructions to provide for administrative designation of the specific areas or 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 are to direct that the designation of such areas and trails 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 also are to require that such areas and trails-

(1) Be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands.

(2) Be located to minimize harassment of wildlife or significant disruption of wildlife habitats.

(3) 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) 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.s 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 E.O. 11644. It also states that such routes and areas may be designated only in national recreation areas, national seashores, national

lakeshores, and national preserves. The 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 U.S. 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.s

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 intervenors, 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/~~E~~environmental I~~m~~pa~~c~~t S~~t~~atement (~~plan~~EIS) and a final special regulation. The Cape Hatteras National Seashore ORV Management Plan/Draft Environmental Impact Statement (DEIS) was released to the public on March 5, 2011 and a 60-day public comment period followed, beginning on March 12, 2011. On December, 20 2010, the Cape Hatteras ORV Management 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 the NPS Planning Environment and Public Comment (PEPC) website at <http://www.parkplanning.nps.gov/caha>. In late March 2011, the NPS notified the parties to the litigation and the U.S. District Court for Eastern District of North Carolina (Court) that the final rule would not be completed by the April 1, 2011, consent decree deadline. 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.

### Notice of Proposed Rulemaking

On July 6, 2011, the NPS published a Notice of Proposed Rulemaking for the management of off-road vehicles at Cape Hatteras National Seashore (76 FR 39350). On July 6, 2011, the NPS also published the “Benefit-Cost Analysis of Proposed ORV Use Regulations in

**Comment [mbm1]:** I suggest we use “plan/EIS” generically for the “plan” or “planning process”, then define both DEIS and FEIS as specific document titles.

Cape Hatteras National Seashore” online at the Seashore’s public planning website at

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

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~~ ~~FEIS~~. The proposed rule 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 the hurricane 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 Responses to Public Comments**

Comments were accepted through the mail, hand delivery, and through the Federal eRulemaking Portal at <http://www.regulations.gov>. A total of 21,302 comment documents were received. A summary of comments and NPS responses is provided below.

1. *Comment:* By allowing ORV use at the Seashore, the proposed rule fails to meet the mandates of the National Park Service Organic Act of 1916 of preserving and protecting flora, fauna, historic objects, and scenery.

*Response:* The NPS and the courts have consistently interpreted the NPS Organic Act and its amendments as providing that resource conservation shall predominate over visitor recreation, in the event of a conflict between the two. However, the Organic Act gives NPS broad authority and discretion to manage these sometimes conflicting goals and to determine how visitor activities, including recreational activities, may be managed to avoid or minimize impacts to



natural and cultural resources. The General Authorities Act, which amended the Organic Act, requires NPS to manage all units as part of a single National Park System managed for the purpose set out in the Organic Act. Other laws and policies also support NPS's decision to manage recreational use at the Seashore. The laws also give the NPS the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values. (NPS Management Policies 2006, Section 1.4.3).

2. *Comment:* By allowing ORV use on large portions of the Seashore, the proposed rule fails to comply with the Seashore's enabling legislation, which said that no plan for the convenience of visitors shall be undertaken that is incompatible with the preservation of the park's unique flora and fauna and physiographic conditions.

*Response:* The Seashore's enabling legislation states in 16 U.S.C. § 459a-1 that "the administration, protection, and development" of the Seashore shall be exercised "subject to the provisions of the NPS Organic Act. Accordingly, recreation must be managed to provide for resource conservation. The enabling legislation does not expressly mandate or authorize ORV use nor provide for recreational activities in a way that would affect NPS's duty to manage those activities so as to avoid impairment of resources, to avoid or minimize unacceptable resource impacts, or to strive to restore the integrity of park resources that have been damaged or compromised in the past (as provided for by the NPS Management Policies). The laws do give the Service the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values" (NPS Management Policies Section 1.4.3). The Selected Action, Alternative F, upon which the rule is based, is consistent with this

mandate, and is also consistent with the enabling legislation’s mandate to preserve the unique flora and fauna and physiographic conditions. Among other things, it specifically provides for actions to preserve sensitive and protected species during important lifecycle stages, thus ensuring their preservation.

3. *Comment:* Implementing ORV restrictions such as vehicle-free areas is in conflict with Section 3 of E.O. 11644 because they severely limit the variety of access opportunities available for visitors and increase the potential for conflicts among users in the areas that remain open to recreational use.

*Response:* Section 3 of E.O. 11644 states that the designation of ORV routes “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.” It does not require the agency to provide for a variety of access opportunities through the designation of ORV

routes. However, part of the purpose of developing the ORV Management Plan/plan/FEIS, as stated in the FEIS, was “to provide a variety of visitor use experiences while minimizing conflicts among various users”, which the NPS believes the plan and rule have accomplished.

This rule designates more than half of the mileage in the Seashore as seasonal or year-round ORV routes, providing a substantial amount of vehicular access. The remaining mileage would be closed to ORV use, which provides a more primitive, vehicle-free visitor experience at the Seashore. The rule also includes measures such as carrying capacity restrictions, reduced speed limits, and parking requirements to reduce the potential for conflicts among Seashore visitors.

4. *Comment:* This regulation conflicts with E.O. 11644 and E.O. 11989, which allow the designation of ORV routes in areas of the national park system only if the agency determines

**Comment [dw2]:** FEIS would be consistent, but do we lose the “planning” part of the process here?

that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values. Driving on the beach clearly adversely impacts these values of the Seashore.

*Response:* This regulation is consistent with E.O. 11644 and E.O. 11989 as explained in the “Compliance with Other Laws and Executive Orders” section of this rule.

5. *Comment:* All ORVs should be banned within the Seashore.

*Response:* This rule implements the December 2010 ROD, which allowed for continued ORV use. ORV use is a historical use at the Seashore that has been accounted for in various planning documents, including Seashore’s 1984 General Management Plan, which states, “Selected beaches will continue to be open for ORV recreational driving and in conjunction with surf fishing in accordance with the existing use restrictions”. Furthermore, prohibition of ORV use at the Seashore would not meet the purpose, need, and objectives of the ORV management plan/EIS, as stated in the FEIS, or rule. The purpose of the plan is to “develop regulations and procedures that carefully manage ORV use/access in the Seashore to protect and preserve natural and cultural resources and natural processes, provide a variety of visitor use experiences while minimizing conflicts among various users, and promote the safety of all visitors....” ORV use, if effectively managed, provides convenient access for many appropriate visitor activities at some popular beach sites including, for example, activities that use vehicles to transport substantial amounts of gear for the activity. Prohibition, rather than management, of ORV use could substantially diminish such visitor experience opportunities. Therefore prohibition of all ORV use would not have met the plan need.

Comment [dw3]: See above comment

6. *Comment:* The proposed rule should refer to the Seashore as "Cape Hatteras National Seashore Recreational Area" because this is the name that was established through the enabling legislation. The name of the Seashore cannot be changed except by an act of Congress, and removing "Recreational Area" from the name changes the original purpose of the Seashore.

*Response:* On June 29, 1940, Congress amended the 1937 authorizing legislation for "Cape Hatteras National Seashore" to permit hunting. The same amendment also changed the formal title of the park to "Cape Hatteras National Seashore Recreational Area," in order to distinguish it from more traditional types of parks where all hunting was generally prohibited, and avoid setting a precedent for other parks. The NPS had already defined a "national seashore" as a recreational area in its 1937 brochure explaining the *Park, Parkway, and Recreational Study Act* and the anticipated recreational purposes of the park were established by Congress through Acting Secretary Chapman's letter to the House Committee on Public Lands. Thus, including the term "recreational area" in the title was redundant. In 1954 the NPS authorized the original park name ("national seashore") to be used for all administrative purposes except for formal memoranda and documents requiring the full legal name. Subsequently, the term "recreational area" fell from use in most official references to the park. In 1961, Congress authorized Cape Cod in Massachusetts as the second "national seashore" and subsequently created eight more "national seashores" between 1962 and 1975 for a total of ten. All such park units that followed Cape Hatteras were officially named "national seashores." Since 1962, Cape Hatteras has been referred to as "national seashore" in all Congressional legislation and "national seashore" has been the standard nomenclature for this type of park. In any event, this nomenclature question is irrelevant to this regulation or the ORV plan. The General Authorities Act of 1970 and the 1978

Redwoods Amendment expressly clarified that all units of the National Park System are to be managed to the same statutory standards and authorities, regardless of their nomenclature.

Furthermore, the NPS motor vehicle regulations at 36 C.F.R. § 4.10 do not recognize a “national seashore recreational area” unit designation as one of the types of units where ORV use is permitted.

7. *Comment:* The proposed rule violates E.O. 13132 by not providing a federalism summary impact statement.

*Response:* The proposed rule is consistent with E.O. 13132. It does not have federalism implications that require a federalism summary impact statement. The rule governs the use of federally-owned land in the Seashore by individual Seashore visitors. It does not have a substantial direct effect on the State of North Carolina (or any other state), on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

8. *Comment:* The proposed rule violates E.O. 13474, which amended E.O. 12962, specifically section (d), which directs Federal agencies to ensure that recreational fishing shall be managed as a sustainable activity in national wildlife refuges, national parks, national monuments...or any other relevant conservation or management areas or activities under Federal authority, consistent with applicable law. The ORV management plan harms recreational fisherman the most.

*Response:* E.O. 12962 (1995), as amended by E.O. 13474 (2008), directs Federal agencies, “to the extent permitted by law”, to improve the quantity, function, sustainable productivity and distribution of U.S. aquatic resources for increased recreational fishing opportunities. It further directs Federal agencies to ensure that recreational fishing shall be managed as a sustainable

activity in national wildlife refuges, national parks or any other relevant conservation or management areas or activities under any Federal authority, “consistent with applicable law”. As stated in Chapter 1 of the FEIS, numerous laws including the NPS Organic Act, the Seashore’s enabling legislation, the Migratory Bird Treaty Act and the Endangered Species Act require the NPS to, among other things, conserve wildlife and other natural and cultural resources unimpaired for the enjoyment of future generations and to contribute to the protection and recovery of migratory birds and Federally listed threatened or endangered species. E.O. 11644 (1972), E.O. 11989 (1977), and NPS regulation 36 CFR § 4.10 also require the NPS to manage ORV use, if it is allowed, in a manner that minimizes harassment of wildlife or significant disruption of wildlife habitats, minimizes conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and ensures the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors. 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 ORV use in such locations will not adversely affect their natural, aesthetic, or scenic values. The proposed rule is “consistent with applicable law” and places no direct constraints on recreational fishing. Its focus is to authorize ORV use at the Seashore, manage it to protect and preserve natural and cultural resources and natural processes in accordance with applicable laws, and provide a variety of safe visitor experiences while minimizing conflicts among various users. To the extent that management of ORV use would impact fishing and other recreational uses of the Seashore, those impacts were analyzed during the preparation of the ORV management plan/EIS.

9. *Comment:* The proposed rule will negatively impact primitive wilderness within the Seashore and does not address Congress's goal of preserving "primitive wilderness" at the Seashore as directed in the park's enabling legislation.

*Response:* The Seashore's 1937 enabling legislation, which indicated that areas not developed for recreational use "shall be permanently reserved as a primitive wilderness", predates the Wilderness Act of 1964. The NPS understands the language of the enabling legislation as authorizing it to provide infrastructure and facilities for visitors in selected areas to support recreational use, as needed (e.g., parking areas, day-use facilities for beach-goers, life-guarded beaches, boat launch areas, and campgrounds, ORV ramps), even though this would not be appropriate in primitive wilderness. The Seashore has many undeveloped areas, many of which are retained and protected under the Selected Action and this rule; however, none of these areas are currently designated or proposed wilderness, and therefore it was not addressed as an impact topic in the ORV management plan/EIS. A study to explore the suitability of wilderness at the Seashore is outside the scope of this planning effort and will be addressed during a future process to develop a new General Management Plan for the Seashore.

10. *Comment:* The exclusion of fixed-distance, mandatory buffers for resource protection in the proposed rule violates the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). By excluding those species protections from the rule, the proposed rule is outside the range of alternatives considered within the EIS and has not undergone the "hard look" required by NEPA. By implementing a new alternative that was not studied in the FEIS, the proposed rule violates the APA's notice and comment requirements

*Response:* The proposed rule is based directly on the Selected Action described in the FEIS and ~~Record of Decision (ROD)~~. The rule contains those portions of the Selected Action, such as the designated ORV routes and other ORV management requirements, which the NPS believes are necessary to comply with the executive orders and NPS regulations. The species management strategies for the Selected Action, as described in the ~~plan/EIS~~FEIS, are intended to evolve over time, through the periodic review process, in order to ensure accomplishment of the desired future condition for park resources stated in the plan. The NPS has revised the wording of subsection (10) of the final rule to more clearly articulate its commitment to the implementation of the species management strategies and periodic review process described in the Selected Action.

11. *Comment:* The NPS and DOI are in violation of NEPA and other Executive Orders because they did not publish the full extent of the proposed restrictions in the *Federal Register* and did not provide ample documentation, review time, and meetings or other forms of education for the public.

*Response:* The NPS has gone through an extensive public participation process, including negotiated rulemaking, to develop the ORV management plan/EIS and special regulation. The public participation process ~~for the plan/EIS~~ is summarized on p. 27 of the FEIS and the expected impact of the proposed alternatives, including the various restrictions proposed in each alternative, is described in “Chapter 4: Environmental Consequences”, pp. 325-638 of the FEIS. A complete list of documents, public participation notices and other information for the project has been and still is available on the NPS PEPC website at <http://parkplanning.nps.gov/caha> (see “Cape Hatteras National Seashore Off-Road Vehicle Negotiated Rulemaking and Management Plan/EIS” project page, “Document List”). The NPS did not conduct public hearings during the



public comment period for the proposed rule because it had already conducted public informational meetings in February and March of 2007 during public scoping on the plan/EIS, conducted additional informational meetings in January – February 2008 to examine the range of alternatives and seek input on alternative elements, held public comment periods each day during 20 days of negotiated rulemaking advisory committee meetings, and conducted five public hearings during the public comment period on the draft plan/EIS (DEIS), as described on p. C-1 of the FEIS. The rule is based on the plan/EIS that was developed through this extensive public participation process.

12. *Comment:* The proposed rule does not adequately address the Migratory Bird Treaty Act, the Endangered Species Act, or the Unfunded Mandates Reform Act (UMRA).

*Response:* The Selected Action ~~in for the ROD~~~~FEIS~~~~ORV management plan/EIS~~, which the rule is based upon, gave extensive consideration to the protection of migratory birds and Federally listed threatened or endangered species. The U.S. Fish and Wildlife Service also reviewed the ~~NPS Preferred~~~~revised~~ Alternative F for the FEIS plan/EIS and drafted a Biological Opinion which concurred with the NPS's Determination of Effect on protected species and provided revisions to be included in the ROD findings in the EIS. A detailed analysis of the impacts of the management alternatives on such species is provided in Chapter 4, pp. 347-491 of the FEIS. Please see the paragraph entitled "Unfunded Mandates Reform Act" in the "Compliance with Other Laws and Executive Orders" section of this rule for explanation regarding consistency with UMRA.

13. *Comment:* The proposed rule makes no mention of the Americans with Disabilities Act (ADA) or the America's Great Outdoor Initiative.

*Response:* The Rehabilitation Act, 29 U.S.C. § 791 et seq., applies to federal agencies in lieu of the ADA, and the NPS is required to provide reasonable access to programs and services at the Seashore. “Reasonable” does not necessarily mean “total” and must be viewed in the light of the entire program or activity, including its purpose (i.e., providing the visitor with a variety of experiences). In developing the ORV management plan/EIS and rule, the NPS recognized that visitors to the Seashore have different needs, and therefore provided a variety of uses, including both ORV and vehicle-free areas. For those visitors that feel that they may require a vehicle to be readily available due to a medical condition or disability or need to have a family member with them at all times, opportunities are provided in the Seashore on designated routes where ORVs are allowed. In addition, the special use permit provision in subsection (7)(iii) of the rule would also 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. These opportunities are in line with the applicable requirements and NPS policies.

The America’s Great Outdoors Initiative (AGO) is a program of the Obama administration to encourage stewardship and recreational use of public lands. AGO vision statements include the following:

- All children, regardless of where they live, have access to clean, safe outdoor places within a short walk of their homes or schools, where they can play, dream, discover, and recreate. Americans participate in the shared responsibility to protect and care for our unique natural and cultural heritage for the use and enjoyment of future generations.
- Our national parks, national wildlife refuges, national forests, and other public lands and waters are managed with a renewed commitment to sound stewardship and resilience.

- Our natural areas and waterways, whether publicly or privately owned, are reconnected, healthy, and resilient and support both human needs and the wildlife that depend on them.

AGO does not provide specific guidance related to NPS ORV management decisions and does not supersede or modify the laws, regulations and executive orders that are applicable to ORV management at the Seashore. The rule is necessary to bring the Seashore in compliance with E.O. 11644 and E.O. 11989 with regard to ORV use, and with NPS laws, regulations (36 CFR § 4.10), and policies to minimize impacts to Seashore resources and values, and to implement the Selected Action identified in the December 2010 [Record of Decision](#) ROD. Under the Selected Action, the NPS will provide visitors to the Seashore with a wide variety of access opportunities for both ORV and pedestrian users, with controls or restrictions in place to limit impacts on sensitive resources, which is consistent with AGO's vision of stewardship and appropriate recreational use of public lands.

14. *Comment:* Subjecting vehicles to search and inspection for equipment and requiring individuals to partake in an in-person education program to obtain a permit violates E.O. 12988 (Civil Justice Reform).

*Response:* As described in the "Compliance with Other Laws and Executive Orders" section of this rule, the provisions of this regulation are consistent with E.O. 12988. Note, however, that E.O.12988 is generally applicable only to civil matters, and violations of this regulation, as with other NPS regulations, would be criminal matters to which this E.O. does not apply.

15. *Comment:* The rule does not comply with the following:

- Regulatory Flexibility Act. There was not adequate consideration given to economic impacts, both direct and indirect, nor to cumulative impacts of small businesses on the islands.
- Antideficiency Act. The rule makes forward looking statements about infrastructure improvements which NPS claims will lessen the economic impacts. There are no funds in the NPS appropriated budget to pay for these improvements.
- Architectural Barriers Act of 1968. A large number of those submitting comments on the DEIS specifically expressed concerns about those with disabilities and others who have an inability to walk long distances would no longer be able to enjoy the Seashore.

*Response:* Pursuant to 5 U.S.C. § 605(b), the Regulatory Flexibility Act (RFA) permits an agency to certify that a proposed rule would not have a significant economic impact on a substantial number of small entities, if the preliminary analysis supports such a decision. The NPS performed the required economic analysis and provided the above certification in the proposed rule. The NPS provided the OMB with the proposed rule prior to publication in the *Federal Register*. The OMB reviewed and commented on the rule, and approved its publication, indicating that it was consistent with applicable regulatory requirements under its purview.

The NPS has included infrastructure and access improvements as an integral part of the ORV plan and regulation, and anticipates that funding for construction of the improvements will come from appropriated NPS programs such as “Line Item Construction”, “Repair and Rehabilitation”, or from the Seashore’s Recreation Fees, or from grants, and thus is consistent with the Antideficiency Act.

The Architectural Barriers Act of 1968, as amended, 41 U.S.C. § 4151 et seq., imposes standards on buildings constructed under several types of federal nexus. The rule, which designates routes for ORV use, does not require the construction of any buildings, so the Act does not apply.

16. *Comment:* The NPS has failed to adequately address or even recognize the economic impact of the rule. The Region of Influence (ROI) is incorrectly identified. Analysis at the county-wide level masks the impacts that would occur in the Seashore villages, and northern communities such as Kill Devil Hills and Southern Shores should not be included in the ROI.

*Response:* To gather data for the socioeconomic analysis, the NPS conducted a survey of businesses in the Seashore villages and in Kill Devil Hills, Nags Head, and Kitty Hawk. In the business survey, some of the businesses in the three villages north of the Seashore reported that beach closures to ORVs would affect their revenue and forecast revenue losses in the future, so it is not inaccurate to include these communities in the ROI. However, it is true that other businesses in the three northern communities reported that ORV restrictions would have no impact on their business. In the economic impact analysis, the NPS applied a range of losses around the mean reported by businesses in the three northern communities to the entire Outer Banks area of Dare County north of the Seashore. The resulting impacts most likely overstated the economic impacts on the northern part of Dare County.

The NPS fully agrees that the impacts will fall mainly on the Seashore villages. For this reason NPS reported the range of revenue impacts used to calculate the impacts for each alternative separately for the Seashore villages and the rest of the ROI. [To measure the economic impacts of the alternatives, the NPS used “IMPLAN”, which is a computer software program model that simulates how changes in sales and employment in one industry can affect other industries and the regional economy as a whole.](#) Although the results from running the IMPLAN model are

presented at the county-level, the discussion of each alternative stated that the Seashore villages would experience the majority of the direct impacts. In the discussion of the impacts on small businesses, the NPS stated that the impacts will be larger for businesses that depend on visitors who use particular beach access ramps or visit particular beaches that will be closed or restricted under the alternative. The conclusion for each alternative reiterated that the Seashore villages will experience the majority of the impacts and that small businesses may be disproportionately impacted. The analysis forecast higher adverse impacts on the small businesses than for the ROI as a whole.

In Hyde County, Ocracoke is relatively wealthier than the rest of the county and accounts for a large portion of the county's income. The IMPLAN analysis estimates the ripple effect of revenue changes in Ocracoke on Hyde County as a whole.

In initial meetings shortly before the Negotiated Rulemaking committee was officially formed and in early meetings with the committee, the NPS was told that the economic impacts would be widespread. Members of the local community urged the NPS to consider the impacts on Dare County, the State of North Carolina, and potentially neighboring states. The NPS chose to narrow the ROI to just the island portions of Dare and Hyde counties, and assessed the resulting indirect and induced impacts on Dare and Hyde County as a whole.

The results of these studies were released and relevant sections of the FEIS were updated to reflect them. It is an acceptable NEPA planning practice for newly available results of studies that were not available at the time a DEIS is written to be incorporated in the FEIS. NPS would prepare a supplemental DEIS for review if there were significant new information relevant to environmental concerns and bearing on the proposed action and its impacts (40 C.F.R.

§ 1502.9(c)(1)(ii). In this case, however, the study findings ~~were~~are consistent with the analysis already provided in the DEIS.

17. *Comment:* The economic analysis for the proposed rule is flawed because it does not address the "ripple effect" to the local economy and is based on faulty assumptions about visitor spending.

*Response:* The NPS obtained relevant data for impact analysis using IMPLAN, an economic model that specifically calculates the "ripple effect" that changes in direct spending by visitors have on other sectors of the economy. According to economic theory, these ripple effects should be included in cost/benefit analyses only if they are large enough to change prices in affected markets. Without further information about possible changes in prices, NPS chose to include these ripple effects in the analysis of impacts and believes its analysis of these ripple effects is adequate.

18. *Comment:* Since the proposed rule raised Office of Management and Budget (OMB) legal or policy issues, OMB may also have concerns about the rulemaking process.

*Response:* As required by federal regulatory procedures, prior to the publication of the proposed rule in the *Federal Register*, OMB reviewed the proposed rule and the "Benefit-Cost Analysis of Proposed ORV Use Regulations at Cape Hatteras National Seashore" and approved the publication of the proposed rule. OMB also reviewed the final rule and the "Benefit-Cost Analysis of Final ORV Use Regulations at Cape Hatteras National Seashore" before OMB approved the publication of the final rule in the *Federal Register*.

19. *Comment:* The ORV permit requirements should require approval by the OMB.

*Response:* The NPS is collecting information to provide the Superintendent data necessary to issue ORV permits. The information will be used to grant a benefit. The response is required to order to obtain the benefit of the ORV permit. As stated in the proposed rule, OMB has approved the information collection requirements associated with permit applications per the requirements of the Paperwork Reduction Act (44 U.S.C. § 3501 et seq.). The OMB approval number is 1024-0026.

20. *Comment:* The public was denied opportunities to comment on the economic impact analysis, including the benefit cost analysis, during the ORV management planning and rulemaking processes.

*Response:* The March 2010 DEIS, which was developed and open to public comment through the NEPA process, contained a socioeconomic impact analysis in Chapter 4, pp. 561-598, of the proposed management alternatives. The DEIS was open to public review and comment for 60 days, during which the NPS received numerous comments on the analysis. A separate report titled “Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore” was prepared, as required, for the proposed rule and posted on-line at <http://www.parkplanning.nps.gov/caha> on July 6, 2011, the same date the proposed rule was published in the *Federal Register*. The public’s opportunity to comment on the proposed rule therefore included the ability to comment on the benefit-cost analysis and other documents and studies that were used to form the basis for the rule.

21. *Comment:* The small business survey conducted for the proposed rule was not released to the public prior to the public comment period, and therefore there was insufficient time for public review and comment. Several local businesses were never consulted or contacted and the estimates are based upon flawed sample data.



*Response:* The NPS contracted with RTI International to conduct a small business survey to provide information for the ~~preparation of the plan/EIS~~~~ORV Management Plan/EIS~~. A representative cross-section of businesses, but not all businesses, was surveyed, which is standard methodology for such a survey. RTI also conducted a survey of Seashore visitors and counts of vehicles using the ocean-side beach access ramps and visitors using selected beaches at the Seashore. The results of these studies were incorporated into the FEIS and the reports were made available to the public on December 23, 2010, when they were posted on the RTI website at <http://rti.org/publications/publications.cfm> and on the NPS PEPC website at <http://www.parkplanning.nps.gov/caha>. The Seashore issued a press release on December 23, 2010, announcing the availability of these reports. The public was given the opportunity to comment on any studies or data used in the planning process during the public comment periods for the DEIS and the proposed rule.

22. *Comment:* The economic impact requirement of \$100 million is not a fair measurement for the area and should be decreased based on the area to which the proposed rule will apply.

*Response:* The economic impact threshold level of \$100 million for analyzing impacts of the proposed actions was set by E.O. 12866, and is used to determine whether the proposed rule is “significant” for purposes of review by OMB. That threshold level did not otherwise affect the analysis of the proposed actions.

23. *Comment:* The economic impact analysis is flawed because there is limited information regarding the number of vehicles or visitors that accessed the Seashore prior to increased access restrictions, which began in 2003, several years prior to the Interim Strategy. Without information prior to 2003, the baseline assessment is skewed.

*Response:* Reliable data on the number of ORVs using Seashore beaches prior to 2003 were not available, and in any case are not directly relevant to this study. As part of the NEPA planning process, NPS developed a set of alternatives for management of ORVs in the Seashore that included two no-action alternatives (the Interim Strategy and the consent decree) and four action alternatives, identifying Alternative F as the NPS Preferred Alternative. The Interim Strategy was implemented in 2006-2007 and the consent decree was implemented in 2008-2010, while the plan/EIS was being developed. These no-action alternatives implemented in 2006-2010 serve as the baseline for comparison of the action alternatives, including the NPS Selected Alternative F that is the basis for this rule. Section 2.3 of the Benefit-Cost Analysis (BCA) describes how NPS evaluated visitation and ORV use information for the range of management alternatives considered in the plan/EIS. The NPS believes that the methodology and information sources described in the BCA provide an adequate basis for assumptions about baseline visitation.

24. *Comment:* The ecosystem and the associated tourism play an important role in the economy of the Seashore. Protection of this environment would be beneficial to the Seashore's economy.

*Response:* While the economic analysis of this rule did not quantify potential benefits from the protection of the Seashore's ecosystems and the environment resulting from the proposed actions, the FEIS did account qualitatively for these benefits, which were considered in selecting the Preferred Alternative, upon which this rule is based.

25. *Comment:* The four areas of the Seashore that the North Carolina Beach Buggy Association had proposed as potential Traditional Cultural Properties (TCPs) were not considered by NPS

during the ORV management planning and rulemaking processes. The National Historic Preservation Act (NHPA) of 1966 requires Section 106 review as part of the NEPA process.

*Response:* As required by Section 106 of the NHPA, the NPS consulted with the North Carolina Department of Cultural Resources, State Historic Preservation Office (SHPO) during the NEPA process. The SHPO sent a letter to the Seashore on April 6, 2010 which indicated that it had reviewed the [plan/EIS/DEIS](#) pursuant to Section 106 of the NHPA, that it was aware of “no historic resources which would be affected by the project”, and that it had no comments. The Seashore has also completed a number of studies meant to identify historic resources, including a Historic Resource Study, an Ethnohistorical Description of the Eight Villages Adjoining Cape Hatteras National Seashore, and an Ethnographic Study Analysis of Cape Hatteras National Seashore. During the process of preparing the ORV management plan/EIS, the NPS determined the areas ineligible as TCPs and provided its determination to the SHPO, which offered no opinion.

26. *Comment:* It was not necessary for the NPS to consult with the Tuscarora Indian tribe since Tribal members never lived at Cape Hatteras.

*Response:* The Presidential Memorandum of April 29, 1994, and E.O. 13175 on Consultation and Coordination with Indian Tribal Governments require the NPS to maintain a government-to-government relationship with federally recognized tribal governments. In this case, the Seashore is mandated to consult with the federally recognized Tuscarora Indian Tribe.

27. *Comment:* Since Pea Island is technically owned by the NPS (although controlled by U.S. Fish and Wildlife Service), it should be included as a vehicle-free area in the Seashore.

*Response:* Pea Island National Wildlife Refuge (Refuge) is owned and administered by the U.S. Fish and Wildlife Service and therefore the NPS cannot direct the management of visitor use at the Refuge.

28. *Comment:* The proposed rule does not reflect the will of the people that was expressed during the public hearings and comment period for the DEIS. A large percentage of the people who spoke during the public comment period preferred that ORV and pedestrian access take priority over resource protection. Why were those numbers not considered more in the proposed rule?

*Response:* While the majority of the members of the public who spoke at the DEIS public hearings supported ORV access over resource protection, statements made at the hearings represent only a subset of the over 15,000 pieces of correspondence that the NPS received on the DEIS. Under NEPA, all comments are considered with equal weight, regardless of whether they were handwritten, electronic, or spoken. The NPS received thousands of comments supporting increased ORV access and thousands calling for increased resource protection. The NPS reviewed and considered these comments and made changes to the Preferred Alternative based on them. These changes were subsequently reflected in the FEIS and ROD, which formed the basis for this rule. Public comment, under NEPA, is not a “voting” process. NPS must base its decision on applicable legal authorities and policies, available scientific information, and other substantive concerns, not the relative popularity of one alternative over another.

29. *Comment:* The NPS should not accept certain comment letters on the proposed rule because the authors failed to comply with NPS requirements that all comments include the agency name and the Regulation Identifier Number (RIN) in the body of the comments, or by submitting form letters orchestrated by advocacy groups.

*Response:* The purpose of emphasizing the use of the identification information was to ensure that comments made their way to the appropriate place for consideration, analysis, and response. The agency name and RIN information were automatically included in all comments that were received through the Federal eRulemaking Portal at <http://www.regulations.gov>. Comments that were mailed or hand delivered to the park in accordance with the stated deadlines were accepted with or without the RIN, as long as they were clearly applicable to the proposed ORV rule at the Seashore.

30. *Comment:* Supporting documents, public comments, and transcripts of public hearings should have been added to the public docket posted at <http://www.regulations.gov> as they contain information which is relevant to the proposed rule.

*Response:* The proposed rule was based directly on the Selected Action identified in the December 2010 ROD for the ~~final ORV management plan/EIS (FEIS)~~FEIS, which was developed through the NEPA process. As stated in the July 6, 2011, *Federal Register* notice for the proposed rule, the ~~ORV management plan~~FEIS, the ROD, and other supporting documentation can be found online at <http://www.parkplanning.nps.gov/caha> and are part of the public record for the plan/EIS.

31. *Comment:* The NPS should create an advisory committee of local residents, ORV representatives and local officials to work with the NPS in determining future resource closures, dates for seasonal ORV restrictions, ORV route boundaries, and other ORV management matters.

*Response:* Creating a standing ORV management advisory committee under the Federal Advisory Committee Act (FACA) was considered but dismissed as a reasonable alternative during the preparation of the plan/EIS. Section 2(b)(2) of FACA restricts the establishment of

such committees to situations “when they are determined to be essential.” The creation of the suggested committee was not determined to be “essential.” When the NPS did establish a negotiated rulemaking advisory committee to assist the NPS in developing alternatives for the ORV management plan and rule, the committee represented a wide range of interests and points of view that were often contradictory. Given the high level of interest in ORV management and species protection at the Seashore, it is not realistic to think that the NPS could establish a standing ORV advisory committee that does not include the many diverse interests similar to those that were represented on the negotiated rulemaking advisory committee. Since the negotiated rulemaking committee was unable to reach consensus on the matters before it, it appears unlikely that such a committee could provide the NPS with clear and consistent, actionable advice, and managing the committee would require a commitment of staff time and funding that could not be sustained over the life of the plan.

32. *Comment:* The comment period should have been extended 30 to 60 days because of Hurricane Irene.

*Response:* The 60-day public comment period for the proposed rule opened on July 6, 2011, and closed on September 6, 2011. With eleven days remaining in the comment period, Hurricane Irene struck the Outer Banks area early on Saturday, August 27, 2011. Thousands of public comments had been received prior to the hurricane reaching the Outer Banks. On September 6, 2011, the NPS announced it would reopen the public comment period until September 19 to allow more time (i.e., thirteen more days) for those who may have been affected by Hurricane Irene to submit comments. A *Federal Register* notice was published on September 9, 2011, to officially reopen the comment period until September 19. The NPS acknowledges that many Outer Banks residents, property owners, and businesses were impacted by Hurricane Irene, and

believes that reopening the comment period for the length of time described above was an appropriate response to the circumstances.

33. *Comment:* The proposed rule does not contain the specific and enforceable protections for wildlife and other natural resources that were included in the Selected Action (Alternative F), as described in the ~~ROD~~[Record of Decision \(ROD\)](#) for the ~~FEIS~~[final ORV Management Plan/EIS](#). As a result, the proposed rule fails to meet the requirements of the FEIS statement of purpose and need, E.O. 11644, 36 CFR § 4.10, and the Consent Decree.

*Response:* The rule contains those portions of the Selected Action, such as the designated ORV routes and other ORV management requirements that the NPS believes are necessary to comply with the executive orders and NPS regulations. The species management strategies for the Selected Action, as described in the ~~plan~~[EIS/FEIS](#), are intended to evolve over time, through the periodic review process, in order to ensure accomplishment of the desired future condition for park resources stated in the plan. The NPS has revised the wording of subsection (10) of the final rule to more clearly articulate its commitment to the implementation of the species management strategies and periodic review process included in the Selected Action.

34. *Comment:* Numerous commenters proposed various changes to the designated routes, including adding more year-round vehicle-free areas or increasing vehicular access to popular fishing areas.

*Response:* Comments on designated ORV routes in the proposed rule were nearly identical to those received on the DEIS. While finalizing the FEIS, the NPS thoroughly considered these comments and made revisions to the ~~P~~preferred Alternative F, which formed the basis for this rule. The NPS believes that the designated routes and areas in the rule provide an equitable balance of vehicle-free areas and ORV routes, which provides for both resource protection and a

variety of visitor experiences. Further information on how the NPS considered and designated routes and areas can be found in the FEIS (page C-115).

35. *Comment:* The Selected Action, Alternative F, was biased toward environmental concerns, rather than recreation.

*Response:* The Selected Action, [as described in the ROD for the FEIS](#), includes the combination of ORV route and requirements and species management strategies that best addresses the stated purpose, need, and objectives of the ~~ORV management~~ plan/EIS. The NPS is obligated under its Organic Act and the Seashore's enabling legislation to ensure that the Seashore's beach nesting wildlife species are sufficiently protected from the impacts of ORV use and human disturbance to ensure that those species are conserved and remain unimpaired for the enjoyment of future generations. As stated in NPS Management Policies 2006, Section 1.4.3, Congress, recognizing that the enjoyment of future generation of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to predominate. This is how courts have consistently interpreted the NPS Organic Act.

36. *Comment:* The NPS should reduce the size of the buffer distances used to protect beach nesting wildlife so that closures are smaller and recreational access is allowed along the shoreline past the nesting areas.

*Response:* Resource closures are established to provide each protected species with the access to key habitat elements during critical points in its annual cycle. As described in the [FEIS plan/EIS](#), the buffer distances are intended to provide adequate protection to minimize the impacts of human disturbance on nesting birds and chicks in the majority of situations, given the level of visitation and recreational use in areas of sensitive wildlife habitat at the Seashore and issues



related to noncompliance with posted resource protection areas. The buffer distances were developed after consideration of the best available science, which includes existing guidelines and recommendations, such as the Piping Plover Recovery Plan (USFWS 1996a) and the USGS Open-File Report 2009-1262 (2010), also referred to as the “USGS protocols”, on the management of species of special concern at the Seashore, as well as relevant scientific literature (research, studies, reports, etc.) for the respective species. In addition, buffer distances were developed using the practical knowledge gained by NPS resources management staff during two years of implementing the Interim Strategy (2006–2007) and three years implementing the consent decree (2008–2010).

37. *Comment:* The species protection measures are based on incomplete science such as the “USGS protocols”, which were not peer-reviewed science.

*Response:* NPS guidelines require that all scientific and scholarly information disseminated to the public in any format meets the requirements of NPS Director’s Order 11-B: *Ensuring Quality of Information Disseminated by the National Park Service*, which may require peer review for activities and information used in the decision-making process. However, there is no requirement for all information used in a NEPA document to be peer-reviewed. The [FEIS/DEIS](#) does not state that the USGS protocols are the primary source of information used in the Plan. The NPS used a multitude of sources in the development of the species protection strategies contained in the [FEIS](#), in addition to the professional experience of Seashore staff implementing various species management measures under the Interim Strategy and the Consent Decree. As noted in the References section of the [FEIS](#), the majority of the research that was relied upon was from peer-reviewed journals and official agency publications such as the USFWS species recovery plans. However, the NPS did review and incorporate the results of several studies that

were completed by university researchers as part of their graduate theses or doctoral dissertations, as many of these research projects involved species found at the Seashore and also occurred in similar coastal or barrier island ecosystems. The NPS believes that the FEIS contains information of maximum quality, objectivity, utility, and integrity and is therefore in compliance with the Information Quality Act and the OMB, DOI, and NPS policies and guidelines that address the Act.

38. *Comment:* The definition of *ORV corridor* in the proposed rule does not sufficiently protect wildlife. The definition 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 (Species Management Areas).

*Response:* The concept of SMAs was not included in the Selected Action for the reasons described on pp. 79-80 of the FEIS. The wording of the proposed rule is consistent with that of the ROD and FEIS, which addressed these issues.

39. *Comment:* There should be corridors to provide access through and around areas of resources closures. The Selected Action, Alternative F, will result in less shoreline available for recreation, resulting in crowding and user conflict.

*Response:* During public comment on the DEIS, some commenters recommended providing a corridor through all species resource closures and buffers. A buffer or resource closure is an area surrounding a sensitive resource, such as bird nests or chicks, which is closed to visitor access during critical life cycle stages to reduce human disturbance and the risk of mortality due to pedestrians and ORVs. Any passages, corridors, or pass-throughs that cut directly across/through a resource closure would essentially undermine the biological function of the closure and could render it compromised, perhaps even useless to the species it is meant to protect, if all buffers

include ORV corridors. Therefore, the element of including an ORV corridor through resource closures was not included in the range of alternatives, as it would violate the mandate to conserve wildlife and other park resources under the NPS Organic Act, the Seashore's enabling legislation, the executive orders on ORV management, and 36 C.F.R. § 4.10.

40. *Comment:* Vehicle traffic should be routed around nesting sites using established roads in order to avoid impacts to wildlife.

*Response:* The ~~plan~~<sup>EIS/FEIS</sup> calls for the use of species-specific buffer distances to minimize human disturbance and protect nesting areas. In many cases, the buffer, once established, will preclude access along the beach adjacent to a nest site, particularly if the beach is narrow.

However, in some cases, such as on a wide beach or inlet spit, there may be sufficient distance between the nesting area and the shoreline to allow continued access when the prescribed buffers are implemented. When shoreline access is temporarily closed to protect a particular nest site, ORV traffic will be able to continue to use open routes, which connect to established roads, in order to access other locations that are open to ORV use.

41. *Comment:* The required training and ORV permits should be available at multiple locations and on-line, not just "in person" as indicated in subsection (2)(v). Requiring the education to be obtained "in person" could cause undue delays for visitors, especially when there is a high influx of visitors. Once an individual has completed the education program once, they should not have to complete the education program in the following years or weeks, if a weekly permit is desired.

*Response:* The NPS has modified paragraph 7.58(c)(2)(v) of the rule by removing the "in person" language to provide the Superintendent with greater flexibility for administering the ORV permit issuance procedures. The objectives of the education program are to ensure ORV

operators know the rules and to improve compliance with ORV and resource protection requirements. The NPS will initially require that all permit applicants take the education program in person in order to ensure completion of the program, and applicants will be required to take the education program annually for annual permits, or once per year if an applicant obtains one or more 7-day permits in a year, assuming the applicant has committed no violations since last taking the education program. Through the periodic review process, NPS will evaluate the effectiveness of the education program in achieving its objectives and could at some point, if appropriate, consider changes in the delivery method or frequency of the education requirement.

42. *Comment:* The Seashore should require education for all visitors, not just ORV users.

*Response:* The education requirement in the rule applies specifically to persons applying for an ORV permit as the NPS believes that the education program will improve compliance with the ORV regulations. As indicated in Table 8 of the FEIS, the NPS will also develop a new voluntary (i.e., not mandatory) resource education program targeted toward pedestrian beach users.

43. *Comment:* The NPS should consider alternatives to a permit fee, including alternative ways for the park to generate revenue such as collecting tolls at the Seashore. If ORV users are going to be charged a user fee, then all visitors should have to pay a fee.

*Response:* During the process of preparing the ~~ORV management~~ plan/EIS, the NPS considered a variety of alternative elements related to ORV permits and fees then considered public comments on the issue before determining the Selected Action in the December 2010 ROD. The idea of an entrance fee for the Seashore was discussed thoroughly during the negotiated rulemaking process and was dismissed primarily due to administrative and financial obstacles. The establishment of an entrance fee would require the NPS to install manned entrance gates in

the Seashore to collect visitor fees. However, there are thousands of local residents that have to travel through the Seashore to gain access to their property. The logistics of collecting entrance fees from all visitors would result in delays at entrances and would restrict travel along NC-12. In addition, the Seashore would only be able to retain a portion of the entrance fees collected and could not use those funds to support key functions associated with an ORV management program, such as law enforcement, maintenance of routes or parking lots, or resource management.

44. *Comment:* Outer Banks residents should not be required to obtain an ORV permit, or at least should not have to pay a fee.

*Response:* As a unit of the National Park System, the Seashore is open on an equal basis to all members of the public, regardless of where they live. Therefore, the cost of ORV permits would be the same for all ORV users and would not vary based on their place of residence or their membership in a particular organization. Additional information on how the permit system would be administered and what fees would be used for can be found in the FEIS (page C-70).

45. *Comment:* ORV permits should be issued to individuals rather than vehicles.

*Response:* The option of issuing a permit to the person that would be usable in any vehicle was considered during the ~~EIS~~-process of developing the plan/EIS, but eventually eliminated.

Verifying that people have permits when the permits are movable between multiple vehicles would require substantially more effort by NPS law enforcement staff, who would have to stop each driver and ask to see his or her permit. Therefore, to provide the most efficient method for enforcing the permit system, the NPS has revised the wording of subsection (2) to make it clear that the permit is issued to the individual for a specific vehicle and the “proof of permit”, such as

a windshield sticker or a hang-tag issued by the NPS, must be affixed to that vehicle for use off-road.

46. *Comment:* The ORV permit should not be based on the calendar year, but instead permits should be valid one year from the issue date. Other commenters suggested that the ORV permit be issued for two weeks, similar to the North Carolina recreational saltwater fishing license.

*Response:* ~~During the process of developing the NEPA planning process for the ORV Management Plan/EIS. In the DEIS,~~ the NPS considered a variety of options for year-long permits, which included an option for permits that would be valid for one year from the issue date, as well as various options for short-term permits. Based on simplicity, operational efficiency, and visitor convenience, the decision was made to provide visitors with two permit options: annual permits, valid for the calendar year; and 7-day permits, valid from date of purchase.

47. *Comment:* The proposed price range for the ORV permit is too high and will discourage use.

*Response:* The price for the ORV permit will be based on a cost-recovery system and is not designed to be cost prohibitive. As a cost recovery program administered under NPS Director's Order 53, the actual price of the ORV permit will be determined by the cost to the NPS to implement the ORV management program divided by the estimated number of permits to be sold. Based on prices at Cape Cod and Assateague Island National Seashores for similar types of permits, as a starting point it is reasonable to expect the price of an annual ORV permit at Cape Hatteras to be \$90-\$150 and the price of a weekly permit to be approximately 50% - 33% of the annual price (up to 50% if the annual price is lower in the price range; as low as 33% if annual price is higher in the price range)

48. *Comment:* After paying for a permit, people may not be able to access their preferred area of the Seashore due to resource closures or carrying capacity restrictions.

*Response:* Obtaining an ORV permit allows a visitor to operate the permitted vehicle on designated ORV routes, but does not guarantee access to all routes all the time. Certain areas of the Seashore may also be closed to ORV access for resource protection during breeding and nesting season for protected species. During peak use periods such as weekends and holidays during the summer, there could be occasions where certain popular areas at the Seashore reach their established carrying capacity limit, precluding additional ORV use until a number of vehicles leave the particular area. While it is true that some popular ORV areas will be inaccessible at certain times during the year, 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. The wording in subsection (9) has been revised to make it clear that certain ramps are “designated for” ORV use, rather than “open” for ORV use; and “designated ORV routes and ramps are subject to resource, safety, and other closures implemented pursuant to subsection (10)” of the rule.

49. *Comment:* There should be lower fees for less polluting vehicles.

*Response:* As discussed previously, the price of the ORV permit fee is determined by how much it costs the NPS to implement the ORV management plan. Although low emission vehicles are less polluting, they still require the same level of management effort as standard vehicles. Therefore, offering a reduced fee for low emission vehicles would not meet the NPS’s goal of recovering the costs of administering the ORV management program.

50. *Comment:* I question the legality of the equipment requirements and NPS inspection of ORVs and the cost of the equipment.

*Response:* As part of the special regulation, the NPS has the authority to develop vehicle and equipment requirements associated with issuance of an ORV permit. Much like state vehicle inspection requirements, Seashore law enforcement personnel may inspect ORVs to ensure compliance with the vehicle requirements contained in the regulation. The NPS does not anticipate randomly searching permitted ORVs for required equipment. However, ORV operators must be able to demonstrate compliance with vehicle and equipment requirements upon request. The NPS developed these equipment requirements as a means of providing for visitor safety and reducing incidences of vehicle strandings. The equipment requirements contained in the regulation are minimal and are generally items that most drivers already have in their vehicles. Accordingly, the cost of these items would be negligible.

51. *Comment:* Low speed vehicles, golf carts, or electric vehicles should be allowed.

*Response:* Under the proposed rule, only vehicles registered, licensed, and insured for highway use and that comply with inspection regulations within the state, country, or province where the vehicle is registered are allowed to operate on the Seashore. While low speed vehicles or neighborhood electric vehicles may be authorized for local use in certain areas, they generally are not registered, licensed, or insured for highway use, and therefore would not be permitted to be used on the Seashore

52. *Comment:* The NPS should clarify what it means in subsection (3)(v) by requiring a “jack stand” be carried. Jack stands are typically used in an automotive repair shop.

*Response:* The NPS concurs with this comment and has revised the wording of the subsection to say “jack support board”, rather than “jack stand”. The purpose of the board is to place it under the jack so the jack does not dig into the soft sand if/when the vehicle operator is attempting to change a tire on the beach.



53. *Comment:* Subsection (6) of the rule should be clarified to indicate that trailers with sleeping, cooking, and bathroom facilities are excluded.

*Response:* The NPS generally concurs with this suggestion; however, the NPS believes that trailers with only cooking facilities, such as a grill, are appropriate for beach use. Since camping on Seashore beaches is prohibited, the intent is to preclude the use of trailers that could contribute to violations of the camping prohibition. The NPS has revised subsection (6) to state as follows: The towing of a travel trailer (i.e., a trailer with sleeping and/or bathroom facilities) off-road is prohibited.

54. *Comment:* Additional modes of alternative transportation should be included in the rule.

*Response:* Alternative transportation is outside the scope of the rule; however, as described in the FEIS under Alternative F, transportation strategies such as shuttles and buses could be considered (page 80). According to the ROD, the NPS would consider applications for commercial use authorizations to offer beach and water shuttle services and would apply for funding to conduct an alternative transportation study to evaluate the feasibility of alternative forms of transportation to popular sites.

55. *Comment:* In subsection (7)(iii), special use permits for mobility impaired individuals should be valid for all vehicle-free areas (VFAs), not just in VFAs in front of villages.

*Response:* VFAs were designed to provide areas for a “vehicle-free” experience for park visitors and to provide for resource protection for wildlife. There are many opportunities for mobility impaired visitors to use an ORV for beach access on the designated ORV routes outside of the VFAs. For mobility impaired visitors who specifically wish to join others that have gathered on foot on a village beach, the special use permit (SUP) option is also provided.

56. *Comment:* In subsection (7)(iii), the requirement that the vehicle must return to the designated ORV route or Seashore road immediately after the transport raises significant safety concerns and is unreasonable. What if the person needs to leave the beach quickly due to weather or health issues?

*Response:* The NPS concurs that the vehicle removal requirement stated in the proposed rule subsection (7)(iii) may create safety concerns or be unreasonable under certain circumstances. The NPS revised the wording to eliminate the vehicle removal requirement and to state that the special use permits are subject to the resource, safety, 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.

57. *Comment:* Vehicular access should only be allowed for mobility impaired visitors.

*Response:* ORV use, if effectively managed, provides convenient access for many appropriate visitor activities at some popular beach sites including, for example, activities that use vehicles to transport substantial amounts of gear for the activity. Allowing only mobility-impaired visitors to operate vehicles on ORV routes would essentially preclude vehicular access for the majority of ORV users at the Seashore. This approach would be inconsistent with the Seashore's 1984 General Management Plan which states that "selected beaches will continue to be open for ORV recreational driving and in conjunction with surf fishing in accordance with the existing use restrictions". This approach would also not meet the purpose, need, and objectives of the **ORV Management Plan/EIS**.

Comment [dw4]: See above comment

58. *Comment:* Special Use Permits (SUPs) should be issued to anyone who is in possession of a legally registered handicap sticker from their state.

*Response:* Anyone who has a license plate or placard issued by a state division of motor vehicles to a mobility impaired individual is eligible for the SUP; however, the SUP is not intended to provide blanket vehicular access to all vehicle-free areas (VFAs). Because the SUP is intended only to allow vehicular transport of mobility impaired individuals via the shortest, most direct distances from the nearest designated ORV route or Seashore road to a predetermined location in a designated VFA in front of a village, the NPS will issue the SUPs upon request on a case by case basis. The specific terms and conditions of each SUP, such as the location to be accessed or the duration of the permit, will be determined based on the individual need.

59. *Comment:* Implementation and enforcement of SUPs will create an undue workload burden on the Superintendent and NPS personnel.

*Response:* The operational impacts of ORV management and the associated costs for adequate staffing to implement the ORV management plan and rule, including the SUP provision, were carefully considered ~~in the FEIS during the development of the ORV management plan/EIS.~~ The specific circumstances described in subsection (7) in which SUPs would be issued to authorize temporary off-road driving in areas not designated as ORV routes are limited in scope, number, and frequency of occurrence. The expected SUP workload will not add substantially or uniquely to the general ORV management workload that was considered and addressed in the ~~development of the plan/EIS/FEIS.~~

60. *Comment:* Non-emergency use by nonessential vehicles should be prohibited within a resource closure and special use permits should state that the holder must adhere to all closures.

*Response:* The NPS concurs with this comment. The wording of subsection (7) has been revised to state that the SUPs are subject to the resource, safety, and other closures implemented

Comment [dw5]: Same comment

pursuant to subsection (10), and may only be used in a manner consistent with the terms and conditions of the permit.

61. *Comment:* The NPS should increase its law enforcement presence and focus on enforcing the existing rules, which are sufficient, rather than establishing additional rules.

*Response:* Without a regulation designating ORV routes, the NPS is out of compliance with its own regulations and the requirements of E.O. 11644 and E.O. 11989 that relate to criteria for ORV route designation and allowing ORV use on national park system lands. Therefore, this special regulation is needed to allow continued ORV use at the Seashore. The operational impacts of ORV management and the associated costs for adequate staffing to enforce regulations related to ORV use were considered and addressed in the [development of the ORV management plan/EIS/FEIS](#).

62. *Comment:* The NPS should create a 1,000 meter ORV exclusion zone on beaches adjacent to all NPS campgrounds to improve the experience for people staying the campgrounds and to reduce visitor conflicts and improvement of amenities.

*Response:* The beach in front of the Ocracoke campground is designated as vehicle-free during periods of high visitor use (April 1 to October 31). At Cape Point, Oregon Inlet, and Frisco Campgrounds, adjacent areas are open to ORV use year round to maintain an ORV route, and the Seashore knows of no major issues raised related to safety or conflicts at the campgrounds that would warrant additional restrictions. However, the Superintendent has the authority under paragraph (10) of this regulation to temporarily restrict access to ORV routes or areas in accordance with public health and safety criteria.

63. *Comment:* The NPS has mischaracterized beach driving as a "new" activity in order to justify new infrastructure.

*Response:* ORV use at the Seashore is not new. The NPS briefly summarized the history of ORV use at the Seashore in the preamble to the proposed rule and more extensively in pp. 17-27 of the FEIS. What is new is that the rulemaking process will result in the formal designation of ORV routes in order to comply with E.O. 11644, as amended by E.O. 11989, and NPS regulation 36 C.F.R. § 4.10(b). As described in the FEIS and [ROD Record of Decision](#), new infrastructure will facilitate public use of designated ORV routes and the VFAs that are not designated for ORV use.

64. *Comment:* In the plan/EIS the NPS indicated it would provide additional access points, including ORV ramps and parking areas and dune walkovers for pedestrians as mitigation for impacts to recreational access. The new infrastructure should be established before new ORV routes and VFAs are implemented.

*Response:* The NPS has included these infrastructure and access improvements as an integral part of the ORV plan and regulation, and anticipates that funding for construction of the improvements will come from appropriated NPS programs such as "Line Item Construction", "Repair and Rehabilitation", or from the Seashore's Recreation Fees, or from grants. However, the only designated year-round ORV route at the Seashore that would not have an established ORV access point until after the new ramps are constructed is the area between ramp 59.5 and ramp 63. Therefore, the NPS has amended the language in the rule to allow for existing ramp 59 to remain open to ORV use until ramp 59.5 can be constructed. Once that occurs, ramp 59 will cease to be a designated ORV access ramp.

65. *Comment:* An area that is not endangering the wildlife should be set aside for recreational beach driving. Please act responsibly and build a nearby track for racing around in a dune buggy or off road vehicle.

*Response:* E.O. 11644 and E.O. 11989 require that ORV activities on public lands be limited to designated routes or areas and that these designations be based on the protection of resources, the promotion of visitor safety, and the minimization of user conflicts. Designating an area for recreational driving or racing would not meet the intent of these Executive Orders as these types of vehicular uses would not promote visitor safety, minimize conflicts, or adequately protect resources. Establishing this type of use would also not be consistent with the purpose of the [plan/EIS, as stated in the FEIS](#), which is to “develop regulations and procedures that 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 use experiences while minimizing conflicts among various users, and to promote the safety of all visitors.”

**Comment [dw6]:** Previously, we've used ORV Management Plan/EIS

66. *Comment:* Where ORV use is allowed could be based on seasonal indicators such as the summer tourist season or by seasonal nesting patterns for species at the Seashore.

*Response:* During the process of preparing the ORV management plan/EIS, the NPS considered a variety of seasonal factors, including shorebird and turtle nesting seasons, and park visitation and rental unit occupancy trends, before determining the dates used for seasonal restrictions in the Selected Action for the December 2010 ROD. The proposed rule is based on and consistent with the ROD.

67. *Comment:* Seasonal ORV closures of villages should be based on conditions, not arbitrary dates. Dates should not be permanently established in the proposed rule, but should be

determined annually by the Superintendent through consultation with Dare County, Hyde County and North Carolina Department of Transportation (NCDOT) officials.

*Response:* The dates for ORV use in front of the seasonally designated villages and Ocracoke Campground are not arbitrary. In the ROD, NPS determined that these areas would be open to ORVs from November 1 to March 31 when visitation and rental occupancy is lowest. These areas will be vehicle-free April 1 to October 31 when visitation and rental occupancy is highest.

68. *Comment:* The language describing user conflicts in the proposed rule is inaccurate. The NPS would have everyone believe that the people who use the Seashore are in conflict with each other. We find this not to be true.

*Response:* The existence of visitor conflicts has been documented in many public comments received on the Interim Strategy and on the [ORV management plan/EIS/DEIS](#). The Seashore also receives letters from visitors complaining about the adverse effects of ORVs on their experience at the Seashore. Some members of the negotiated rulemaking committee represented members of the public that consider the presence of vehicles driving on the beach as a conflict with their experience of the Seashore. The Seashore does not compile data on numbers of these complaints or incidents of visitor conflict, nor is a quantitative analysis required to manage or minimize it under E.O. 11644 and E.O. 11989. As required by these Executive Orders, the Seashore is designating routes to “minimize visitor conflict.”

69. *Comment:* ORVs should be limited to the amount of noise each vehicle can make.

*Response:* Vehicles used off-road 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. Most jurisdictions require that vehicles authorized for highway use have

functioning exhaust and muffler systems and prohibit modifications to those system would could result in excessive noise. In addition, 36 CFR § 2.12, Audio Disturbances, prohibits the operation of motorized vehicles within national park units in excess of 60 dBA at a distance of 50 feet from the source, or if below that noise level, noise which is unreasonable. The regulation also established reduced speed limits, which will reduce vehicular noise. The NPS believes that this combination of restrictions will adequately protect the soundscape in the Seashore.

70. *Comment:* There should be substantial fines for violation of ORV rules and requirements.

*Response:* Most of the violations observed at the Seashore are considered petty offenses (Class B Misdemeanors) in the federal court system, which carry a maximum fine of \$5,000.00 and/or six months in prison. The monetary amount of fines is governed by the Collateral Forfeiture Schedule (CFS), which must be approved by the Chief Judge of the Eastern District of North Carolina. The last update to the CFS was approved by the court in 2004. The NPS will submit an update the CFS in the next year or two and may request higher fines for ORV related offenses. In addition to the possibility of fines for the violator, an ORV permit may be revoked for violation of applicable park regulations or terms and conditions of the permit, which would include a violation of resource protection closures.

71. *Comment:* Night driving should be prohibited during sea turtle and bird nesting season.

*Response:* This regulation prohibits night driving from May 1 through September 14, which coincides with sea turtle nesting season. The regulation authorizes the Superintendent to permit night driving from September 15 through November 15 only in areas where no sea turtle nests remain. Prenesting and seasonal resource closures described in the [ORV Management Plan/EIS/FEIS](#) prohibit any ORV use in these areas during the nesting period for sensitive bird



species. The NPS believes that these measures provide ample nighttime protection for birds, sea turtles, and their nests.

72. *Comment:* Night driving restrictions are not needed, are not based on science, and should not be included in the rule. There has only been one documented case in the history of the Seashore of a sea turtle being hit by an ORV, and that occurred in an area closed to the public while the consent decree night driving restriction was in effect.

*Response:* The sea turtle management procedures at the Seashore are based on the latest scientific research and are consistent with the latest U.S. Fish and Wildlife Service Recovery Plan for the Northwest Atlantic Population of the Loggerhead Sea Turtle (2008) and North Carolina Wildlife Resources Commission guidelines, which were both developed by scientific experts in the field of loggerhead sea turtle biology and conservation. For example, the loggerhead sea turtle recovery plan recommends that nighttime driving on beaches during the loggerhead nesting season be prohibited because vehicles on the beach have the greatest potential to come into contact with nesting females and emerging hatchlings at night.

Driving on the beach at night has been shown to impact nesting sea turtles and hatchlings both directly and indirectly. Because visibility is reduced at night, there is also the potential for nesting, live stranded, or hatchling turtles to be hit by ORVs operating at night. In addition, because NPS does not have the resources to monitor the entire beach 24 hours per day, the number of recorded incidents resulting from human activities, especially at night, likely underestimates the actual number of incidents that occur. In areas that people would not normally access due to distance, the Seashore has documented vehicle lights, people with lights, and cameras causing false crawls—false crawls that would likely not have occurred if ORVs had not brought the people to those locations. Park staff has also documented turtles crawling toward

vehicle lights after nesting, false crawls adjacent to fire pits, hatchlings disoriented by fires, hatchlings caught in tire ruts, and vehicles running over turtle nests prior to morning turtle patrols—some with recorded damage to eggs. Though it is the only known recorded incident at the Seashore where an adult nesting turtle was struck and killed by an ORV, the recent death of an adult nesting turtle that likely occurred during the early morning hours of June 24, 2010, indicates that the potential does exist for vehicles driving at night to strike and kill nesting turtles.

73. *Comment:* The regulation should allow portions of designated ORV routes to remain open to night driving rather than closing the entire route containing a turtle nest.

*Response:* The NPS concurs with this comment and has revised the rule language to provide the Superintendent with the authority to open “portions of” designated ORV routes in sea turtle nesting habitat to night driving if no turtle nests remain within those portions.

74. *Comment:* The NPS should close the Seashore to night driving from 10pm - 6am or from one hour after sunset to one hour before sunrise.

*Response:* As described in the FEIS, the NPS studied several different scenarios for establishing the hours and dates for night driving at the Seashore. Restricting night driving between the hours of 9:00 pm and 7:00 am provides an easily understood, enforceable restriction that provides a balance between conservation and public access by encompassing the majority of the nesting and hatching periods at night while generally allowing turtle patrol staff time to find and protect nests prior to ORVs being on the beach each day.

75. *Comment:* The rule should allow vehicle operators to avoid turtles rather than closing routes to night driving.

*Response:* As noted above, night driving has been shown to impact sea turtles and turtle management experts who developed the loggerhead sea turtle recovery plan recommend that night driving be prohibited during the turtle nesting season. Allowing vehicles in close proximity to sea turtles, especially at night, greatly increases the potential for direct and indirect disturbance to nesting turtles and hatchlings. Therefore, seasonally closing ORV routes (or portions of ORV routes) to night driving is a reasonable method of protecting sea turtles while continuing to provide ORV users with some level of night driving opportunities outside of seasonal restrictions.

76. *Comment:* The NPS should require applicants for night driving permits to complete an educational program.

*Response:* The education program that must be taken in order to obtain the standard ORV permit will address night driving restrictions and reasons for those restrictions. Under the Selected Action and proposed rule, there is no separate or special permit required for night driving.

77. *Comment:* The night driving restriction will curtail other early evening and night time activities at the Seashore, such as night sky viewing and beach fires. Lack of ORV access at night will create safety issues by requiring fisherman to walk in the dark to access prime historic fishing grounds.

*Response:* Seasonal night driving restrictions may affect the ability of visitors to have beach fires in more remote areas of the Seashore after 9:00 pm. However, beach fires would still be permitted throughout the Seashore outside of turtle nesting season and in front of villages and other selected beaches during the nesting season. Night driving restrictions would actually improve the ability of visitors to enjoy night sky viewing by reducing the amount of ambient light on the beaches. Although night driving restrictions would preclude fishermen from driving

to or from fishing grounds after 9:00 pm, nothing in the regulation would prohibit fishermen (or other visitors) from carrying a flashlight along the beach outside of resource closures.

78. *Comment:* Camping in self contained vehicles, vehicles engaged in fishing, or vehicles remaining stationary, should be allowed.

*Response:* Off-season self-contained vehicle camping in park campgrounds was analyzed in the FEIS in Alternative E and was not selected in the ROD or included in the rule due to the staffing needs, operating costs, and permitting, law enforcement patrol, and maintenance workloads associated with keeping campgrounds open in the off-season for a limited number of campers. NPS believes that local commercial campgrounds provide appropriate opportunities for off-season vehicle camping. Allowing vehicles to remain parked on the beach for the duration of the night when night driving is restricted would be difficult to patrol and enforce, and could place an unrealistic expectation on visitors parked in such locations to strictly comply with the night driving restrictions. The NPS does not have the resources to patrol the entire Seashore at night to enforce compliance, and allowing parked vehicles on the beach at night would potentially result in additional compliance problems that would cause adverse impacts to park resources.

79. *Comment:* The Seashore should be closed to commercial fishing. If not closed to commercial fishing, there should be specific restrictions on commercial fishing activity and permits.

*Response:* The Seashore's enabling legislation provides that the legal residents of the villages have the right to earn a livelihood by fishing within the boundaries of the park. Therefore, the NPS allows commercial fishing. However, the activity is managed, restricted, and permitted in accordance with the eligibility requirements identified in 36 C.F.R. § 7.58(b). Under the ORV rule, commercial fishermen would be not be required to obtain a separate ORV permit, but their

use of vehicles on Seashore beaches would be regulated through their commercial fishing permit issued by the Seashore.

80. *Comment:* Commercial fishing should be allowed only where there is neither a resource closure nor a lifeguarded beach.

*Response:* Commercial fishing vehicles have been prohibited from entering either resource closures or lifeguarded beaches for a number of years under the Superintendent's compendium and it is the intent of the NPS to continue this prohibition in the special regulation. To make it clear that the restriction applies to either situation, the NPS has revised the wording of subsection (8)(i).

81. *Comment:* The list of "open ramps" in subsection (9) is misleading because it includes proposed ramps that are not yet funded. Since these ramps are not funded, they should not be included in the rule and the rule should not be implemented until the ramps are constructed.

A specific fund should be established to ensure the funds needed for the proposed ramps.

*Response:* Implementation of the ORV Management Plan and regulation would require funding for construction of supporting infrastructure, such as new access ramps and parking areas. The NPS anticipates that funding for this construction will come from appropriated NPS program funds such as Line Item Construction (major or costly construction activities) or Repair and Rehabilitation (improvements to existing infrastructure at moderate costs), or from the Park's Recreation Fees, or from grants. The only designated year-round ORV route at the Seashore that would *not* have an established ORV access point until after the new ramps are constructed is the area between ramp 59.5 and ramp 63. Therefore, the NPS has amended the language in the rule to allow existing ramp 59 to remain open to ORV use until ramp 59.5 can be funded and constructed.

82. *Comment:* Some areas that have been historically open to ORVs have been excluded from the designated routes listed in the tables in subsection (9). If the NPS moves forward with its plan to close these areas to ORV use, the rule should be revised to provide for an adaptive management process pursuant to which the NPS could reopen these closures based on visitor use patterns.

*Response:* The designated ORV routes in paragraph (9) of the regulation are taken from Alternative F (the NPS Preferred Alternative) in the FEIS, which became the Selected Action in the ROD. E.O. 11644 and E.O. 11989 require the NPS to designate routes through the promulgation of this special regulation. The NPS received and considered numerous comments on the proposed ORV routes during the review of the DEIS and addressed these public comments in Appendix C of the FEIS. While the FEIS contains adaptive management provisions for protected species management, the designation of ORV routes in a regulation does not lend itself to the principles of adaptive management, which is designed to make iterative adjustments to management techniques as new scientific information becomes available. If at some point in the future the NPS needed to revise the designated ORV routes, additional NEPA compliance would be required, followed by a new proposed and final rule.

83. *Comment:* Subsection 9 of the proposed rule (ORV Routes) should be amended to state explicitly that these routes will be subject to mandatory resource, safety, seasonal and other closures. These clarifications are necessary to make it clear that even if a route is “open”, it is still subject to certain closures. By not putting in these clarifications, the NPS would violate E.O. 11644.

*Response:* The wording of subsection (9) has been revised to make it clear that the routes and ramps listed are “designated” for off-road vehicle use, not necessarily “open”. Subsection (10)

indicates that routes or areas designated for off-road use are subject to closure or restriction by the Superintendent for a variety of reasons, including natural and cultural resource protection.

84. *Comment:* Section 7.58(c)(10) should be revised to provide the Superintendent with the discretion to authorize enhanced access when he or she determines that such enhanced access is appropriate based upon consideration of the relevant factors.

*Response:* Paragraph (10) applies specifically to the Superintendent's authority to establish temporary closures of ORV routes as needed to provide for resource protection, public health and safety, and other conditions described in that paragraph. Examples could include pre-nesting closures, carrying capacity closures, and implementation of resource protection buffers described in the [ORV Management Plan/EIS/FEIS](#). The Superintendent does not have the discretion to allow vehicular access to areas that are not authorized or designated as ORV routes in the special regulation, except for the specific situations addressed in subsection (7) related to special use permits for off-road driving, temporary use.

85. *Comment:* There is no basis for the NPS to establish parking requirements and reduced speed limits in the rule.

*Response:* As described in the FEIS, the NPS decided to implement the "one deep" beach parking restriction as a safety measure to ensure that two-way traffic would not be impeded during times of high ORV use. Although parking multiple rows deep may seem desirable to some visitors, law enforcement staff have documented that it has resulted in parking congestion, especially on narrow beaches, that blocks vehicle travel lanes, impedes safe traffic flow, fosters disorderly behavior, or results in a potentially dangerous situation in the event of an emergency. Reduced speed limits were implemented to increase pedestrian safety in areas where pedestrians and ORVs are in close proximity to one another.

86. *Comment:* The use of the term “may” in subsection (10), Superintendent’s Closures, renders the section permissive rather than obligatory. As written, the proposed rule seems to allow the Superintendent to choose not to impose any closures at all, even in the presence of protected species nests or chicks that would warrant imposition of buffers under the FEIS and ROD. The wording should be revised to state “the Superintendent shall limit, restrict, or terminate access to routes or areas designated for off-road use” based the considerations listed.

*Response:* The intent of the special regulation is to implement the Selected Action as described in the FEIS and ROD, which includes implementation of the Species Management Strategies described in Table 10-1 in the FEIS. As described in response # 33, the strategies will be periodically reviewed to evaluate their effectiveness. The wording of subsection (10) has been revised to state that the Superintendent “will” temporarily limit, restrict, or terminate access to routes and areas designated for off-road use in accordance with the criteria listed; and wording has been added that states “the Superintendent will conduct periodic reviews of the criteria and the results of these closures to assess their effectiveness.”

87. *Comment:* The vehicle carrying capacity is objectionable and not necessary, as the capacity of the area regulates itself. Carrying capacity should be struck from the rule.

*Response:* The NPS disagrees with the assertion that “the capacity of the area regulates itself.” Numerous documented law enforcement incidents have occurred over the years at popular locations during peak use periods, such as summer holiday weekends, involving crowded conditions, disorganized parking, and unsafe vehicle operation. The 260 vehicle per linear mile limit is based on a physical space requirement of 20 feet per vehicle, which would allow enough space for vehicles to be parked side by side with their doors open without touching each other



and with room for a person to pass between them safely. This, along with the other measures in the rule, would improve visitor experience and visitor safety during busy weekends.

88. *Comment:* The carrying capacity in the proposed rule should be much lower and allow no more than 130 ORVs per mile of Seashore. Language should be added to the rule to clarify that density limitations apply per mile of the beach, and not to the entire National Seashore.

*Response:* As described above, the NPS developed carrying capacity restrictions to work with other measures in the rule to mitigate public safety and visitor experience impacts during peak ORV use periods at the Seashore. The established capacity limits are intended to apply to beach segments open to ORV use at any particular time and not as a method of establishing the total allowable numbers of vehicles in the entire Seashore at any one time. Subsection (13) of the rule has been revised to make it clear that the carrying capacity applies to that portion of an ORV route that is open for ORV use.

### **Changes to the Final Rule**

After taking the public comments into consideration and after additional internal review, the NPS has made the following changes to the final rule:

Subsection 7.58(c)(1) has been revised to provide more specificity in the definition of *ORV corridor*, to describe the physical boundaries of the ORV corridor on the beach, and to ensure that the definition is consistent with the intent of the language in the FEIS and ROD.

Subsection 7.58(c)(2)(v) has been modified by removing the “in person” language from the rule to provide the Superintendent with greater flexibility for administering the ORV permit issuance procedures.

Subsection 7.58(c)(2)(vi) has been revised to clarify that the operator must affix the *proof* of the ORV permit to the vehicle covered by the permit for use off-road.

Subsection 7.58(c)(3)(v) has been revised to replace the phrase “jack stand” with “jack support board” to clarify exactly what piece of equipment the NPS intended to require. The phrase “jack support board” is also consistent with terminology used in other NPS ORV regulations.

Subsection 7.58(c)(7)(iii) has been modified to allow ORVs that transport mobility impaired individuals to remain on the beach, subject to conditions outlined in the special use permit issued for such activity. This paragraph has also been revised to clarify that these special use permits will be subject to all resource, safety, seasonal, and other closures implemented pursuant to subsection (10) of the rule.

Subsections 7.58(c)(8)(i) and (ii) have been revised to indicate exactly where commercial fishing permit holders can operate ORVs when engaged in authorized commercial fishing activities.

Subsection 7.58(c)(9) has been revised to clarify that designated ORV routes and ramps are subject to resource, safety, seasonal, and other closures. This paragraph was also modified to indicate that ramp 59 would be temporarily designated as an ORV ramp until ramp 59.5 is constructed. The language in the designated routes table for Hatteras Island was revised to provide a more accurate description of the current conditions at Hatteras Inlet spit, as a result of physical changes to the island caused by Hurricane Irene in August 2011. The language in the designated routes table for Ocracoke Island has been revised to indicate that ramp 59 will be temporarily designated as an ORV ramp until such time as ramp 59.5 is constructed and operational.

Subsection 7.58(c)(10) has been revised to clarify the Superintendent's authority to implement and remove closures, to better describe the criteria for establishing these closures, and to add language regarding the periodic review process.

The table in subsection 7.58(c)(12)(i) has been revised to clarify that the Superintendent may open *portions of* designated ORV routes in sea turtle nesting habitat to night driving from September 15 through November 15, if no turtle nests remain within these portions of ORV routes. The proposed rule stated that only entire routes with no turtle nests remaining could be opened to night driving.

Subsection 7.58(c)(13) has been revised to clarify that carrying capacity refers to the maximum number of vehicles allowed on any open ORV route, at one time, and is the length of the route (or, if part of the route is closed, the length of the portion of the route that is open) divided by 6 meters (20 feet).

### **The Final Rule**

This final 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, 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 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. This deletion

consequently requires redesignation of the remaining provisions of paragraph (b). The addition of paragraph (c) will implement portions of the Selected Action 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 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; but 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 proof of permit, such as a color-coded windshield sticker or hang tag for the rear-view mirror 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.

*Are there other types of permits that allow ORV use at the Seashore?*

Yes. Commercial fishermen and persons conducting authorized commercial activities on Seashore beaches are required, for those respective activities, to have a separate permit that may also authorize ORV use by the permittee. In addition, the Superintendent may issue a special use permit for temporary off-road vehicle use to 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; to 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 to 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.

*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 even 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 board.

*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 (i.e., a trailer with sleeping and/or restroom facilities) on designated ORV routes?*

No. Travel 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 that are not registered, licensed, and insured for highway use, including ATVs and UTVs, cannot lawfully be operated on park roads or designated off-road routes. 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. 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, 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 or portions of 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, if you obtain a special use permit (SUP) for that purpose. The SUP 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. You would be subject to the terms and conditions set in the SUP. Additionally, you should keep in mind that with a standard ORV permit you would have access to many miles of beach open to ORVs year-round or seasonally. 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 CUA holders 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)?*

Yes. In keeping with the current practice, commercial fishermen when actively engaged in their authorized commercial fishing activity may be allowed to operate an ORV 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. Lifeguarded beaches would be seasonally closed to ORVs by the Superintendent. Commercial fishing activities and use of associated fishing gear conflict with the significant concentrated beach use and associated swimming in these areas.

Commercial fishermen actively engaged in authorized commercial fishing activity who are carrying and able to present a fish-house receipt from the previous 30 days will 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**

**Comment [dw7]:** Changes to EIS/FEIS terminology from here forward may not be needed, as AJ indicated that some of these sections won't appear in the final rule (i.e. Information Quality Act, etc)

#### **Use of Off-Road Vehicles on the Public Lands (E.O. 11644)**

Section 3(4) of the 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 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 agency heads to monitor the effects of ORV use on lands under their jurisdictions. On the basis of the information gathered, agency heads 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~~ FEIS, as described in the ROD, identifies monitoring and resource protection procedures, periodic review, and desired future conditions 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 final regulation and under 36 C.F.R. § 1.5 to close portions of the Seashore as needed to protect park resources.

#### **Regulatory Planning and Review (Executive Order 12866)**

The Office of Management and Budget (OMB) has determined that this document is a significant rule and has reviewed the rule in accordance with E.O. 12866. The assessments required by E.O. 12866 and the details of potential beneficial and adverse economic effects of the final rule can be found in the report entitled “Benefit-Cost Analysis of Final 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 since 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 Final ORV Use Regulations in Cape Hatteras National Seashore”, available for review online

at <http://www.parkplanning.nps.gov/caha>. As stated in that report, no entities, small or large, are directly regulated by the 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 percent of the rule's economic 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 Selected Action described in the December 2010 [Record of Decision ROD](#), upon which the final rule is based, includes a number of measures designed to mitigate the 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 who use 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, the NPS will seek funding for an alternative transportation study and consider applications for businesses to offer beach and water shuttle

services. These extra efforts to increase overall 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 Final ORV Use Regulations in Cape Hatteras National Seashore”, available online at <http://www.parkplanning.nps.gov/caha>. This action will result in increased costs for those visitors desiring to operate ORVs on the beach, due to the requirement for an ORV 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 CUA or commercial fishermen operating under a commercial fishing special use permit would not need an ORV permit.

#### **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 (E.O. 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 (E.O. 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 (E.O. 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 (E.O. 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 DEIS was released to the public on March 5, 2011 and a 60-day public comment period followed, beginning on March 12, 2011. 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 rule is to implement 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 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 rule is of sufficient quality, objectivity, utility, and integrity to comply with the IQA (Pub. L. 106-554).

#### **Effects on the Energy Supply (E.O. 13211)**

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

#### **Administrative Procedure Act**

This rule is effective on February 15, 2012. Under 5 U.S.C. § 553(d), new rules ordinarily go into effect no less than thirty days after publication in the *Federal Register*, except under specified circumstances, including a finding by the agency that there is good cause for making the rule effective earlier. For this regulation, the NPS has determined under 5 U.S.C. § 553(d) and 318 DM 6.25 that this rule should be effective no later than February 15, 2012. The NPS has found that good cause exists for this effective date, for the following reasons:

(1) The ~~Record of Decision (ROD)~~ for the ~~Cape Hatteras ORV Plan/~~~~Final Environmental Impact Statement (plan/~~FEIS), upon which this rule is based, was signed on December 20, 2010, and the public was informed of the availability of the ~~plan/~~FEIS and ROD through notice in the *Federal Register* on December 28, 2010. Therefore, by February 15, 2012, the public already will have had 415 days notice of the NPS decision.

(2) An integral part of the ~~plan/~~EIS/FEIS and rule is the species management strategies described in the ~~FEIS/~~ORV management plan/EIS, which were developed to manage ORV use in a manner conducive to the protection of the migratory birds and sea turtle species that rely on the Seashore's beach habitat for nesting. The shorebird breeding season at the Seashore begins in early March. Implementation of the rule and the associated species management strategies would be most effective if the designated ORV routes and ORV permit and education requirements were implemented, and signs reflecting the new requirements were to be installed, prior to the start of the breeding season. A significant change in management procedures and information regarding ORV requirements implemented after the breeding season begins would compromise

the efficiency and effectiveness of ORV management and species protection at the Seashore and be confusing to Seashore visitors.

(3) There would be no benefit to the public in delaying the effective date of this rule, given that there has already been substantial notice, including the court approved deadline for completion of the rule, that the Seashore will be operating under the new ORV rule for the 2012 breeding season.

The above-described harms to the public resulting from a procedural delay of this rule should therefore be avoided, and an effective date of February 15, 2012, is warranted.

#### **Clarity of this Rule.**

We are required by E.O. 12866 and E.O. 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.

#### **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 covered by the permit for use 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 trailer with sleeping 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, 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 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.

<b>BODIE ISLAND - DESIGNATED ROUTES</b>	
<b>YEAR ROUND</b>	Ramp 2.5 (0.5 miles south of the southern boundary of Coquina Beach) to 0.2 miles south of ramp 4

<p><b>SEASONAL</b> <b>September 15 to March 14</b></p>	<p>0.2 miles south of ramp 4 to the eastern confluence of the Atlantic Ocean and Oregon Inlet</p>
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<p><b>HATTERAS ISLAND - DESIGNATED ROUTES</b></p>	
<p><b>YEAR ROUND</b></p>	<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><b>SEASONAL</b> <b>November 1 to March 31</b></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>



	East Hatteras boundary to ramp 55 (Hatteras village beach)
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<b>OCRACOKE ISLAND - DESIGNATED ROUTES</b>	
<b>YEAR ROUND</b>	<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>
<b>SEASONAL September 15 to March 14</b>	<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>
<b>November 1 to March 31</b>	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 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:

<b>HOURS of OPERATION/NIGHT DRIVING RESTRICTIONS</b>	
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 length of the route (or, if part of the route is closed, the length of the portion of the route that is open) 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.

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Acting Assistant Secretary for Fish and Wildlife and Parks

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Date