

January 9, 2008

TO: Mike Murray, Superintendent, Cape Hatteras National Seashore

FROM: Michael Stevens, Attorney-Adviser, Office of the Regional Solicitor

SUBJECT: Questions on off-road vehicle (ORV) routes/areas

At the December 2008 meeting of the ORV negotiated rulemaking committee, two questions were ask about the designation of ORV routes/areas that required legal interpretation of Executive Order 11989. The joint Solicitor's Office/NPS answers to these questions are:

Question 1: In the special regulation, may an area be designated as "pedestrian only" subject to conditions? For instance, may NPS designate pedestrian routes and areas that only become effective as such once the planned supporting infrastructure (i.e., pedestrian overpasses, boardwalks, parking lots) are in place, but remaining as ORV routes/areas until that time? As another example, may NPS create pedestrian routes/areas that would revert to ORV routes/areas if NPS determined that they were not sufficiently used to justify keeping them pedestrian-only?

Answer: Technically yes. However, it would likely violate the Executive Order if all, or even a substantial number, of the pedestrian areas were really "conditional" pedestrian areas. Section 3 of the Executive Order requires NPS to designate ORV routes and areas, and provides criteria for doing so, but does not require any special designation or criteria for non-ORV areas, either for pedestrians or some other non-ORV use. Since a "conditional pedestrian area" would at some point be an ORV route or area, the only way to create this type of area would be to designate it as, in effect, a "conditional ORV route/area." There is no reason that some individual routes could not be designated in this way, as long as the criteria in Section 3 are met. However, we have already determined that designating all or nearly all of the Seashore as an ORV route or area would not comply with the Executive Order. Therefore, there would be a limit on the overall number of ORV areas, whether "conditional" or unconditional.

Question 2: May ORV routes/areas be designated year-round and opened and closed seasonally, or must they be designated seasonally, i.e., open part of the year and closed part of the year?

Answer: Either way, as long as each designation includes specific, objective triggers that ensure that the route/area will be open only when the Section 3 criteria are met. Note that the triggers need not be actual dates, but could also be events (i.e., the first appearance of breeding birds, the last chick fledging, a certain density of pedestrians) as long as they are specific and objective. As an example, it does not matter whether the designation says "The beach in front of X village will be an ORV route from September 16 until March 14," "The beach in front of X village will be an ORV route, but closed from March 15 until September 15," or "The beach in front of X village will be an ORV route, provided that the number of pedestrians does not exceed Y per mile," because in each case the triggers for meeting an Executive Order criterion (in this case, minimizing user conflicts) are met. Where a "seasonal closure" would run afoul of the Executive Order would be for it to say "The beach in front of X village will be an ORV route" with the Section 3 criteria deferred for the Superintendent to apply later.