

1/05/09

## Response from NPS/DOI to Committee question about “conditional” designation of pedestrian areas

**Question** (from December 2008 meeting): In creating the special regulation, may NPS designate pedestrian routes and areas<sup>1</sup> that only become effective as such once the planned supporting infrastructure (i.e., pedestrian overpasses, boardwalks, new or expanded parking lots) are in place, with the routes/areas remaining as ORV routes/areas until that time? A related question: May NPS generate pedestrian routes/areas that would revert to ORV routes/areas if NPS determined that they were not used sufficiently to justify their continued limitation to pedestrians? Both of these questions can be combined into one general question: **May a route or area be designated as “pedestrian only” subject to conditions?**

**Short Answer:** Technically yes, but not to the extent that all or even a substantial proportion of pedestrian areas would be so limited.

**Discussion:** First, we must note that NPS general regulations do not require a special regulation to establish pedestrian-only routes. It is true that Executive Order 11644, as amended, requires each agency to designate “specific areas and trails on public lands on which the use of [ORVs] may be permitted, and areas in which the use of off-road vehicles may not be permitted . . . .” § 3. However, this does not mean that an area must be closed to pedestrians (or other non-ORV use) absent a special regulation, or that the area is in some kind of administrative limbo until a regulation making it either an ORV route/area or non-ORV area is published. Furthermore, it clearly does not mean that if an area was used by ORVs in the absence of a regulation, it may remain as an ORV area until the regulation is finalized. The clear intent of the Executive Order is that ORV use is allowed only on those routes and areas that have been specially designated by the agency, and that until that time, ORV use is prohibited. NPS’s general regulations capture this intent, by requiring only that “routes and areas designated for [ORV] use shall be promulgated as special regulations.” 36 C.F.R. § 4.10. They do not state any requirements for designating areas where ORVs may not travel. In other words, under the Executive Order and NPS regulations, NPS does not have to do anything in order to establish an unconditional “pedestrian-only” area.

This would not be true for the conditional “pedestrian-only” area described above. As described, this area either might start out as an ORV route/area, because the infrastructure to facilitate pedestrian access has not been built, or might later revert to an ORV route/area, if the level of pedestrian use is not maintained over a specified period of time at some pre-determined level. In either case the area would have to be designated as an ORV route/area, but one in which ORV use is suspended only if certain conditions are met (i.e., infrastructure is available, or pedestrian use remains above a certain level). In short, these conditional “pedestrian-only” areas are more accurately called, for rulemaking purposes, conditional ORV routes/areas.

---

<sup>1</sup> “Pedestrian area,” pedestrian-only area,” and “pedestrian routes” mean areas that are not designated for ORV use, and that provide an opportunity for visitors to experience activities such as walking, shelling, swimming, sunbathing, surfing, fishing, solitary exploration or relaxation, beachcombing, birdwatching, and other activities in a natural landscape without the presence or signs of vehicles, such as a rutted beach. They differ from village closures in that a purpose of pedestrian-only areas is to provide the opportunity for a visitor by walking further from the access point to experience solitude and inspiration from the Seashore’s natural landscape.

1/05/09

**Response from NPS/DOI to Committee question about “conditional” designation of pedestrian areas**

May the committee recommend, and NPS designate, these “conditional” ORV routes/areas?

Technically yes, provided that the designation (just as for an “unconditional” ORV route/area) satisfies other requirements of Section 3 of the Executive Order (i.e., designation of routes/areas must be based upon protection of resources, promotion of safety, and minimization of conflicts, and will be done in such a way as to minimize these adverse effects). A problem could arise, however, with the extent to which this classification, in addition to the “unconditional” route/area, would be used. If all or even a substantial proportion of the areas identified as “pedestrian” are, in fact, “conditional” ORV areas, then the rule would end up as simply a variation on earlier proposals—with the “default position” for all or most of CAHA being an ORV route or area—that we have already determined, in our review of these proposals, does not comply with the Executive Order. Furthermore, the addition of “conditional” actions may complicate NPS’s planning process for the ORV rule, including a significant increase in the complexity of the Environmental Impact Statement.