

**Cape Hatteras National Seashore,
North Carolina**

Off-Road Vehicle Management Plan

Consistency Determination
Coastal Zone Management Act

Submitted by:
Cape Hatteras National Seashore
National Park Service
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1 **FEDERAL CONSISTENCY**

2 The National Park Service’s Outer Banks Group (hereinafter referred to as the “Park,” the
3 “Seashore,” or the “Cape Hatteras National Seashore”) seeks a consistency concurrence from the
4 North Carolina Division of Coastal Management for the implementation of an off-road vehicle
5 (ORV) management plan on National Park Service (NPS) property within the Seashore. The
6 proposed action would be the implementation of alternative F (the NPS preferred alternative) of
7 the draft ORV management plan / environmental impact statement (EIS). This plan would guide
8 the management of ORVs at the Seashore over the next 10 to 15 years.

9 This application is submitted to ensure conformity with 15 CFR Part 930, which requires that the
10 proposed activity complies, to the maximum extent practicable, with the enforceable policies of
11 the State’s approved coastal management program. North Carolina’s coastal zone management
12 program consists of, but is not limited to, the Coastal Area Management Act, the State’s Dredge
13 and Fill Law, and the land use plan of the County and/or local municipality in which the proposed
14 project is located.

15 **Background**

16 Officially authorized in 1937 along the Outer Banks of North Carolina, Cape Hatteras is the
17 nation’s first national seashore. Consisting of more than 30,000 acres distributed along
18 approximately 68 miles of shoreline, the Seashore is part of a dynamic barrier island system.

19 The Seashore serves as a popular recreation destination, with more than 2.1 million visitors in
20 2008 (NPS 2008), showing an eightfold increase in visitation since 1955 (NPS 2007). Seashore
21 visitors participate in a variety of recreational activities, including beach recreation (sunbathing,
22 swimming, shell collecting, etc.), fishing (surf and boat), hiking, hunting, motorized boating,
23 nonmotorized boating (sailing, kayaking, canoeing), nature study, photography, ORV use (beach
24 driving), shellfishing, sightseeing, watersports (surfing, windsurfing, kiteboarding, etc.), and
25 wildlife viewing. Seashore visitors use ORVs for traveling to and from swimming, fishing, and
26 surfing areas, and for pleasure driving.

27 Current management practices at the Seashore allow ORV users to drive on the beach seaward of
28 the primary dune line, with a 10-meter backshore area seaward of the primary dune line protected
29 seasonally. Drivers must use designated ramps to cross between the beach and North Carolina
30 Highway 12 (NC 12), which runs behind the primary dune line. In addition to a multitude of
31 visitor opportunities, the Seashore provides a variety of important habitats created by its dynamic
32 environmental processes, including habitats for the federally listed piping plover, sea turtles, and
33 one listed plant species, the seabeach amaranth. The Seashore contains ecologically important
34 habitats such as marshes, tidal flats, and riparian areas, and hosts various species of concern such
35 as colonial waterbirds (least terns, common terns, and black skimmers), American oystercatcher,
36 and Wilson’s plover, all of which are listed by the North Carolina Wildlife Resources
37 Commission (NCWRC) as species of special concern. In addition, the gull-billed tern, also found
38 at the Seashore, is listed by the NCWRC as threatened.

1 Historically, beach driving at the Seashore was for transportation, not recreation. The paving of
2 NC 12, the completion of the Bonner Bridge connecting Bodie and Hatteras islands in 1963, and
3 the introduction of the State of North Carolina ferry system to Ocracoke Island facilitated visitor
4 access to the sound and ocean beaches. Improved access, increased population, and the popularity
5 of the sport utility vehicle have resulted in a dramatic increase in vehicle use on Seashore
6 beaches. There has also been a decline in most beach-nesting bird populations on the Seashore
7 since the 1990s.

8 Since the 1970s, ORV use at the Seashore has been managed through various draft or proposed
9 plans, although none were ever finalized or published as a special regulation as required by
10 Executive Orders 11644 and 11989 and 36 CFR 4.10. The NPS issued the Interim Protected
11 Species Management Strategy (Interim Strategy) in 2006 to provide resource protection guidance
12 until the long-term ORV management plan and regulation could be completed. The Finding of No
13 Significant Impact (FONSI) was issued for the Interim Strategy in July 2007. In October 2007, a
14 lawsuit was filed on the Interim Strategy, which resulted in a consent decree in April 2008. As
15 part of the consent decree, the court ordered deadlines for completion of an ORV management
16 plan/EIS and special regulation. This document, once finalized and approved, will serve as the
17 ORV management plan and will form the basis for the special regulation governing ORV use at
18 the Seashore.

19 **Purpose of the Plan**

20 The purpose of the ORV management plan is to develop regulations and procedures that carefully
21 manage ORV use/access in the Seashore to protect and preserve natural and cultural resources
22 and natural processes, to provide a variety of visitor use experiences while minimizing conflicts
23 among various users, and to promote the safety of all visitors.

24 **Need for Action**

25 Cape Hatteras National Seashore provides a variety of visitor experiences. It is a long, essentially
26 linear park, visitation is high, and parking spaces near roads are limited. Some popular beach
27 sites, particularly those near the inlets and Cape Point, are a distance from established or possible
28 parking spaces. Visitors who come for some popular recreational activities such as surf fishing
29 and picnicking are accustomed to using large amounts and types of recreational equipment that
30 cannot practically be hauled over these distances by most visitors without some form of
31 motorized access. For many visitors, the time needed and the physical challenge of hiking to the
32 distant sites, or for some even to close sites, can discourage or preclude access by non-motorized
33 means. As a result, ORVs have long served as a primary form of access for many portions of the
34 beach in the Seashore, and continue to be the most practical available means of access and
35 parking for many visitors.

36 In addition to these recreation opportunities, the Seashore is home to important habitats created
37 by the Seashore's dynamic environmental processes, including habitats for several federally listed
38 species including the piping plover and three species of sea turtles. These habitats are also home
39 to numerous other protected species, as well as other wildlife. NPS is required to conserve and
40 protect all of these species, as well as the other resources and values of the Seashore.

1 The use of ORVs must therefore be regulated in a manner that is consistent with applicable law,
2 and appropriately addresses resource protection (including protected, threatened, and endangered
3 species), potential conflicts among the various Seashore users, and visitor safety. Section 4.10(b)
4 of the NPS regulations in Title 36 of the Code of Federal Regulations, which implements
5 Executive Orders 11644 and 11989, prohibits off-road use of motor vehicles except on designated
6 routes or areas. It requires that “routes and areas designated for ORV use shall be promulgated as
7 special regulations” in compliance with other applicable laws.

8 Therefore, in order to provide continued visitor access through the use of ORVs, NPS must
9 promulgate a special regulation authorizing ORV use at the Seashore. In order to ensure that
10 ORV use is consistent with applicable laws and policies, the Seashore has determined that an
11 ORV management plan is necessary as part of this process. Thus, the ORV plan and special
12 regulation would

- 13 • Bring the Seashore in compliance with Executive Orders 11644 and 11989 respecting
14 ORV use, and with NPS laws, regulations (36 CFR 4.10), and policies to minimize
15 impacts to Seashore resources and values.
- 16 • Address the lack of an approved plan, which has led over time to inconsistent
17 management of ORV use, user conflicts, and safety concerns.
- 18 • Provide for protected species management in relation to ORV use upon expiration of the
19 Interim Strategy (NPS 2006), and associated Biological Opinion and amendments
20 (USFWS 2006, 2007, 2008) as modified by the consent decree.

21 **Project Description**

22 Alternative F of the draft ORV management plan/EIS (also referred to in this document as
23 preferred alternative or proposed action) is designed to provide visitors to the Seashore with a
24 wide variety of access opportunities for both ORV and pedestrian users, including access to the
25 spits and points, but often with controls or restrictions in place to limit impacts on sensitive
26 resources. This means that some areas may be kept open to ORV users for longer periods of time
27 by reopening some ORV corridors at the spits and points soon after shorebird breeding activity is
28 completed and by improving interdunal road and ORV ramp access. Pedestrian access would be
29 enhanced by providing increased parking capacity at various points of access to vehicle-free
30 areas. Vehicle-free areas would be provided during all seasons so non-ORV users can experience
31 the park without the presence of vehicles. The preferred alternative would manage ORV use by
32 identifying areas that historically do not support sensitive resources and areas of lower visitor use.
33 Many of these areas would generally be designated as ORV routes year-round. Areas of high
34 resource sensitivity and high visitor use would generally be designated as seasonal ORV routes,
35 with restrictions based on seasonal resource and visitor use, or as year-round non-ORV areas.

36 Areas of high resource sensitivity would be designated as Species Management Areas (SMAs)
37 and would be closed to ORV use from March 15 through July 31, or two weeks after shorebird
38 breeding ceases or all chicks have fledged, whichever is later. During the shorebird breeding
39 season, a shoreline pedestrian access corridor would be established at Bodie Island Spit, and ORV
40 access corridors would be established at Cape Point and South Point. These corridors would use
41 standard resource-protection buffers and would be subject to resource closures. When unfledged

1 chicks are present, the probability of being able to provide this access would decrease. The
2 preferred alternative would also involve the development of an interdunal pedestrian trail on
3 Bodie Island. The trail would begin at a new parking area near the campground and would
4 provide access to the inlet, subject to resource-protection closures. The preferred alternative of
5 the ORV management plan includes the designation of a short ORV route to access a new
6 pedestrian trail to the sound on Ocracoke Island.

7 Areas that would be seasonally designated vehicle-free would include the areas in front of
8 villages, except Buxton, which would be vehicle-free year-round, and some SMAs that would
9 have seasonal restrictions on ORV use. The ORV open season in front of the villages would vary,
10 with northern Hatteras village beaches (Rodanthe, Waves, Salvo, and Avon) open September 16
11 to May 14, southern Hatteras village beaches open December 1 to February 28/29, and Ocracoke
12 campground and day-use area beaches open November 1 to March 31. SMAs that are designated
13 as seasonal ORV routes would generally be closed to ORV use March 15 through July 31, or until
14 two weeks after all chicks have fledged and breeding activity has ceased, whichever comes later.
15 ORV access would be allowed to Cape Point and South Point during the breeding season, subject
16 to resource closures, using the standard buffer distances. New interdunal roads on South Beach
17 from ramp 45 to ramp 49, on Hatteras Inlet Spit extending northeast and southwest from the
18 southern terminus of Pole Road, and on North Ocracoke Spit from ramp 59 extending northeast
19 toward the inlet would facilitate access to locations that have either seasonal or year-round
20 restrictions on ORV use.

21 Existing soundside access points would remain open, with better maintenance than currently
22 occurs. Signage/posts would be installed at the soundside parking areas and boat launch areas to
23 prevent damage to vegetation and other soundside resources. The preferred alternative also
24 involves the addition of parking spaces at several ramp locations, including ramps 23, 24, 26,
25 32.5, 38, and 64 in addition to new or expanded parking at kite point, near the old coast guard
26 station site, at the Pony Pen, and new parking established northeast of ramp 59 and south of ramp
27 72. However, at this time the NPS has not identified the exact location of the proposed
28 improvements associated with the preferred alternative (please see note on page 6 of this
29 document).

30 ORV routes would be subject to temporary resource closures established when protected-species
31 breeding behavior warrants and/or if new habitat is created. In addition to the breeding-season
32 measures, resource closures and/or vehicle-free areas would be established, based on an annual
33 nonbreeding habitat assessment conducted after the breeding season, to provide areas of
34 nonbreeding shorebird habitat with reduced human disturbance while still allowing a pedestrian
35 or pedestrian/ORV access corridor in areas designated by the NPS. This would include three
36 “floating” nonbreeding shorebird habitat areas located between ramps 23 and 34, between ramps
37 45 and 49, and south of ramp 72. The floating areas would be adjusted on a yearly basis to
38 provide nonbreeding habitat in these areas. These closures would float year to year depending on
39 where the most effective wintering habitat is located, which would be determined based on a
40 review of the previous year’s monitoring results.

1 To facilitate access to ORV routes, new ramps would be added near Haulover Beach (to be
2 known as ramp 39), and near beach mile markers 32.5, 62, and 64, in addition to relocating the
3 existing ramp 2. New ramps would also be established at both 24 and 26, along with new parking
4 areas. Designated ORV routes would be open to ORV use 24 hours a day from November 16
5 through April 30. From May 1 through September 15, all potential sea turtle nesting habitat
6 (ocean intertidal zone, ocean backshore, and dunes) would be closed to non-essential ORV use
7 from 1 hour after sunset until the NPS turtle patrol has checked the beach in the morning (by
8 approximately one-half hour after sunrise) to provide for sea turtle protection and allow
9 enforcement staff to concentrate their resources during the daytime hours. From September 16
10 through November 15, selected ORV routes with no or a low density of turtle nests remaining (as
11 determined by the NPS) would reopen to night driving, subject to the terms and conditions of a
12 required permit.

13 ORV safety closures could be designated as conditions warrant and would be evaluated for
14 reopening by NPS law enforcement staff on a weekly basis. ORV safety closures would be
15 applicable only to ORV access; pedestrian and commercial fishing access would generally be
16 maintained in safety closures. Additional ORV driving requirements would be implemented to
17 provide for increased pedestrian safety in all areas open to ORV use. The preferred alternative
18 would include a carrying-capacity requirement (peak-use limit) for all areas based on a physical
19 space requirement of one vehicle per 20 linear feet for Bodie Island, Hatteras Island, and
20 Ocracoke Island districts, except that 400 vehicles would be allowed within a 1-mile area
21 centered on Cape Point. The carrying-capacity requirement would prevent safety concerns
22 associated with overcrowding, such as at peak-use periods during major summer holidays and
23 weekends. The allowable number of vehicles in each area would be determined by the space
24 requirements and the beachfront length of the area.

25 The preferred alternative would include an ORV permit system, with no limit on the number of
26 permits issued. To obtain a permit, ORV owners would be required to complete a short education
27 program in person or online and pass a basic knowledge test demonstrating their understanding of
28 the rules and regulations governing ORV use at the Seashore, beach-driving safety, and resource-
29 closure requirements. Following completion of the test, owners would need to sign for their
30 permit to acknowledge that they understand the rules and that all drivers of the permitted vehicle
31 will abide by the rules and regulations governing ORV use at the Seashore. A violation of the
32 rules and regulations by the owner or driver of the ORV could result in revocation of the vehicle
33 permit, and the owner/permittee would not be allowed to obtain another permit for any vehicle for
34 a specified period of time. In addition to the mandatory education program for ORV users, the
35 NPS would establish a voluntary resource-education program targeted toward non-ORV
36 beach users.

37 Every five years the NPS would conduct a systematic review of the ORV and species
38 management measures identified in this alternative as being subject to periodic review. This could
39 result in changes to those management actions in order to improve effectiveness.

40 **Note:** *Although the management plan describes the installation of interdunal roads, pedestrian*
41 *trails, ORV access ramps, and parking areas, the NPS has not yet determined the exact location*

1 *for these proposed improvements and therefore is not seeking consistency concurrence on any of*
2 *the construction activities at this time. Therefore, certain enforceable polices of the North*
3 *Carolina Coastal Management Program, such as Section .0303—Ocean Hazard Areas and*
4 *Section .0310—Use Standards for Inlet Hazard Areas, do not apply and are not discussed below.*
5 *Once the NPS has established specific locations for these improvements, additional National*
6 *Environmental Policy Act (NEPA) evaluation and a CAMA consistency determination and*
7 *consultation will be required and will occur at that time.*

8 **NEPA Compliance**

9 Internal scoping for this project began on November 15, 2004, with staff members from the
10 Seashore, NPS Environmental Quality Division, NPS Southeastern Region, and contractor
11 personnel in attendance. During the 3-day meeting, the NPS identified the purpose of and need
12 for action, management objectives, issues, and impact topics. The planning team also discussed
13 possible alternative elements, cumulative impacts, and strategies for public involvement
14 throughout the process. Public scoping began with the December 11, 2006, Federal Register
15 publication of the notice of intent (NOI) to prepare an EIS (71 FR 71552–71553). See the Draft
16 EIS for a description of public involvement during the planning process.

17 An EIS for the proposed ORV management plan has been prepared in accordance with NEPA;
18 regulations of the Council on Environmental Quality (40 CFR 1508.9); and NPS Director’s Order
19 12: Conservation, Planning, Environmental Impact Analysis, and Decision Making (NPS 2001).
20 This EIS also complies with Section 106 of the National Historic Preservation Act of 1966, as
21 amended. The EIS analyzes the impact of two no-action and four action alternatives on the
22 natural, cultural, and human environment. Copies of all documentation associated with this
23 project are available on the NPS Planning, Environment, and Public Comment website located at
24 <http://parkplanning.nps.gov/caha> (see attachment: Draft ORV Management Plan/EIS).

25 **Review of Applicable North Carolina Coastal Management Program** 26 **Enforceable Polices**

27 In order to determine whether the preferred alternative of the draft ORV management plan/EIS,
28 also referred to as the proposed action, is consistent to the maximum extent practicable with the
29 approved North Carolina State Coastal Management Program, an analysis of the pertinent
30 enforceable policies is required. The two subchapters of Title 15 of the North Carolina
31 Administrative Code that are relevant to this evaluation are subchapters 7H and 7M. The
32 following applicable sections of code were addressed in this consistency determination:

- 33 • Areas of Environmental Concern (15A NCAC 07H.0100 et seq.)
- 34 • Estuarine and Ocean Systems (15A NCAC 07H.0200 et seq.)
- 35 • Ocean Hazard Areas (15A NCAC 07H.0300 et seq.)
- 36 • Natural and Cultural Resource Areas (15A NCAC 07H.0500 et seq.)
- 37 • Shorefront Access (15A NCAC 07L.0300, et seq.)
- 38 • Coastal Water Quality (15A NCAC 07L.0800, et seq.)

1 **Title 15 NCAC 07H—State Guidelines for Areas of Environmental Concern (AEC)**

2 **Section .0203—Estuarine and Ocean Systems**

3 **Policy:** It is the state’s objective to conserve and manage the estuarine and ocean systems to
4 “safeguard and perpetuate their biological, social, economic, and aesthetic values.” In addition,
5 the protection of access to coastal areas is also an objective.

6 **Response:** The proposed action is designed to provide for public access while protecting the
7 biological values associated with ocean and estuarine systems. Designation of SMAs and vehicle-
8 free areas would reduce the overall ambient level of ORV use at the Seashore, thereby reducing
9 potential impacts on biological systems in addition to improving aesthetic values for those
10 visitors desiring a more primitive experience. The proposed action would allow various types of
11 visitor access to much of the Seashore and would also allow for continued commercial fishing
12 opportunities, thereby perpetuating the social and economic values of the estuarine and ocean
13 systems in and around the Seashore. Therefore, the proposed action would be consistent with the
14 policies and objectives described in Section .0203.

15 **Section .0205—Coastal Wetlands**

16 **Policy:** Coastal wetlands are defined as any salt marsh or other marsh subject to regular or
17 occasional flooding by tides, including wind tides. It is the objective of the Coastal Resources
18 Commission to conserve and manage coastal wetlands so as to safeguard and perpetuate their
19 biological, social, economic, and aesthetic values, and to coordinate and establish a management
20 system capable of conserving and using coastal wetlands as a natural resource essential to the
21 functioning of the entire estuarine system.

22 **Response:** The proposed action is designed to protect the biological values associated with ocean
23 and estuarine systems, including coastal wetlands. NPS regulations at the Seashore currently
24 prohibit driving on vegetation, including marsh vegetation often found in and around coastal
25 wetlands. The proposed action would also involve the installation of signage and posts at the
26 soundside parking areas and boat launch areas to keep vehicles from damaging vegetation and
27 other soundside resources. This additional protective measure would reduce the potential for
28 damage to estuarine wetlands. According to the analysis of alternative F in chapter 4 of the ORV
29 management plan/EIS (attached), there would be short-term, negligible adverse impacts to marine
30 intertidal wetlands due to continued ORV use in these areas and long-term negligible adverse
31 impacts to wetlands due to direct damage from ORV use in and around vegetated wetlands on the
32 sound side and along interior ORV routes. Impacts to soundside wetlands would remain at a
33 negligible level due to the protection provided by the installation of signage. Overall, coastal
34 wetlands would maintain their functionality in the estuarine ecosystem and the proposed action
35 would be consistent with Section .0205.

36 **Section .0206—Estuarine Waters**

37 **Policy:** It is the state’s objective to conserve and manage the important features of estuarine
38 waters so as to safeguard and perpetuate their biological, social, aesthetic, and economic values;
39 to coordinate and establish a management system capable of conserving and utilizing estuarine
40 waters so as to maximize their benefits to man and the estuarine and ocean system.

1 **Response:** As described above under Section .0203 and .0205, the proposed action is designed to
2 provide for public access while protecting the biological values associated with ocean and
3 estuarine systems. Designation of official routes and areas for ORV use would not occur in areas
4 where ocean and estuarine systems would be impacted. The installation of signage and posts at
5 the soundside parking areas and boat launch areas would keep vehicles from driving off of these
6 designated areas and damaging vegetation and other soundside resources. This additional
7 protective measure would reduce the potential for damage to estuarine wetlands. Overall, the
8 proposed action would be consistent with Section .0206.

9 **Section .0207—Public Trust Areas**

10 **Policy:** With respect to areas within the Seashore, public trust areas are all waters of the Atlantic
11 Ocean and the lands thereunder from the mean high water mark to the seaward limit of state
12 jurisdiction; all natural bodies of water subject to measurable lunar tides and lands thereunder to
13 the normal high water or normal water level; and all navigable natural bodies of water and lands
14 thereunder to the normal high water or normal water level as the case may be.

15 It is the state’s management objective to protect public rights for navigation and recreation and to
16 conserve and manage the public trust areas so as to safeguard and perpetuate their biological,
17 economic, and aesthetic value.

18 **Response:** The proposed action would continue to allow vehicular and pedestrian access to
19 public trust areas, including intertidal beaches seaward of the mean high water line. As previously
20 discussed, the designation of SMAs and vehicle-free areas under alternative F would reduce the
21 overall level of ORV use at the Seashore in areas with sensitive resources during breeding and
22 nesting seasons, thereby reducing potential impacts on biological systems in addition to
23 improving aesthetic values for those visitors desiring a more natural experience. The proposed
24 action would allow various types of visitor access to much of the Seashore and would also allow
25 for continued commercial fishing opportunities, thereby perpetuating the social and economic
26 values of the estuarine and ocean systems in and around the Seashore. Therefore, the proposed
27 action would be consistent with the policies and objectives described in Section .0207. See the
28 discussion under “Dare County Policies: Policy #40” for further discussion regarding how the
29 proposed action is consistent with perpetuating the economic value of the area.

30 **Section .0209—Coastal Shorelines**

31 **Policy:** The coastal shorelines category includes estuarine shorelines and public trust shorelines.
32 Estuarine shorelines AEC are those non-ocean shorelines extending from the normal high water
33 line or normal water line along the estuarine waters, estuaries, sounds, bays, fresh and brackish
34 waters, and public trust areas as set forth in an agreement adopted by the Wildlife Resources
35 Commission and the Department of Environment and Natural Resources for a distance of 75 feet
36 landward.

37 The management objective related to this policy is to ensure that shoreline development is
38 compatible with the dynamic nature of coastal shorelines as well as the values and the
39 management objectives of the estuarine and ocean system. Other objectives are to conserve and
40 manage the important natural features of the estuarine and ocean system so as to safeguard and

1 perpetuate their biological, social, aesthetic, and economic values; to coordinate and establish a
2 management system capable of conserving and utilizing these shorelines so as to maximize their
3 benefits to the estuarine and ocean system and the people of North Carolina.

4 **Response:** As discussed above under sections .0203, .0205, .0206, and .0207, the proposed action
5 would allow public use of these areas while protecting coastal shorelines (including estuarine
6 shorelines and public trust areas) though the designation of SMAs, establishment of vehicle-free
7 areas, installation of protective signage along the soundside access points, and prohibition of
8 driving on vegetation. Under alternative F, SMAs would be designated along coastal shorelines in
9 areas that historically provide habitat for sensitive species. The SMAs and other vehicle-free
10 areas would protect the coastal shoreline ecosystem by providing areas where sensitive species
11 would be protected from human disturbance during key life stages. Protection of coastal
12 vegetation through signage and driving restrictions would also serve to maintain the functionality
13 of the coastal shoreline ecosystem. Therefore, the implementation of the proposed action would
14 be consistent with the provisions of section .0209.

15 *Section .0311—Installation and Maintenance of Sand Fencing*

16 **Policy:** According to section .0311, sand fencing may only be installed for the purpose of
17 building sand dunes by trapping windblown sand and for the protection of the dune(s) and
18 vegetation (planted or existing). Sand fencing shall not impede existing public access to the
19 beach, recreational use of the beach, or emergency vehicle access. Sand fencing shall not be
20 installed in a manner that impedes or restricts established common law and statutory rights of
21 public access and use of public trust lands and waters. Sand fencing shall not be installed in a
22 manner that impedes, traps, or otherwise endangers sea turtles, sea turtle nests, or sea turtle
23 hatchlings.

24 **Response:** The proposed action does not call for the installation of sand fencing; however,
25 symbolic fencing around sensitive resources, light-filtering fencing, and predator enclosures are
26 part of the preferred alternative.

27 Symbolic fencing consists of wooden and metal posts installed on the beach with rope and signs
28 strung between them. This fencing is used to restrict public access to specific areas used by
29 sensitive species such as state or federally listed birds, turtles, and plants. These areas are
30 monitored by park staff frequently and maintained as needed to ensure resource protection and
31 avoid the loss of materials and creation of beach hazards. The materials used do not contain
32 creosote or present any chemical risk to the environment. Symbolic fencing is removed when the
33 protected species have left the area, as described in the species management tables in chapter 2 of
34 the draft ORV management plan/EIS. Although the installation of symbolic fencing would
35 impede public access to some specific areas of the Seashore, this fencing is temporary in nature, it
36 is only used in areas associated with sensitive species, and overall public access to beaches would
37 be maintained.

38 Light-filtering fencing consists of black silt fence and is used at sea turtle nests around the time of
39 hatching. Light-filtering fence would be used in a U-shaped configuration around nests nearing
40 their hatch dates, with the open face of the U oriented toward the water, to block light pollution

1 from the villages and vehicles operating on the beach after dark. Once the nest has hatched and
2 has been excavated, the fences are removed. These fences are typically installed for a short period
3 (several days). These fences would not restrict public access to beaches.

4 Predator exclosures are wire fences placed around piping plover or turtle nests that protect the
5 nests from predation. These exclosures vary in size; plover exclosures are the largest,
6 approximately 10 feet in diameter. Once the eggs hatch, the exclosures are removed. These
7 exclosures are monitored and maintained as needed. These exclosures would not restrict public
8 access to beaches.

9 The installation and maintenance of these fences and exclosures are as consistent as practicable
10 with the policies as described in the Administrative Code. Although fencing would result in some
11 restrictions on public access, the temporary and site-specific nature of the fences would only
12 restrict access to small sections of beach during only a portion of the breeding season. Because
13 they are not by definition sand fences, they do not meet the specific section .0311 criteria that are
14 directly applicable; nor do they pose a hazard to the environment or eliminate public access,
15 except temporarily in a limited area, and only if no alternate ORV route or pedestrian access is
16 available. Therefore, because any fencing installed is not within the definition of sand fencing,
17 and it would not prevent public access to beaches or cause harm or injury to sea turtles, the
18 proposed action is consistent with the provisions in Section .0311.

19 *Section .0505—Coastal Areas That Sustain Remnant Species*

20 **Policy:** Coastal areas that sustain remnant species are those areas that support native plants or
21 animals determined to be rare or endangered (synonymous with threatened and endangered).
22 Such places provide habitats necessary for the survival of existing populations or communities of
23 rare or endangered species within the coastal area. The state’s management objective for these
24 areas is to protect unique habitat conditions that are necessary to the continued survival of
25 threatened and endangered native plants and animals and to minimize land use impacts that might
26 jeopardize these conditions.

27 **Response:** The draft ORV management plan/EIS attached to this determination includes detailed
28 species management requirements for the protection of the federally protected piping plover, sea
29 turtles, and seabeach amaranth that would be implemented under alternative F (the proposed
30 action). In addition, the proposed action contains protection measures for American oystercatcher,
31 Wilson’s plover, colonial waterbirds, and red knot, which are considered state-listed or special-
32 status species. On the whole, the protection measures contained in the proposed action represent
33 an increase in the level of protection for the species mentioned above, including provisions for
34 larger species buffers and designation of SMAs, which would reduce the level of recreational
35 access to sensitive resource areas at the Seashore during the breeding season. In addition, the
36 proposed action would contain night-driving restrictions during the breeding season and
37 protection of wintering habitat. These measures would protect sensitive species that forage on the
38 beaches at night and those that use the Seashore during the non-breeding season. Therefore, the
39 proposed action protects these species and their habitat and is consistent with Section .0505.

1 **Title 15 NCAC 07M—General Policy Guidelines for the Coastal Area**

2 **Section .0300—Shorefront Access Policies**

3 **Policy:** These policies describe the traditional and customary use of the ocean beaches and
4 estuarine and public trust waters for public recreation. It is state policy to “foster, improve,
5 enhance and ensure optimum access” to the beaches and waters of the state, consistent with the
6 “need to protect important coastal natural resources such as sand dunes and coastal marsh
7 vegetation.”

8 **Response:** The proposed action is consistent with this policy, as it ensures public access to the
9 extent practicable given the constraints of the Seashore’s enabling legislation, its mission, NPS
10 management policies, and requirements pursuant to federal laws, including the Endangered
11 Species Act (ESA), the NPS Organic Act, and Executive Order 11644 of 10972, amended by
12 Executive Order 11989 of 1977. The proposed action includes improvements for both pedestrian
13 and vehicular access in several areas of the Seashore, including access corridors at selected points
14 and spits, improvements to the interdunal road system, an increased number of ORV access
15 ramps, and installation of primitive pedestrian trails. The implementation of the proposed action
16 would result in a rule allowing ORV use on designated routes and areas, ensuring public access to
17 the shorefront, while at the same time implementing improvements in relation to protection of
18 coastal natural resources resulting from the establishment of SMAs and the prohibition of driving
19 on vegetation.

20 **Section .0800—Coastal Water Quality Policies**

21 **Policy:** This section indicates that coastal waters are “a valuable natural and economic resource
22 of statewide significance” and that traditional uses such as fishing, swimming, hunting, boating,
23 and commerce depend upon the quality of these waters. Policies under this section declare that “no
24 land or water use shall cause the degradation of water quality so as to impair traditional uses of
25 the coastal waters.”

26 **Response:** The proposed action does not propose any land or water uses that that would cause the
27 degradation of water quality. On the contrary, implementation of alternative F would result in an
28 overall decrease in the level of vehicle use in certain areas of the Seashore as a result of the
29 seasonal designation of SMAs at the Seashore. The proposed action would also result in increased
30 protection of vegetated wetlands by installing posts and signage to prevent damage to wetlands at
31 soundside ORV access points. The draft ORV management plan/EIS (attached) also addressed
32 impacts to water quality from the management of ORV use. The analysis found that these impacts
33 would be negligible at most under the proposed action; therefore, in chapter 1 of the EIS the topic
34 of water quality was dismissed from further analysis.

35 **Review of Dare and Hyde Counties Land Use Plans**

36 In order to fulfill federal requirements under the Coastal Zone Management Act, county plans
37 within the proposed action area must be examined to ensure consistency with enforceable
38 policies. Dare County’s 2003 Land Use Plan and Hyde County’s 2008 Land Use Plan were
39 evaluated to determine whether the proposed action is consistent with county policy. Dare County
40 is adjacent to the Seashore along Hatteras Island and Hyde County is adjacent to the Seashore on

1 Ocracoke Island. In general, Hyde County’s plan defers to state and federal regulations and
2 existing local law enforcement, although specific policies are addressed below.

3 The following policies related to the proposed action were identified in county land use plans:

4 **Dare County Policies**

5 **Policy #4:** Oceanfront shoreline development should continue to be managed to protect and
6 preserve the natural and recreational resources along the oceanfront.

7 **Response:** Although the proposed action would not be considered “development,” the preferred
8 alternative (alternative F) of the ORV management plan/EIS is designed to both protect sensitive
9 species and habitat and provide for continued recreational access. The proposed action provides
10 various methods of access for recreational use while implementing improved protection for
11 protected species and their habitats. The proposed action is consistent with this policy as it
12 ensures public access to the extent practicable given the constraints of the Seashore’s enabling
13 legislation, its mission, NPS management policies, and requirements pursuant to federal laws,
14 including the ESA, the NPS Organic Act, and Executive Order 11644 of 10972, amended by
15 Executive Order 11989 of 1977. The proposed action includes improvements for both pedestrian
16 and vehicular access in several areas of the Seashore, including access corridors at selected points
17 and spits, improvements to the interdunal road system, an increased number of ORV access
18 ramps, and installation of primitive pedestrian trails. The proposed action provides public access
19 to the shorefront concurrent with improvements in the protection of natural resources resulting
20 from the establishment of SMAs and the prohibition of driving on vegetation.

21 **Policy #5:** Estuarine shoreline development should continue to be managed to protect and
22 preserve the natural resources of the estuarine waters and the estuarine shoreline.

23 **Response:** The proposed action would not involve any development along the estuarine
24 shoreline. On the contrary, the proposed action would provide increased protection for estuarine
25 resources by installing posts and signage to prevent vehicular damage to estuarine vegetation and
26 wetlands adjacent to ORV access points on the sound side of the Seashore.

27 **Policy #8:** Dare County supports the preservation and protection of the public’s right to access
28 and use the public trust areas and waters.

29 **Response:** Implementation of the proposed action would result in the establishment of a rule that
30 would authorize the use of ORVs at the Seashore after years of operation without the required
31 regulations for such use. The proposed action includes improvements for both pedestrian and
32 vehicular access in several areas of the Seashore, including access corridors at selected points and
33 spits, improvements to the interdunal road system, an increased number of ORV access ramps,
34 and installation of primitive pedestrian trails.

35 **Policy#9:** Dare County advocates a local-level management program to address the competition
36 among recreational users of the public trust waters. Dare County reserves the right to review,
37 comment, advocate, or oppose any proposed federal or state regulations or programs that affect
38 the public trust waters or public trust areas.

1 **Response:** Among other things, the proposed action manages ORV and other recreational use at
2 the Seashore, including access to public trust areas. As mentioned above under Policy #8, the
3 proposed action includes improvements that would facilitate both pedestrian and vehicular access
4 to Seashore beaches. However, the proposed action would not impact the use of public trust
5 waters. Through the NEPA process, the NPS has engaged in public scoping and has received and
6 considered comments from county officials regarding the proposed action (alternative F of the
7 draft ORV management plan/EIS). Dare County participated in the negotiated rulemaking
8 advisory committee that provided input to NPS that was used in the development of alternative F.

9 **Policy #14:** Dare County supports North Carolina's shoreline access policies as stated in 15A
10 NCAC 7M, Section .0303. Dare County recognizes shoreline access to both ocean and estuarine
11 shorelines as a key component in the local tourist economy.

12 **Response:** As discussed above, the proposed action is consistent with the policies under 15A
13 NCAC 7M, Section .0303. The proposed action ensures public access to the extent practicable
14 given the constraints of the Seashore's enabling legislation, its mission, NPS management
15 policies, and requirements pursuant to federal laws, including the ESA, the NPS Organic Act, and
16 Executive Order 11644 of 10972, amended by Executive Order 11989 of 1977. The proposed
17 action includes improvements for both pedestrian and vehicular access in several areas of the
18 Seashore, including access corridors at selected points and spits, improvements to the interdunal
19 road system, an increased number of ORV access ramps, and installation of primitive pedestrian
20 trails.

21 **Policy #30:** Dare County supports the maintenance of preserve areas for wildlife habitat and
22 public access to these areas for managed wildlife harvesting and observation.

23 **Response:** No state or county preserve areas would be impacted by the implementation of the
24 proposed action. The proposed action would continue to allow public access to the Seashore for
25 hunting and fishing opportunities, as long as the proper permits and licenses are obtained
26 pursuant to NPS and other applicable federal, state, or local regulations.

27 **Policy #40:** Dare County recognizes the importance of four-wheel drive vehicle access to the
28 beaches of Hatteras Island that are under the management authority of the federal government.
29 Efforts to prohibit beach driving on these federally managed areas are not supported. Proposals to
30 impose additional driving restrictions will be reviewed on a case-by-case basis, with support or
31 opposition offered depending on the proposal and its potential negative impacts on the local
32 tourist economy.

33 **Response:** The proposed action maintains ORV access to the beaches of Hatteras Island to the
34 maximum extent practicable, given the constraints of NPS management policies, the Seashore's
35 enabling legislation, and other federal regulations, including the ESA. Implementation of the
36 proposed action would result in the establishment of a rule that would authorize the use of ORVs
37 at the Seashore after years of operation without the required regulations for such use. The
38 proposed action includes improvements for both pedestrian and vehicular access in several areas
39 of the Seashore, including access corridors at selected points and spits, improvements to the

1 interdunal road system, an increased number of ORV access ramps, and installation of primitive
2 pedestrian trails. However, the NPS recognizes that vehicular and/or pedestrian access to some
3 beaches would be temporarily prohibited during key life stages of sensitive species. These
4 restrictions, along with the requirement for vehicle permits and the application of carrying-
5 capacity requirements during peak-use weekends may discourage some ORV users from coming
6 to the Seashore and could impact the local economies. As found in the EIS analysis of alternative
7 F, the proposed action, socioeconomic impacts would be negligible to minor adverse over the
8 entire economic Region of Influence, but would increase from minor to moderate adverse when
9 considering small businesses, many of which are located within the Seashore boundary. Although
10 there would be impacts to the local economy, the preferred alternative provides flexibility in
11 ORV access to minimize these impacts and to be consistent with this policy.

12 Through the NEPA and negotiated rulemaking processes, the NPS has engaged in public scoping
13 and has received and considered comments from county officials regarding the draft ORV
14 management plan/EIS and the proposed action. These comments have been incorporated into the
15 development of the plan and the proposed action (alternative F), which was developed around
16 input from members of the negotiated rulemaking committee (which included both Dare and
17 Hyde counties).

18 **Policy #41:** Additional federal or state regulatory programs or expansion of existing programs
19 will be reviewed on a case-by-case basis. Dare County reserves the right to support, oppose,
20 review, or comment on additional regulations that may impact Dare County and its economy.
21 Local Public Hearings by federal or state agencies should be extensively advertised and
22 conducted in Dare County before any new regulations are adopted or existing programs are
23 expanded.

24 **Response:** As discussed under Policy #40 above, the NPS has engaged in extensive public
25 scoping and has received and considered comments from county officials and residents regarding
26 the proposed action. In addition, the NPS engaged in the negotiated rulemaking process to receive
27 input from multiple interest groups involved with this issue, a process in which both Hyde and
28 Dare counties participated. Chapter 5 of the attached draft ORV management plan/EIS details the
29 extensive public outreach process conducted by the NPS on this issue, including the public
30 meetings held to gain public and county input. As required by the NEPA process, all public
31 meetings or hearings have been or will be properly publicized. Several public meetings have been
32 conducted in Dare County and future meetings on the proposed action will be held there as well.

33 **Hyde County Policies**

34 **Policy #3:** Hyde County supports the frequency of shoreline access as defined by 15A NCAC
35 7M, Section .0300, Shorefront Access Policies.

36 **Response:** As discussed above, the proposed action is consistent with the policies under 15A
37 NCAC 7M, Section .0303. The proposed action ensures public access to the extent practicable
38 given the constraints of the Seashore's enabling legislation, its mission, NPS management
39 policies, and requirements pursuant to federal laws, including the ESA, the NPS Organic Act, and
40 Executive Order 11644 of 10972, amended by Executive Order 11989 of 1977. The proposed

1 action includes improvements for both pedestrian and vehicular access in several areas of the
2 Seashore, including access corridors at selected points and spits, improvements to the interdunal
3 road system, an increased number of ORV access ramps, and installation of primitive pedestrian
4 trails.

5 **Policy #31:** Hyde County supports the enforcement of local, state, and federal regulations and
6 programs that minimize the threat to life and property from flooding.

7 **Response:** The proposed action is consistent with state and federal floodplain regulations,
8 applicable NPS management policies, NPS Director's Order 77-2 (NPS 2003), and Executive
9 Order 11998. The implementation of the proposed action would manage the use of ORVs for
10 recreation and species management purposes, which would not have a measurable effect on
11 floodplains because driving on beaches, interior ORV routes, or along soundside ORV access
12 routes would not impact the natural function of the floodplain.

13 **Policy #51:** Hyde County recognizes the value of water quality maintenance and supports the
14 protection of fragile areas and the provision of clean water for recreational purposes.

15 **Response:** The proposed action does not propose any land or water uses that would cause the
16 degradation of water quality. To the contrary, the proposed action would result in an overall
17 decrease in the level of vehicle use in certain areas of the Seashore as a result of the seasonal
18 designation of SMAs at the Seashore. The proposed action would also result in increased
19 protection of vegetated wetlands by installing posts and signage to prevent damage to wetlands at
20 soundside ORV access points.

21 **Policy #118:** Hyde County generally supports projects that will increase public access to
22 shoreline areas.

23 **Response:** The proposed action ensures public access to shoreline areas to the extent practicable
24 given the constraints of the Seashore's enabling legislation, its mission, NPS management
25 policies, and requirements pursuant to federal laws, including the ESA, the NPS Organic Act, and
26 Executive Order 11644 of 10972, amended by Executive Order 11989 of 1977. The proposed
27 action includes improvements for both pedestrian and vehicular access in several areas of the
28 Seashore, including access corridors at selected points and spits, improvements to the interdunal
29 road system, an increased number of ORV access ramps, and installation of primitive pedestrian
30 trails.

31 **Policy #126:** Hyde County supports preservation of its commercial fishing industry.

32 **Response:** The proposed action would continue to allow access for commercial fishing
33 operations to the extent practicable, given the constraints of resource closures required for the
34 protection of sensitive species. Commercial fishing vehicles would be allowed to enter non
35 resource-based closures except for lifeguarded beaches. This action would allow the
36 Superintendent to modify the hours of night-driving restrictions for authorized commercial
37 fishing operations, outside of resource closures, to further ensure that this access is continued.
38 Therefore, the proposed action would be consistent with this county policy.

1 ***Conclusion***

2 Based on the evaluation of the land use plans for Dare and Hyde counties, the proposed action
3 (alternative F of the draft ORV management plan/EIS) is consistent with county policies to the
4 maximum extent practicable.

5 **North Carolina Dredge and Fill Law (NCGS-113-229)**

6 The proposed project would not result in any excavation or filling within any estuarine waters,
7 tidelands, or state-owned lakes; therefore, no further action is required regarding compliance with
8 NCGS-113-229.

9 **CONSISTENCY DETERMINATION CONCLUSION**

10 The preferred alternative evaluated in the ORV Management Plan/EIS for Cape Hatteras National
11 Seashore (the proposed action) protects federal and state-listed species while maintaining
12 pedestrian and vehicular access to the Seashore. The proposed action provides ORV access to
13 Seashore beaches to the maximum extent practicable, given the constraints of NPS management
14 policies, the Seashore's enabling legislation, and other federal regulations, including the ESA, the
15 NPS Organic Act, and Executive Order 11644 of 10972, amended by Executive Order 11989 of
16 1977. The NPS believes that, to the maximum extent practicable, the implementation of the
17 proposed action fully conforms to and is fully consistent with the enforceable policies of North
18 Carolina's approved Coastal Management Program.

19

1 **REFERENCES CITED**

2 Dare County

3 2003 *Dare County Land Use Plan*. July, 2003.

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5 2006 *Hyde County, North Carolina CAMA Core Land Use Plan*.

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18 2006 *Biological Opinion on Interim Protected Species Management Strategy*. U.S. Fish
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20 2007 *Amendment to the Biological Opinion for Cape Hatteras National Seashore's Interim*
21 *Protected Species Management Strategy*. Raleigh Field Office. April 24, 2007.

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23 *Interim Protected Species Management Strategy*. Raleigh Field Office. March 28,
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