

An 18' x 43' construction work barge may be located in the channel during the prosecution of this bridge maintenance. The work barge will move upon request by calling the bridge tender either on the land line (508) 672-5111 or on VHF channel 13 and 16.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible.

Should the bridge maintenance authorized by this temporary deviation be completed before the end of the effective period published in this notice, the Coast Guard will rescind the remainder of this temporary deviation, and the bridge shall be returned to its normal operating schedule. Notice of the above action shall be provided to the public in the Local Notice to Mariners and the **Federal Register**, where practicable.

This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 15, 2007.

**Gary Kassof,**

*Bridge Program Manager, First Coast Guard District.*

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## DEPARTMENT OF THE INTERIOR

### National Park Service

#### 36 CFR Parts 1, 3 and 7

RIN 1024-AD07

#### Boating and Water Use Activities

**AGENCY:** National Park Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** The National Park Service (NPS) is revising rules that regulate boating and water use activities in areas administered by the NPS. The rule is intended to address changing visitor use patterns, changing technologies, compelling boating and water safety issues, and the evolution of related statutory authorities. The goal is to provide for greater consistency with United States Coast Guard (USCG) regulations and state laws and regulations and to establish rules which will be more clearly understood by the visiting public, and which can be more effectively communicated and enforced by NPS personnel. Promulgation of the final rule will eliminate many requirements which are ineffective or out of date and will provide flexibility in managing safety, resource preservation, and public use needs throughout the National Park System.

**DATES:** This regulation becomes effective April 23, 2007.

**FOR FURTHER INFORMATION CONTACT:** Jerry Case, Regulations Program Manger, National Park Service, 1849 C Street, NW., Room 7241, Washington, DC 20240. Phone: (202) 208-4206. E-mail: [Jerry\\_Case@nps.gov](mailto:Jerry_Case@nps.gov).

**SUPPLEMENTARY INFORMATION:** The regulations contained in Parts 1 through 7 of Title 36 of the Code of Federal Regulations (CFR) are the basic mechanisms used by the National Park Service (NPS) to protect the natural and cultural resources of the parks and to protect visitors and property within the parks. Parts 1 through 6 are general regulations applicable to all areas of the National Park System, with some exceptions, while Part 7 contains special regulations, which have been found necessary for individual parks as supplements to the general regulations. Part 3 is specific to boating and water activities. The Part 3 regulations were last revised in 1983. Although amendments and additions have been made from time to time since 1983, this was usually in response to new situations for which the existing regulations were not sufficient. For example, personal watercraft (PWC) were addressed in 36 CFR 3.24, promulgated in April, 2000. Between 1983 and the present, the evolution of statutory authorities, changing visitor use patterns, new technologies, and continued boating and water safety issues coupled with evolving national trends to address such issues, all revealed that a comprehensive review of Part 3 regulations was needed.

A work group of experienced employees from a wide variety of parks with water-based recreation and resources management responsibilities was established to work on Part 3. The work group included an experienced State Boating Law Administrator, representing the National Association of State Boating Law Administrators (NASBLA). Park superintendents were asked to provide comments regarding boating and water safety issues apart from those addressed in the existing Part 3, and comments were received from sixteen parks and from the staff at the NPS Washington Office. All comments were evaluated by the workgroup. Some of the comments were incorporated into the proposed rule. Other comments were more appropriately addressed in section(s) of 36 CFR other than Part 3. Some comments, specific to an individual park's circumstances, are more appropriately addressed as special regulations in Part 7.

The NPS faced several situations where parks were unclear about enforcing USCG regulations and/or state laws and regulations. Specifically, an issue arose about the applicability of USCG regulations on a tour boat being operated on Crater Lake which is a non-navigable body of water. Lake Mead was also presented with a requirement to provide lifeguards on beaches because of Nevada state water use regulations. In addition to these specific questions, there has been some general confusion about the order of applicability or hierarchy of adopting USCG regulations and state boating safety laws and regulations in relation to NPS specific regulations contained in Part 3. The required order of applicability, or hierarchy, of laws and regulations on park waters is as follows:

1. Regulations in Title 36, Code of Federal Regulations (CFR) will apply over any comparable law or regulation.

2. Laws and regulations of the USCG adopted pursuant to § 3.2 (a) will apply over any comparable state law or regulation.

3. Non-conflicting state boating safety laws and regulations that are not addressed by either 36 CFR or by the USCG are adopted pursuant to 3.2(b). The NPS is not adopting state water use laws or regulations unless specifically indicated in Part 3.

Where the NPS, USCG, and State have a comparable but different rule, the NPS rule applies first, except where we have specifically adopted the more stringent rule in our regulation (See 3.10(a)(2)). The USCG rule will apply when no NPS rule exists and if the NPS and USCG do not have a rule then the State boating safety rule applies.

The work group took several factors into consideration while discussing regulations to be changed, deleted, or written anew. Those factors include compliance with the NPS mission, safety issues, resource protection issues, clarity of existing regulations, reducing NPS regulations where possible and the consistency of regulations with the USCG, the states, and among units of the National Park System to the extent possible. As a result of the review, the proposed changes to Part 3 are expected to be more clearly understood by the public and be more effectively communicated and enforced by NPS employees. In addition the changes will enhance the NPS focus on safety and resource preservation issues, provide flexibility to address changing technologies, maintain minimum regulation necessary to address safety and resource preservation and provide for greater consistency in enforcement

of NPS, USCG regulations and state boating safety laws and regulations.

**Section By Section Analysis**

*Organizational Summary*

The National Park Service (NPS) has prepared the following organizational summary to assist in the location and analysis of the final revisions.

*Numbering*

Old	New
3.1 Applicable Regulations .....	3.2
3.2 NPS Distinctive Identification	Deleted
3.4 Accidents .....	3.5
3.5 Inspections .....	3.4
3.6 Prohibited Operations .....	3.8
3.7 Noise Abatement .....	3.14
3.20 Water Skiing .....	3.11
3.21 Swimming and Bathing .....	3.15
3.22 Surfing .....	Deleted.
3.23 SCUBA and Snorkeling .....	3.17
3.24 Regulation of Personal Watercraft.	3.9
<b>New Sections</b>	
3.1 Applicability and Scope.	
3.6 Operator Age for Power Vessels.	
3.7 Personal Floatation Devices (PFDs).	
3.10 Operating Under the Influence.	
3.12 Marine Sanitation Devices.	
3.13 Sunken, Grounded, Disabled Vessels.	
3.16 Swim Beach Areas.	
3.18 Submersibles.	

**Summary of Comments**

On August 26, 2003, the NPS issued a proposed rule requesting comments for 120 days (68 FR 51207). A total of 278 comments were received. We received ten comments from organizations, eight comments from government agencies, six comments from businesses and 254 comments from individuals. The following is a summary of the comments received and the NPS response to each comment.

16 U.S.C. 1a–2(h) authorizes the NPS to promulgate and enforce boating and water related regulations that are complementary to, and not in derogation of, the authority of the USCG to regulate waters of the United States. For this reason the NPS has worked closely with USCG Boating Safety Regulations division throughout the rulemaking process. The USCG provided a draft copy of the final rule for review and on July 25, 2005, the NPS met with the USCG to discuss their comments which have been included throughout the following section.

*Section 1.4 Terms*

1. One commenter suggested the NPS should include the definition of the International Code Flag “A” as its use pertains to diving activities within NPS areas.

*NPS Response:* Although the NPS recognizes that adding the definition of the International Code Flag “A” may be helpful to boaters operating on NPS waters, the USCG describes the International Code Flag “A” in Title 33 of the U.S. Code and therefore it would be redundant to re-define it in § 1.4.

Navigation Rules (NAVRULES) require the display of the International Code Flag “A” when a vessel’s maneuverability is limited when engaged in support of diving activities on navigable waters. These requirements are codified in 33 U.S.C. 2027(e) and are applicable to navigable and non-navigable waters subject to the jurisdiction of the NPS as adopted through § 3.2. The dive flag, however must be displayed when there is a diver in the water, whether or not the vessel’s maneuverability is restricted. The dive flag relates to the diver and the code flag “A” relates to the vessel with restricted maneuverability. The NPS recognizes that there may be occasions when the International Code Flag “A” must be displayed on NPS waters in addition to complying with the requirement to display a dive flag.

2. One commenter indicated the term “Flat Wake Speed” will cause confusion because a wake by definition is not flat. They further recommended the NPS use the term “No Wake or Idle Speed NTE 5 mph”.

*NPS Response:* The NPS considered the various terms that have been used to describe zones that are intended to require a slow speed. The determination of these zones is predicated on visitor safety needs and the protection of park resources. The terms include “no wake”, “wakeless speed”, “5 mph”, “slow speed” and idle speed. Since a boat underway and making way creates some wake regardless of speed, the term no wake and wakeless speed are not descriptive of the desired condition. The term 5 mph may describe the desired condition but is difficult for boaters to identify with since effective speedometers are rarely found on recreational vessels. Neither slow speed nor idle speed effectively addresses the desired condition as they are terms that allow for individual interpretation and/or variants in equipment. The term “flat wake speed” is the preferred NPS term since the desired condition, a minimal disturbance of water by a vessel in order to prevent damage or injury is

described. The ability of park staff to understand and educate the boating public as well as take proactive enforcement actions is enhanced.

3. One commenter recommended that the NPS adopt the EPA definition of sewage.

*NPS Response:* Our definition in this rule is identical to the USCG definition of sewage found in 33 U.S.C. 1322 and to EPA’s found in 40 CFR 122.2.

4. There were numerous comments concerning the definition of a vessel and the need for the NPS to define “non-traditional watercraft”. It is apparent that commenters have concerns about the inclusion of non-traditional watercraft within the scope of the definition of a vessel, specifically float tubes, and the thought that users would be required to carry PFDs on these non-traditional watercraft. There was also considerable comment about the economic impact to tube rental businesses that would occur if the NPS implemented this definition.

*NPS Response:* The NPS acknowledges the concerns raised by the comments related to the proposed rule definition of vessel and non-traditional watercraft. The NPS will use the statutory definition USCG uses for vessel, but with an exception for seaplanes on the water: “The term ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the water”, 1 U.S.C. 3. Using this definition the NPS no longer believes that a separate definition is needed for “non-traditional watercraft”. This view reflects judicial interpretations of the definition of vessel that read capable as meaning practically capable. The Court in *Evansville & Bowling Green Packet Co. v. Chero Cola bottling Co.*, 271 U.S. 19, 22, 46, S.Ct. 379, 380, 70 L.Ed. 805 (1926), developed a test to determine whether a vessel was “practically capable” of being used as a means of transportation on the water. The criteria included whether the craft was: (1) Used to carry freight from one place to another; (2) used as a means of transportation; (3) moved from place to place; and/or (4) exposed to the typical perils of navigation to which craft used for transportation are exposed.

The definition of vessel does not include float tubes, inner tubes, water play toys, or homemade devices that float unless they are modified in such a way with the addition of paddles, motors, or some other type of propulsion device. The statement of applicability in the USCG regulations for PFDs at 33 CFR 175.11 provides that the regulations only apply to vessels

“that are propelled or controlled by machinery, sails, oars, paddles, poles, or another vessel.” When they are modified with the addition of some type of propulsion and used as a means of transportation and/or moved from place to place then these devices become artificial contrivances and therefore, vessels in the revised NPS definition. With this definition, a surfboard by itself is not a vessel, but if a sail is attached then it is a vessel; or an inner tube by itself is not a vessel, but if a motor is attached then it is a vessel. Though these buoyant devices are not considered vessels under the regulations, the NPS has provided the superintendents authority in section 3.7(b) to regulate their use by requiring the wearing of PFDs when it is deemed necessary to protect the public. This management approach will allow individual park areas and superintendents to assess the economic impacts to small businesses of imposing these requirements.

5. The NPS should define a recreational boat accident.

*NPS Response:* The NPS disagrees with this comment. By adopting USCG regulations the NPS also adopts those definitions that are applicable to the regulations. By adopting USCG definitions we are seeking consistency in vocabulary for the boat operator.

### 3.2 Other Boating Laws and Regulations

6. Some commenters suggested that the NPS would “preempt any other comparable laws including USCG regulations”. The numerous cites “may confuse the reader”. Some indicated that the regulations should be changed to reflect exemptions under 33 CFR 175.17. Some commenters suggested that the NPS adopt regulations for the state where the park area is located.

*NPS Response:* Commenters were concerned with the NPS regulations conflicting with USCG or applicable State laws. It has always been the intent of the NPS to apply USCG and state laws and regulations whenever possible. In the adoption of these laws and regulations, it is also recognized that the NPS is adopting not only the regulations but the exemptions appearing within the regulations and that is true for 33 CFR 175.17. It should be noted that the NPS does have a separate and distinct responsibility to protect the cultural, historical, natural, and other park resources that may not receive adequate protection from other regulatory agencies. Therefore it is necessary to create specific NPS regulations and these regulations would preempt any other comparable laws and regulations.

### 3.3 Vessel Permit

7. One commenter was opposed to an increase in the use of permits on NPS waterways, and was concerned about the potential expansion of permit use to include private non-powered boaters.

*NPS Response:* The NPS regulation codified in § 3.3 does not deviate significantly from the existing regulation pertaining to permits. This regulation clarifies the superintendent’s authority to establish permit requirements as detailed in 36 CFR Part 1 and serves to alert the public that permits to operate vessels may be required in NPS areas based upon considerations of factors in 36 CFR 3.3.

8. A commenter suggested the NPS should clearly identify the superintendent’s authority to establish permits related to boating.

*NPS Response:* The statutory authority is 16 U.S.C. 1a–2(h) and it is implemented in 36 CFR parts 1 and 3, setting forth the park superintendent’s authority to require and issue permits for the purpose of regulating activities consistent with applicable legislation and federal administrative policies. It is based upon a determination that such action is necessary in consideration of public health and safety, protection of park resources, weather and park management objectives. It also recognizes one of the primary missions of the NPS, the protection of natural, cultural, historic and other park resources. It also recognizes the need for scientific research, implementation of management objectives and responsibilities, equitable allocation and use of park facilities or avoidance of conflict among visitor use activities.

9. One commenter suggested that the NPS should require all boating activity restrictions be based on an equitable balance of the needs of all park users and any outright prohibitions should only be approved by a part 7 regulation.

*NPS Response:* The NPS agrees that an equitable balance of the needs of all park users should be considered along with other criteria detailed in 36 CFR part 1 in the determination of requirements for the issuance of a permit. Each proposed action, including all closures, public use limitations or restrictions by the NPS, is evaluated to determine appropriate publication as either a part 7 regulation or in the Superintendent’s Compendium as required by 36 CFR 1.5(b). Among the factors evaluated are the significance and duration of the impact of the NPS action upon the public.

### 3.4 Vessel Inspection

10. Some comments were received surrounding the definition of

“authorized person” and what authority does the NPS have to board a vessel “at any time” similar to USCG authority.

*NPS Response:* Authorized person is currently defined in 36 CFR 1.4. This is not a change with this rulemaking. It should be noted that in our current regulations authorized persons have the authority to stop and board a vessel to examine documents, licenses or permits related to the operation of the vessel as well as to determine compliance with regulations pertaining to safety equipment and operation, 36 CFR 3.5(a).

### 3.5 Boating Accidents

11. There were several comments related to accidents, reporting of accidents and the threshold value of when to report an accident. The comments indicated that the NPS should defer to the state in which the park was located.

*NPS Response:* By adopting USCG regulations in 33 CFR 175.51–59 the NPS is in concert with all applicable USCG regulations related to the reporting of boat accidents. The NPS is in consultation with the USCG regarding their requirements related to the reporting of boat accidents and we will ensure that necessary USCG information is captured in our new reporting system. Until the new system is in operation the Service will use the existing OMB approved form for reporting boating accidents. The NPS needs to receive accident reports for agency statistical analysis of visitor safety incidents. Therefore, each park unit is encouraged to develop standard operating procedures that include sharing of accident information with their state boating enforcement agencies. States are required to furnish all accident information to the USCG.

### 3.6 Operator Age

12. One commenter stated that the language in paragraph § 3.6 was confusing and could preclude young people that have completed a boater education program from operating a motorboat. Another commenter stated that the NPS should require that all recreational boaters on NPS waters complete any and all mandatory state boater safety education requirements.

*NPS Response:* The NPS agrees that the language could be misinterpreted and therefore has made changes to clarify that language. We have also provided for adoption of mandatory state boater education requirements for boaters of all ages. NPS boating regulations adopt state law. If a state law requires boater safety education, then NPS will enforce that requirement on park waters.

13. Many of the commenters commended the NPS for establishing minimum age requirements for boat operation.

*NPS Response:* The NPS agrees that a minimum age requirement is necessary for boating safety. The NPS regulations will continue to defer to state boater age requirements where they exist.

### 3.7 Personal Flotation Devices

14. Several commenters requested that Type V PFDs be included as appropriate flotation devices when used in accordance with the label.

*NPS Response:* The NPS agrees that Type V PFDs are a USCG approved PFD when used as intended by the manufacturer. Therefore the NPS is adopting all USCG regulations regarding PFD wear and carriage contained in 33 CFR part 175, including the use of Type V PFDs.

15. Several commenters were concerned that the NPS was mandating the wearing of PFDs while floating on riverways.

*NPS Response:* Under the proposed rules, the wearing of PFDs would have been required during certain boating activities like river floating. However, the NPS will use the USCG statutory definition in 1 U.S.C. 3 but modified slightly by including an exception for seaplanes on the water. The USCG applicability clause for PFD carriage in 33 CFR 175.11 exempts the requirement to wear or carry a PFD on some buoyant devices such as innertubes which would be used for floating on a riverway. The NPS in 36 CFR 3.7 specifically provides the authority for a Superintendent to determine if the mandatory wearing or carriage of a PFD should be required for the use of watercraft such as an innertube. This authority may be necessary to provide for boater safety. The NPS is adopting the USCG regulations, and where applicable, State regulations, on wearing and carriage of PFDs.

16. One commenter felt that all children under 13 should be required to wear PFDs on all park waters.

*NPS Response:* The NPS is adopting USCG regulations for wearing and carriage of PFDs, including those regulations that apply to children under the age of 13. We are also adopting State regulations, where they exist, for wearing PFDs by children under 13. The NPS retains the authority for a Superintendent to determine when the mandatory wear or carriage of a PFD could be required, including mandatory wearing by children under 13.

17. One commenter supported the Superintendent's authority to require wearing of PFDs under certain

conditions or during certain activities and one commenter disagreed with this authority.

*NPS Response:* The NPS feels that it is necessary to provide some flexibility to individual Superintendents at a variety of park areas to address boating safety issues. There are a number of different waterways throughout the National Park System and no one regulation could address all safety concerns. Individual Superintendents are aware of their park's issues and can address those safety concerns by establishing specific PFD requirements as needed for the safety of park visitors.

### 3.8 Prohibited Operations

18. One commenter asked the NPS to clarify what a designated launch site was under paragraph 3.8 and how it affects the launching of non-traditional watercraft.

*NPS Response:* The superintendent will determine what a designated launch site is based on resource management concerns and other factors. Launch sites could be as specific as traditional formed concrete boat ramps, graveled access points to a waterway or the entire shoreline of a river. The launching of various types of watercraft will depend on the types of areas designated for launching at individual parks. Because of the variety of waterways throughout the National Park System, this designation of launch sites needs to be left to the discretion of the park Superintendent. The NPS feels it is necessary to have "designated" launch sites in order to protect park resources along the body of water.

19. One commenter indicated that in paragraph 3.8(b)(3)(ii)(B) the NPS was inconsistent in its use of terminology for non-traditional watercraft.

*NPS Response:* We agree and have changed the terminology in that paragraph, which is now renumbered as 3.8(b)(4)(ii).

20. One commenter stated that in paragraph 3.8(b)(3)(ii)(D) (now renumbered as 3.8(b)(4)(iv)) we replace the phrase "manually propelled, anchored, or drifting" with the word "any" so that the flat wake distance requirement applies to all vessels.

*NPS Response:* The NPS is concerned about the lack of maneuverability in "manually propelled, anchored, or drifting" vessels and thus reduced other vessels' speed to flat wake within 100 feet of these vessels. Power driven vessels have the ability to maneuver when in proximity to each other; therefore, a reduced speed when in proximity is not required. Additionally, if other speed and proximity regulations

exist within the State regulations, the NPS defers to the State.

21. One commenter stated that the regulations should require the marking of swimming beaches with buoys to increase boater awareness. They also suggested that no swimming beaches be designated in narrow channels to avoid conflicts between boaters and swimmers.

*NPS Response:* The NPS agrees that swimming areas should be delineated with buoys whenever possible. However, in some circumstances such as swimming areas along the open ocean, buoys may not be practical or other methods of delineating swimming areas may be used such as poles and indicators on the beach that are visible to boaters in the water. Additionally, in accordance with paragraphs 3.16 and 3.17, the Superintendent may close or restrict areas such as narrow channels to swimming for safety and other appropriate reasons.

22. One commenter asked that the NPS add language to prohibit being on, or holding onto, a swim platform or ladder while the boat engine is running in order to reduce exposure to carbon monoxide.

*NPS Response:* The NPS agrees that prohibiting this activity would be a benefit to the public and that exposure to carbon monoxide is a serious health issue in the boating community. According to case incident reporting records for the National Park Service during a 9 year period (1993–2001) there were 9 attributed contributed to carbon monoxide poisoning on Lake Powell alone. In the last 14 years there were over 120 non-fatal carbon monoxide poison cases, all boating related, within the National Park System. Accordingly, the language in § 3.8 has been modified to reflect this new prohibition which prohibits holding on while the vessel is operating, not just when the vessel is moving.

23. One commenter said that the prohibitions in § 3.8 seemed redundant with existing laws governing malicious and dangerous behaviors.

*NPS Response:* The NPS generally disagrees with that observation. Most of the prohibitions identified in § 3.8 are unique to NPS areas. Those paragraphs that may be redundant were included here to provide consistency in interpreting a variety of terms used in boating behaviors throughout the States such as careless, negligent, grossly negligent, etc. The NPS did review the included paragraphs and determined that the USCG already addresses the issue of attaching to or interfering with navigational aids in 33 CFR 70.05.

Therefore that paragraph has been removed.

### 3.9 Personal Watercraft

24. Many commenters requested the NPS maintain a system-wide prohibition on PWC operations.

*NPS Response:* The NPS will continue to comply with the requirements in § 3.9 which prohibit the operation of PWCs except when authorized through special regulations.

25. One commenter said that PWC use should be authorized except where prohibited by special regulation.

*NPS Response:* In regulations promulgated in April 2000, the NPS determined that PWC use is generally inappropriate in units of the National Park System. The NPS recognizes, however, that there are units where PWC use may be appropriate considering the purpose for which the area was created and other factors. The NPS will continue to comply with the requirements in § 3.9, which prohibit the operation of PWCs except when authorized through special regulations.

26. One individual commented that the use of inflatable PFDs should not be allowed on PWCs.

*NPS Response:* The NPS is adopting all USCG regulations pertaining to the wearing and carriage of PFDs, which apply to PWCs as well as other types of vessels. All Coast Guard approved inflatable PFDs have on their label the statement: "Not approved for use on personal watercraft, for white water paddling, or for waterskiing, kneeboarding, or similar towed uses." If the USCG approves inflatable PFDs for such activities in the future, NPS regulations will allow their use.

27. One commenter said that the attaching of lanyards to the operator should apply to all motorboats and not just PWCs.

*NPS Response:* The NPS strives to be consistent in its application of regulations to all vessels. The NPS recognizes that the nature of the configuration of a PWC is such that the operator rides on instead of in the vessel creating a greater need for the wearing of the lanyard to the "cut-off" switch for safety reasons. Currently 42 states require the use of a lanyard on PWCs. The safety risks are not as great with a traditional hull configuration; therefore, the NPS does not require the use of the lanyard but encourages its use by the boating public.

28. One commenter said that § 3.9(b)(4) is not needed because it is redundant with regulations found in § 3.8(b).

*NPS Response:* In § 3.9(b)(4), the NPS recognizes that there are certain

maneuvers that PWCs can perform more easily than other vessels that are dangerous to the operator and passengers as well as other vessels in the area. Wake jumping and similar maneuvers are not specifically addressed in § 3.8(b).

### 3.10 Operating Under the Influence

29. One commenter supported the new boating under the influence requirement.

*NPS Response:* The NPS agrees and those regulations are consistent with the driving under the influence regulations found in 36 CFR Part 4. Paragraphs (a) through (c) of § 3.10 address two individual offenses. These provisions apply whether the alcohol or drugs were obtained legally or not. The first is a standard prohibition against operating a vessel while under the influence of alcohol or drugs. The elements necessary to prove a violation of this provision can be demonstrated through descriptions of observations made by the arresting officer and witnesses, physical evidence and the results of field tests conducted by the officer at the scene. The second offense involves operating a vessel while the alcohol concentration in the operator's blood is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. The elements necessary to prove a violation of this provision can be shown only through the results of chemical or other quantitative tests.

30. A couple of commenters said that the NPS should adopt USCG operating under the influence regulations and/or state blood alcohol content (BAC) levels.

*NPS Response:* The NPS regulations are similar to USCG regulations found in 33 CFR Part 95. However, the USCG defers to the state blood alcohol level even if it is a higher threshold than .08 BAC. For consistency with a Presidential Proclamation for operating a motor vehicle while under the influence of alcohol, the NPS will maintain a BAC level of .08 for all boating and driving under the influence violations. As a result, the NPS will not adopt USCG regulations for boating under the influence.

31. One commenter said that NPS boating under the influence regulations may be redundant to existing laws, while using inner tubes in public while under the influence is already prohibited, along with its accompanying behavior.

*NPS Response:* The NPS agrees that it is redundant in some situations but not all operators under the influence are disorderly. The boating under the influence regulation will apply to all

operators under the influence, even those not covered with the existing disorderly conduct regulation.

### 3.12 Waterskiing

32. One commenter said that in this section, the NPS does not provide the same option for adopting state regulations as found in other sections. They said that setting a minimum age for observers could be in conflict with state regulations and confuse the public.

*NPS Response:* The NPS agrees that this regulation could conflict with state regulations, but we want to place a specific emphasis on visitor safety and are concerned that a child under the age of 12 may not be a capable observer to ensure the safety of the person being towed. According to NASBLA, a majority of states that set a minimum age for the observer, have 12 years of age as the minimum requirement. This regulation will allow the NPS to be consistent with the majority of states who have an observer age requirement.

33. One commenter recommended that the NPS have a requirement that tow ropes be 20' or longer to reduce exposure to carbon monoxide.

*NPS Response:* The NPS agrees and has added this requirement to the regulation.

### 3.13 Marine Sanitation Devices

34. Many comments asked that we continue the prohibition on black water dumping while one other commenter said that we should take into account alternative treatment processes and adequate pump out facilities when regulating the disposal of black water.

*NPS Response:* The NPS is mandated to comply with various laws, regulations and policies to protect park resources. Since water is a significant resource for such things as wildlife habitat, drinking water, and recreational activities, the NPS strives for the highest water quality status. The discharge of black water is not consistent in keeping with the mission of the NPS and the EPA does not authorize dumping of black water in fresh water areas. In water use areas where boaters are likely to go for several days away from a dock, and black water accumulation would occur, the NPS provides sufficient pump-out stations. It is not necessary to treat and discharge black water under those circumstances.

35. Many people commented that gray water be banned. Another commenter said that gray water discharge should not be regulated.

*NPS Response:* The NPS is not prohibiting the discharge of gray water. Gray water is not defined as a pollutant in the Federal Water Pollution Control

Act and does not contain the contaminants found in Marine Sanitation Devices (MSD) that degrade water quality. The NPS will continue to monitor additional information from EPA and USCG in assessing the discharge of gray water.

36. One commenter recommended that the NPS adopt USCG, EPA or state sewage or MSD requirements.

*NPS Response:* The NPS will adopt USCG, EPA or state sewage or MSD requirements and/or regulations when they do not conflict with the special provisions found in section 3.13. The NPS prohibits dumping of sewage, treated or un-treated, into any body of fresh water and limits accidental discharge of MSDs by requiring the locking or securing of the mechanism. It was recommended that the NPS allow the discharge of treated sewage into salt water areas. The discharge of untreated sewage is prohibited under Federal law within the navigable waters of the United States and the discharge of treated sewage by vessels is prohibited under either Federal or State law in many bodies of water where recreational boaters operate. The NPS understands that in some situations vessels may traverse through park salt water areas from areas where regulations allow the dumping of treated sewage. They would then be out of compliance when in the park. For this reason we have changed the final rule to reflect this concern.

In salt water areas surrounded by protected marine waters the park superintendent has the ability to promulgate a special regulation to modify this section.

### 3.15 Vessel Noise

37. Several commenters said the paragraph on vessel noise levels is incomplete and not enforceable.

*NPS Response:* The NPS disagrees. The testing procedures listed are acceptable standards found in the NSBLA Model Act for Motorboat Noise and the National Marine Manufacturers Model Act which prescribe sound decibel levels and testing standards. The regulation allows for either testing while the vessel is underway or stationary. This new approach will make it easier for field enforcement of noise standards.

38. Several commenters recommend that the NPS update noise standards and reduce noise levels equivalent to that of four-stroke engines.

*NPS Response:* The NPS regulations are generally consistent with the standards found in the NSBLA Model Act for Motorboat Noise and the National Marine Manufacturers Model Act which prescribe sound decibel levels and testing standards. The NPS

will encourage individual parks to more rigorously enforce these regulations to enhance the visitor experience by reducing noise violations.

39. One commenter stated that the NPS must not adopt any boating regulations that deviate from the authority of the USCG.

*NPS Response:* NPS boating regulations primarily rely upon USCG regulations for the regulation of park waters. However there are situations unique to park areas that are not covered by USCG regulations. In those situations the NPS develops and adopts specific regulations. These regulations are not a deviation from but rather address situations necessary for protection of park resources and the safety of park visitors.

40. A number of commenters say that where USCG regulations are not applicable, NPS should adopt state regulations because this would be less confusing to boaters and increases compliance.

*NPS Response:* The NPS agrees. Part 3 regulations adopt state regulations with the intent of applying state regulations where USCG regulations do not address these situations. The NPS further agrees that this approach allows for increased compliance from the boating public.

41. Several commenters stated that USCG laws and regulations should be at the top of the NPS boating and water use hierarchy with state law as second and NPS regulations last.

*NPS Response:* It's the goal of the park service to adopt and enforce USCG regulations when they apply and do not conflict. Before the NPS actually develops a regulation we look to determine whether the states have current regulations to address these situations. If state boating laws adequately address the situation then the NPS will adopt state law rather than creating a separate regulation. Unfortunately there are situations in park areas not addressed by USCG or State regulations that require the NPS to develop specific regulations.

42. One commenter stated that we should standardize regulations with other agencies to the extent that the regulations remain compliant with mandates of the NPS Organic Act.

*NPS Response:* NPS agrees. NPS will adopt and enforce the regulations of the other agencies when this action will also satisfy our responsibilities under the NPS Organic Act and the enabling acts for the individual parks.

43. One commenter stated that where state regulations are applied in NPS areas with overlapping jurisdictions of

more than one state, the stricter state requirement should apply.

*NPS Response:* At this time the NPS believes the appropriate approach is to apply the law of the state in which the boating activity is occurring. It would be confusing to the boating public to enforce one law in an area where two conflicting state laws exist. Until we can be assured the approach proposed by the commenter would not cause unreasonable confusion for the park visitor, we will continue to enforce the two different state laws.

44. One commenter stated that superintendents should not have compendium authority to ban or restrict boating usage.

*NPS Response:* NPS regulations at 36 CFR 1.5 address when a superintendent has the authority to close or restrict park visitor activities. This regulation includes the criteria that must be satisfied before the decision is made and provides two approaches for implementing any restrictions. These two approaches are the superintendent's compendium and special regulations. Under either approach the superintendent would only have the authority to take such action generally for the purposes of ensuring public safety and protection of park resources as described by the regulation.

45. Several comments concern the use of two stroke engines on park waters.

*NPS Response:* The NPS believes that EPA regulations prohibiting manufacturing of carbureted and electronic fuel injected (EFI) two stroke engines after 2006 provides generally for long-term protection of park waters through the phasing out of selected two stroke engines.

46. One commenter stated that we failed to address permeation losses to the atmosphere through emissions of hydrocarbons.

*NPS Response:* We think this issue is beyond the scope of this rulemaking and do not have any information to support rulemaking.

47. A comment was received suggesting NPS should prohibit service-wide certain water-based activities, such as parasailing, use of hovercraft and the use of submersibles, as not being appropriate in NPS areas.

*NPS Response:* NPS is sensitive to appropriateness of activities allowed within parks. In the case of the examples given, the NPS evaluated the activities and determined that parasailing and the use of submersibles may be appropriate activities but use of a hovercraft continues to be inappropriate. The NPS will continue to evaluate individual water-based

activities for appropriateness as visitor trends and technologies change.

48. Two commenters raised concerns that NPS has not completed PWC special regulations.

*NPS Response:* The promulgation of regulations to authorize PWC use in individual parks is not within the scope of this rulemaking, but rather is occurring through separate rulemaking processes to promulgate special regulations for codification in 36 CFR part 7.

49. One commenter expressed concerns about not having adequate staffing to enforce boating regulations.

*NPS Response:* Staffing is always an issue and many parks will maintain partnerships with USCG and state boating officials to provide for increased enforcement. These regulations combined with our enforcement partnerships will provide a higher level of enforcement, a greater consistency in enforcement and will be more clearly understood by the visiting public and can be more effectively communicated and enforced by NPS personnel.

50. One commenter stated that we should address the dangers of carbon monoxide from boats and houseboats in final rulemaking.

*NPS Response:* NPS agrees. This final rule addresses the dangers of carbon monoxide while boating. Exposure to carbon monoxide is a serious health issue in the boating community. According to case incident reporting records for the National Park Service during a 9-year period (1993–2001) there were 9 fatalities contributed to carbon monoxide poisoning on Lake Powell alone. In the last 14 years there were over 120 non-fatal carbon monoxide poison cases, all boating related, within the National Park System. Changes have been made accordingly to §§ 3.8 and 3.12 to reduce the public's exposure to CO while boating.

51. One commenter stated it supported NPS changes in its method for noise enforcement.

*NPS Response:* NPS agrees. The new approach will make it easier for field enforcement of noise standards.

52. One commenter stated that the NPS needed to address amplified noise with a "plainly audible" standard.

*NPS Response:* Amplified noise is currently regulated by 36 CFR 2.12(a)(1). We think this regulation is sufficient for amplified noise problems on watercraft.

53. One commenter stated that the current standard of 82 dBA @ 82 feet is very weak.

*NPS Response:* The rule proposed for noise testing is modeled after the NASBLA model act. This act has also

been adopted in whole or part by many states. The standards adopted are SAE J-2005 and SAE J-1970.

54. A commenter stated that a dive flag should not be displayed unless diving activity is in progress.

*NPS Response:* NPS agrees. The regulation has been changed accordingly.

55. A commenter stated the proposed rule does not address the use of dive flag for night-time diving.

*NPS Response:* NPS agrees. The regulation has been changed to require illumination of dive flag for any diving occurring between sunset and sunrise. The illumination of the dive flag does not meet NAVRULES required lighting and may not consist of lights that may be confused with navigation lights or ATON lights.

56. A commenter expressed concerns about the use of dive flags in narrow channels where boating activity would be unduly restricted.

*NPS Response:* NPS acknowledges the concern with diving in narrow channels but believes the best approach for addressing this issue is for superintendents to determine whether restrictions are necessary for public safety and safe navigation.

57. Two commenters stated the proposed rule does not address the need for displaying the international code flag A.

*NPS Response:* The international code flag A (Alpha) is defined, and its use regulated, in USCG rules. In § 3.2 the NPS adopts applicable laws and regulations of the United States Coast Guard. The USCG laws and regulations are found in Title 14 United States Code, Title 33 United States Code, Title 46 United States Code, and 33 CFR Chapter 1, 46 CFR Chapter I and III and 49 CFR Chapter IV. The dive flag for the diver does not meet the NAVRULES requirement to display a Code Flag "A", if the vessel's maneuverability is restricted.

#### Changes to the Final Rule

In response to public comments, the NPS has made the following changes to the final regulation:

Section 1.4—There were numerous comments concerning the proposed definition of a vessel and the need for the NPS to define "non-traditional watercraft". It is apparent that commenters have concerns about the inclusion of non-traditional watercraft within the scope of the definition of a vessel, specifically float tubes (innertubes), and the thought that users would be required to carry PFDs on these non-traditional watercraft. The proposed definition deviated too much

from the widely accepted USCG definition for vessel and had the potential to create controversial situations and confusion. Therefore the NPS will be using the USCG statutory definition found in 1 U.S.C. 3, modified with an exception for seaplanes on the water. In the USCG definition for vessels all types of artificial contrivance are included if they can be used as a means of transportation, moved from place to place and/or exposed to perils of navigation. If the (watercraft) artificial contrivance is equipped with a means of propulsion such as oars, paddles, paddlewheel, motor, sail, etc. it would then be held to the various regulations required of a vessel of that size. Superintendents will still have the authority in § 3.7(b) to regulate the use of non-traditional watercraft not meeting the vessel definition. This means that the Superintendent can require that a PFD be worn or carried on any type of watercraft, on designated waters and/or during designated water based activities. That decision is made on a park-by-park basis.

Section 3.2—The language in paragraph (a) was changed slightly to further clarify the intent of the paragraph and the adoption of USCG laws and regulations.

Section 3.3—Commenters raised concerns about the ambiguity of the term "or other factors" when referring to the issues the superintendent might take into consideration when requiring a permit for use of a vessel. Commenters asked that the factors considered by the superintendent be specific when requiring a permit and in NPS response the term was removed. The remaining factors were considered specific enough by the commenters.

Section 3.5—The language was changed in paragraph (c) to require the superintendent to forward all boating accident reports to the appropriate reporting authority, usually the State. These reports should be submitted within the timeframes required by 33 CFR 173.55. All States are required to forward boating reports to the USCG. This way accident reporting requirements can be met with a single report.

Section 3.6—The title was changed to be broader since proposed paragraph (b) is a more general discussion of State law adoption and not just age requirements. Paragraph (c) was added to adopt State mandatory boater education requirements.

Section 3.7—Paragraph (a) now defers to the USCG for adoption of their requirements for the wearing or carriage of PFDs. However, the regulations also allow a superintendent to require the

wear or carriage of a PFD on park waters when the USCG does not, if a determination is made that such wear or carriage is necessary. The change also removes the requirement to comply with state laws on PFD wearing or carriage in order to simplify the regulation.

Section 3.8—The term hovercraft was removed from paragraph (a) since a commenter did not think it was appropriate to classify a hovercraft as a “vessel” by addressing its use in part 3. The NPS will pursue a clarification to part 2 that clearly states the prohibition on hovercraft while not attempting to classify it as an aircraft (where it is currently addressed) or as a vessel.

Paragraph (a)(5) is also removed because the regulations in 33 CFR 70.05 already address this issue sufficiently.

Paragraph (b)(4)(ii) (formerly (b)(3)(ii)(B)) was changed to state “fishing from shore” rather than just “fishing” to be clear that even though the person fishing may not be in the water, slow speeds in the proximity of the person fishing is still warranted.

Paragraph (b)(6) (formerly (b)(5)) was changed to expand the list of locations on the vessels where persons may not ride or hold on to when the vessel is moving or idling in place. These changes are in response to concerns that certain unsafe activities be prohibited at any speed, not just speeds above flat wake. The regulation continues to allow for exceptions during certain maneuvering activities.

Paragraph (b)(7) (formerly (b)(6)) was added to prohibit activities that put boaters in close proximity to vessel exhaust. This addition is in response to comments received about possible carbon monoxide exposure and poisoning from unsafe proximity to vessel exhaust when the vessel engine is operating, not just when the vessel is moving.

Paragraphs (b)(6) and (7) were renumbered (b)(8) and (9).

Section 3.12—paragraph (b)(6) was added to define the minimum length of a tow rope in response to comments regarding concerns over carbon monoxide exposure from being towed too close to the engine of a vessel.

Section 3.13—paragraph (a) and (b) were changed to apply to bodies of fresh water only. USCG regulations still apply in salt water areas. The language in paragraph (b) discussing the locking of MSD was changed to be consistent with USCG regulations at 33 CFR 159.7(b)(1–4) to reduce confusion to the public. Paragraph (c) was removed as being overly restrictive and expensive for boaters and paragraph (d) was renumbered as the new paragraph (c).

Section 3.15—this section was revised to update testing with the most recent standards adopted by the Society of Automotive Engineers (SAE) for noise level enforcement. This rule is modeled after the NASBLA model act and has also been adopted whole or in part by many states.

Section 3.18—language was added in paragraph (b) to be clear that “a dive flag must not be displayed unless dive ops are ongoing” in order to reduce confusion and safety risks of improperly identified underwater operations.

Paragraph (c) was added to require that dive flags be illuminated in reduced light conditions to provide additional diver safety.

The previous paragraph (c) was renumbered to paragraph (d) and terminology added to clarify the proximity to flag requirement.

The previous paragraph (d) was renumbered to (e) and language was changed to adopt all state laws or regulations pertaining to snorkeling, not just dive flag requirements.

#### Compliance With Other Laws

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

This document is a significant rule and the Office of Management and Budget has reviewed this rule under Executive Order 12866.

##### *Regulatory Flexibility Act*

I certify that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This rule affects vessel operation and imposes requirements that are generally already required by most states. There are no regulations proposed that would likely change the amount of users to an NPS unit nor are there regulations that impose any restrictions on concessions or other vessel or water related businesses.

##### *Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of \$100 million or more. This rule is not expected to have any economic affect on local communities or businesses because the scope of the regulations focuses on the way in which vessels are operated, not the amount of vessels to an area.

b. Will not cause a major increase in costs or prices for consumers,

individual industries, Federal, state, or local government agencies, or geographic regions. This rule has no association with costs for consumers nor does it impose any restrictions on businesses or governments of any kind.

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 rule has no association with businesses or uses outside NPS areas.

##### *Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, et seq.):

a. This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. This rule has no affect on government entities, only the visiting public.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year, i.e., it is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

##### *Takings (Executive Order 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. This rule is generally focused on safety regarding water use and vessel activity and does not impose any regulations on lands or waters outside the NPS or on any private property.

##### *Federalism (Executive Order 13132)*

NPS has examined today’s final rule pursuant to Executive Order 13132 and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rule does not have federalism implications because the rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

Further, no consultation is needed to discuss the preemptive effect of today’s rule. Rules of the U.S. Coast Guard can have preemptive effect in at least two ways. First, applicable statutes may contain express preemption provisions. In that circumstance, consultation would be inappropriate because the statutory command would preempt State law, not this rulemaking. Second, in addition to express preemption the Supreme Court has also recognized that



authoritative federal determinations that an area is best left unregulated have as much preemptive force as a decision to regulate. *Sprietsma v. Mercury Marine*, 537 U.S.51 (2002). While NPS has not identified specific State requirements that may be preempted by such determination by the U.S. Coast Guard, as such conflicts can arise in varied contexts in different States, NPS generally acknowledges that such conflicts may exist. As these conflicts arise outside of the context of this rulemaking consultation is not appropriate.

*Civil Justice Reform (Executive Order 12988)*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and does not meet the requirements of sections 3(a) and 3(b)(2) of the Order. This rule is focused on providing clearer interpretation of existing regulations and consistency with USCG regulations and state laws and regulations in order to make it easier for the visiting public to comply with regulations.

*Paperwork Reduction Act*

This regulation does not require an information collection under the Paperwork Reduction Act.

*National Environmental Policy Act*

We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act and have determined that this rule is covered by a categorical exclusion adopted by this federal agency in accordance with the Council on Environmental Quality regulations, 40 CFR parts 1500–1508. The DOI Manual contains the categorical exclusions applicable to the National Park Service and the exceptions of the use of a categorical exclusion. The effect of the categorical exclusion is to identify a category of activities that individually or cumulatively do not have significant effects on the human environment and therefore are exempt from the requirements to prepare an environmental impact statement. The federal action proposed in this rule is described in the categorical exclusion listed in the Departmental Manual at 516 DM 6, Appendix 7, Section 7.4.A(10) and none of the exceptions to the use of the categorical exclusions listed at 516 DM 2, Appendix 2 are applicable.

*Government-to-Government Relationship With Tribes*

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), Executive Order 13175, “Consultation and Coordination with Tribal Governments”, and 512 DM 2:

We have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects. This rule only pertains to water use and vessel operations on waters inside NPS boundaries and does not propose to change use patterns or amounts so is not likely to affect any tribes near an NPS unit with water use.

*Drafting Information:* The primary authors of this regulation were Jay Lippert, Fire Island National Seashore; Art North, Delaware Water Gap National Recreation Area; Bonnie Foist, Everglades National Park; Kym Hall, Coronado National Monument; Mike Tiernan, Solicitor’s Office, DOI and Jerry Case, Regulations Program Manager, National Park Service.

**List of Subjects**

*36 CFR Part 1*

National parks, Penalties, Reporting and recordkeeping requirements, Signs and symbols.

*36 CFR Part 3*

Marine safety, National parks, Reporting and recordkeeping requirements.

*36 CFR Part 7*

District of Columbia, National parks, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the National Park Service amends 36 CFR parts 1, 3 and 7 as follows:

**PART 1—GENERAL PROVISIONS**

■ 1. The authority for part 1 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460 1–6a(e), 462(k); D.C. Code 8–137, 40–721 (1981).

■ 2. Amend § 1.4 as follows:

■ A. Add the following terms in alphabetical order.

■ B. Revise the definition of “vessel.” The additions and revisions read as follows:

**§ 1.4 What terms do I need to know?**

\* \* \* \* \*

*Dive flag* means a flag not less than 12 inches square, red in color, with a white stripe running diagonally from the top of the staff to the opposite lower corner.

The white stripe shall be one-fifth the width of the flag.

\* \* \* \* \*

*Flat wake speed* means the minimum required speed to leave a flat wave disturbance close astern a moving vessel yet maintain steerageway, but in no case in excess of 5 statute miles per hour.

*Harbor* means a natural or artificially improved body of water providing protection for vessels, which may include anchorage, mooring or docking facilities.

\* \* \* \* \*

*Manned submersible* means any vessel that carries or is capable of carrying passenger(s) within the confines of the vessel below the surface of the water.

\* \* \* \* \*

*Power-driven vessel* means any vessel propelled by machinery.

\* \* \* \* \*

*Sailing vessel* means any vessel under sail provided, if propelling machinery is fitted, it is not being used.

\* \* \* \* \*

*Sewage* means human body waste or the waste from a toilet or other receptacle intended to receive or retain body waste.

\* \* \* \* \*

*Underwater diving* means the use of any apparatus, whether self contained or connected to a distant source of air or other gas, whereby a person wholly or partially submerged in water, can obtain or reuse air or any other gas or gasses for breathing without returning to the surface of the water. Underwater diving would include, but is not be limited to use of SCUBA, surface supplied air, mixed gas, or re-breathers.

\* \* \* \* \*

*Un-manned submersible* means any device operated by remote control, used or capable of being used, to search or collect below the surface of the water. This definition does not apply to a device being used lawfully for fishing.

\* \* \* \* \*

*Vessel* means every description of watercraft, or other artificial contrivance used, or capable of being used, as a means of transportation on the water. This definition does not apply to a seaplane on the water.

**PART 3—BOATING AND WATER USE ACTIVITIES**

■ 3. Revise part 3 to read as follows:

**PART 3—BOATING AND WATER USE ACTIVITIES**

Sec.  
3.1 What is the applicability and scope of this part?

- 3.2 Do other boating laws and regulations apply to me when I operate my boat on park waters?
- 3.3 Am I required to obtain a permit to operate a vessel in a park area?
- 3.4 For what purposes may my vessel be inspected?
- 3.5 Do I have to report an accident involving a vessel to the National Park Service?
- 3.6 What are the requirements to operate a power driven vessel?
- 3.7 What are the NPS Personal Flotation Device (PFD) requirements?
- 3.8 What vessel operations are prohibited?
- 3.9 May I operate my personal watercraft (PWC) in park waters?
- 3.10 What are the regulations regarding operating a vessel while under the influence of alcohol and/or drugs?
- 3.11 When is testing for alcohol or drugs required?
- 3.12 May I use a vessel to tow a person for water skiing or other similar activities?
- 3.13 What conditions apply to the use of Marine Sanitation Devices (MSD)?
- 3.14 Am I required to remove a sunken, grounded, or disabled vessel?
- 3.15 What is the maximum noise level for the operation of a vessel?
- 3.16 May I swim or wade in park waters?
- 3.17 What regulations apply to swimming areas and beaches?
- 3.18 May I snorkel or underwater dive in park waters?
- 3.19 May I operate a submersible within park waters?

**Authority:** 16 U.S.C. 1, 1a–2(h), 3.

**§ 3.1 What is the applicability and scope of this part?**

The applicability of the regulations in this part is described in § 1.2 of this chapter.

**§ 3.2 Do other boating laws and regulations apply to me when I operate my boat on park waters?**

(a) In addition to the regulations contained in this part, the NPS adopts applicable laws and regulations of the United States Coast Guard. The USCG laws and regulations are found in Title 14 United States Code, Title 33 United States Code, Title 46 United States Code, and 33 CFR chapter I, 46 CFR chapter I and III and 49 CFR chapter IV. NPS applies the adopted laws and regulations to vessels and their operation on all waters (navigable and non-navigable) subject to NPS jurisdiction. Therefore, Federal regulations authorizing an action by the “captain of the port” or another officer or employee of the United States Coast Guard, authorize a like action by the superintendent.

(b) Except to the extent that directives of the United States Coast Guard have expressly or implicitly preempted inconsistent state laws and regulations or as otherwise provided by subsection (a), vessels and their operation on all

waters subject to NPS jurisdiction are governed by non-conflicting boating safety laws and regulations of the State within whose interior boundaries a park area or portion thereof is located.

**§ 3.3 Am I required to obtain a permit to operate a vessel in a park area?**

Generally, you are not required to obtain a permit to operate a vessel in a park area. However, in certain circumstances, taking into consideration public safety, protection of park resources, and weather and park management objectives, the superintendent may require a permit for use of a vessel within a park area, under §§ 1.5 and 1.7, and will issue permits consistent with § 1.6 of this chapter.

**§ 3.4 For what purposes may my vessel be inspected?**

(a) An authorized person may at any time stop and/or board a vessel to examine documents, licenses or permits relating to operation of the vessel, and to inspect the vessel to determine compliance with regulations pertaining to safety equipment, vessel capacity, marine sanitation devices, and other pollution and noise abatement requirements.

(b) An authorized person who identifies a vessel being operated without sufficient life saving or firefighting devices, in an overloaded or other unsafe condition, as defined in United States Coast Guard regulations, or in violation of a noise level specified in § 3.15(a) of this part, may direct the operator to suspend further use of the vessel until the condition is corrected.

**§ 3.5 Do I have to report an accident involving a vessel to the National Park Service?**

(a) The operator of a vessel involved in an accident must report the accident to the superintendent as soon as practical, but in any event within 24 hours of the accident, if the accident involves:

(1) Total property damage of \$2000 or more; or

(2) Injury, or death or disappearance of a person

(b) If the operator is physically incapable of making the report, the owner or an occupant of the vessel must report the accident to the superintendent.

(c) Filing a report with the superintendent may satisfy applicable United States Coast Guard, State, and local accident reporting requirements. Superintendents will forward the accident report to the appropriate reporting authority in a timely manner that complies with the requirements of 33 CFR 173.55.

**§ 3.6 What are the requirements to operate a power driven vessel?**

(a) To operate a power-driven vessel on park waters, a person must be either:

(1) At least 16 years old; or

(2) Between 12 and 15 years old and accompanied on the vessel by a person at least 18 years old.

(b) If a park area is located within a State having different age requirements, then the applicable State law is adopted in lieu of paragraph (a) of this section.

(c) If a park area is located within a State having a mandatory boater education requirement, then that State requirement is adopted.

**§ 3.7 What are the NPS Personal Flotation Device (PFD) requirements?**

(a) All requirements in Title 33 CFR part 175 related to PFDs are adopted.

(b) The Superintendent may require that a PFD be worn or carried on designated waters, at designated times and/or during designated water based activities in accordance with §§ 1.5 and 1.7 of this chapter.

**§ 3.8 What vessel operations are prohibited?**

(a) The following operations are prohibited:

(1) Launching or operating an airboat.

(2) Launching or recovering a vessel, except at a launch site designated by the superintendent.

(3) Operating a power-driven vessel on waters not accessible by road.

(4) Operating a vessel in excess of a length, width, or horsepower restriction established by the superintendent in accordance with §§ 1.5 and 1.7 of this chapter. For the purposes of this paragraph, vessel length is measured according to criteria established in 46 CFR chapter I or 33 CFR chapter I.

(b) The following operations are inherently unsafe and therefore prohibited:

(1) Operating a power-driven or sailing vessel within 100 feet of a diver's flag except a vessel in support of dive operations, which may not be operated in excess of flat wake speed.

(2) Failing to observe restriction(s) established by a regulatory marker.

(3) Operating a vessel in excess of flat wake speed in designated areas.

(4) Operating a vessel in excess of flat wake speed within 100 feet of:

(i) A downed water skier;

(ii) A person swimming, wading, fishing from shore or floating with the aid of a flotation device;

(iii) A designated launch site; or

(iv) A manually propelled, anchored or drifting vessel. If the park is located within a State specifying different conditions, then that State law is adopted in lieu of this paragraph.

(5) Unless a designated area is marked otherwise, operating a power-driven or sailing vessel within 500 feet of a shoreline designated as a swimming beach. This prohibition does not apply in locations such as a river, channel, or narrow cove where passage is restricted to less than 500 feet. In such restrictive locations where swim beaches are designated, the operation of a vessel in excess of a flat wake speed is prohibited.

(6) Operating a power-driven vessel while a person is riding on the decking over the bow, gunwales, top edge of the transom, motor cover, or in any other unsafe position when the vessel is being operated. This provision does not apply

when that portion of the vessel is designed and constructed for the purpose of carrying passengers safely at all speeds or when the vessel is maneuvering for anchoring, docking or mooring.

(7) Operating a power driven vessel engine/s or generator with a person sitting, riding or hanging on to a swim platform or swim ladder.

(8) Operating a vessel, or knowingly allowing another person to operate a vessel in a negligent manner, by failing to exercise that degree of care which a reasonable person, under like circumstances, would demonstrate in order to prevent the endangering of the life, limb, or property of a person(s)

through the operator's lack of knowledge, inattention, or general carelessness.

(9) Operating a vessel or knowingly allowing another person to operate a vessel in a grossly negligent manner, by willfully and wantonly creating an unreasonable risk of harm to person(s) or property, regardless of whether the operator intended to cause harm.

**§3.9 May I operate my personal watercraft (PWC) in park waters?**

(a) A person may operate a PWC only in park areas where authorized by special regulation. Special regulations may only be promulgated in the 21 parks listed in the following table:

Name	Water type	State
Amistad National Recreation Area	Impounded Lake	TX
Assateague Island National Seashore	Open Ocean/Bay	MD/VA
Bighorn Canyon National Recreation Area	Impounded Lake	MT
Big Thicket National Preserve	River	TX
Cape Cod National Seashore	Open Ocean/Bay	MA
Cape Lookout National Seashore	Open Ocean/Bay	NC
Chickasaw National Recreation Area	Impounded Lake	OK
Cumberland Island National Seashore	Open Ocean/Bay	GA
Curecanti National Recreation Area	Impounded Lake	CO
Delaware Water Gap	River	PA/NJ
Fire Island National Seashore	Open Ocean/Bay	NY
Gateway National Recreation Area	Open Ocean/Bay	NY
Glen Canyon National Recreation Area	Impounded Lake	AZ/UT
Gulf Islands National Seashore	Open Ocean/Bay	FL/MS
Indiana Dunes National Lakeshore	Natural Lake	IN
Lake Mead National Recreation Area	Impounded Lake	AZ/NV
Lake Meredith National Recreation Area	Impounded Lake	TX
Lake Roosevelt National Recreation Area	Impounded Lake	WA
Padre Island National Seashore	Open Ocean/Bay	TX
Pictured Rocks National Lakeshore	Natural Lake	MI
Whiskeytown-Shasta-Trinity National Recreation Area	Impounded Lake	CA

(b) Where authorized, operation of a PWC on park waters is subject to the following conditions:

(1) No person may operate a PWC unless each person aboard is wearing a Type I, II, III, or V PFD approved by the United States Coast Guard.

(2) A person operating a PWC equipped by the manufacturer with a lanyard-type engine cut-off switch must attach such lanyard to his person, clothing, or PFD, as appropriate for the specific vessel.

(3) No person may operate a PWC anytime between sunset and sunrise.

(4) No person may operate a PWC by jumping the wake, becoming partially airborne or completely leaving the water while crossing the wake of another vessel within 100 feet of the vessel creating the wake.

(5) If a park area is located within a State that has more restrictive regulations for the operation of PWC, then applicable State law applies in lieu

of paragraphs (b)(1) through (b)(4) of this section.

**§3.10 What are the regulations regarding operating a vessel while under the influence of alcohol and/or drugs?**

(a) Operating or being in actual physical control of a vessel is prohibited while:

(1) Under the influence of alcohol, a drug or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or

(2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath.

(b) If State law that applies to operating a vessel while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits apply rather than the limits specified in paragraph (a) of this section.

(c) The provisions of this section also apply to an operator who is or has been legally entitled to use alcohol or drugs.

**§3.11 When is testing for alcohol or drugs required?**

(a) At the request or direction of an authorized person who has probable cause to believe that an operator of a vessel has violated provisions of § 13.10, the operator must submit to one or more testing procedures of the blood, breath, saliva or urine for the purpose of determining blood alcohol and/or drug content.

(1) Refusal by an operator to submit to a test is prohibited and proof of refusal may be admissible in any related judicial proceeding.

(2) Any test or tests for the presence of alcohol and drugs must be determined by and administered at the direction of an authorized person.

(3) Any test must be conducted by using accepted scientific methods and equipment of proven accuracy and

reliability operated by personnel certified in its use.

(b) The results of chemical or other quantitative tests are intended to supplement the elements of probable cause used as the basis for the arrest of an operator charged with a violation of § 13.10. If the alcohol concentration in the operator's blood or breath at the time of testing is less than alcohol concentrations specified in § 13.10(a)(2), this fact does not give rise to any presumption that the operator is or is not under the influence of alcohol.

(c) The provisions of paragraph (b) of this section are not intended to limit the introduction of any other competent evidence bearing upon the question of whether the operator, at the time of the alleged violation, was under the influence of alcohol, or a drug, or drugs, or any combination thereof.

**§ 3.12 May I use a vessel to tow a person for water skiing or other similar activities?**

(a) The towing of a person by a vessel is allowed only in designated waters, and in accordance with conditions established by the superintendent under §§ 1.5 and 1.7 of this chapter.

(b) Towing a person using a parasail, hang-glider or other airborne device may be allowed only in accordance with a permit issued by the superintendent under § 1.6 of this chapter.

(c) Where towing is designated, the following conditions apply:

(1) Towing is allowed only between the hours of sunrise and sunset.

(2) In addition to the boat operator, a person at least 12 years of age must be present to observe the action of the person being towed.

(3) A person being towed must wear a United States Coast Guard approved Type I, II, III, or V PFD.

(4) A person being towed may not commit any act in a manner that endangers, or is likely to endanger, any person or damage property.

(5) Operating a vessel that does not have the capacity to carry the person(s) being towed in addition to the operator and observer is prohibited.

(6) No person shall operate a power driven vessel using a tow rope 20 feet or less in length when towing a person.

**§ 3.13 What conditions apply to the use of Marine Sanitation Devices (MSD)?**

(a) Discharging sewage from any vessel, whether treated or not, in any body of fresh water is prohibited.

(b) The owner or operator of any vessel on park fresh water that is equipped with toilet facilities and/or a MSD that is capable of discharge, must lock or otherwise secure the valves or mechanism of the device. Acceptable methods of securing the device include:

(1) Closing the seacock and removing the handle;

(2) Padlocking the seacock in the closed position;

(3) Using a non-releasable wire-tie to hold the seacock in the closed position; or

(4) Locking the door to the space enclosing the toilets with a padlock or door handle key lock.

(c) The superintendent may modify the requirements of this section through a special regulation.

**§ 3.14 Am I required to remove a sunken, grounded or disabled vessel?**

(a) Except as provided in paragraph (b) of this section, the owners or authorized salvager of a sunken, grounded, or disabled vessel must remove the vessel, all component parts and equipment, and all associated cargo thereof in accordance with procedures established by the superintendent. In establishing removal procedures, the superintendent is authorized to:

(1) Establish a reasonable date by which vessel removal operations must be complete;

(2) Determine times and means of access to and from the vessel; and

(3) Specify the manner or method of removal.

(b) The superintendent may waive the requirements of paragraph (a) of this section or prohibit removal of the vessel, equipment, or cargo upon a written determination that:

(1) The removal would constitute an unacceptable risk to human life;

(2) The removal would result in extensive resource damage; or

(3) The removal is impracticable or impossible.

**§ 3.15 What is the maximum noise level for the operation of a vessel?**

(a) A person may not operate a vessel at a noise level exceeding:

(1) 75dB(A) measured utilizing test procedures applicable to vessels underway (Society of Automotive Engineers SAE—J1970); or

(2) 88dB(A) measured utilizing test procedures applicable to stationary vessels (Society of Automotive Engineers SAE—J2005).

(b) An authorized person who has reason to believe that a vessel is being operated in excess of the noise levels established in paragraph (a) of this section may direct the operator of the vessel to submit the vessel to an on-site test to measure the noise level.

**§ 3.16 May I swim or wade in park waters?**

Swimming or wading is allowed in waters, subject to closures or restrictions designated by the superintendent in

accordance with §§ 1.5 and 1.7 of this chapter.

**§ 3.17 What regulations apply to swimming areas and beaches?**

(a) The superintendent may designate areas as swimming areas or swimming beaches in accordance with §§ 1.5 and 1.7 of this chapter.

(b) Within designated swimming areas, the use of a surfboard or similar rigid device is prohibited.

(c) The superintendent may prohibit the use or possession of flotation devices, glass containers, kites, or incompatible activities in swimming areas or swimming beaches in accordance with §§ 1.5 and 1.7 of this chapter.

**§ 3.18 May I snorkel or underwater dive in park waters?**

(a) Snorkeling and underwater diving is allowed in park waters, subject to closures or restrictions designated by the superintendent in accordance with §§ 1.5 and 1.7 of this chapter.

(b) In waters open to the use of vessels, a diver must prominently display a dive flag during dive operations. A dive flag must not be displayed unless dive operations are ongoing.

(c) The dive flag must be illuminated when dive operations take place between sunset and sunrise. The dive flag illumination may not consist of lights that may be confused with navigation lights or aids to navigation lights.

(d) While on the surface, submerging or surfacing the diver must remain within a 100 feet horizontal radius of the diver flag.

(e) If State laws or regulations exist concerning snorkeling activities, those provisions of State law or regulation are adopted.

**§ 3.19 May I operate a submersible within park waters?**

The use of manned or unmanned submersibles may only occur in accordance with a permit issued by the superintendent under § 1.6 of this chapter.

**PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM**

■ 4. The authority citation for part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8–137 (1981) and D.C. Code 40–721 (1981).

**§ 7.45 [Amended]**

■ 5. In § 7.45, remove paragraph (e)(8) and redesignate paragraph (e)(9) as paragraph (e)(8).

**§ 7.48 [Amended]**

■ 6. In § 7.48, remove paragraph (d) and redesignate paragraphs (e) through (g) as paragraphs (d) through (f), respectively.

**§ 7.57 [Amended]**

■ 7. In § 7.57, remove paragraph (c) and redesignate paragraphs (d) through (h) as paragraphs (c) through (g), respectively.

**§ 7.70 [Amended]**

■ 8. In § 7.70, remove paragraphs (c) and (d) and redesignate paragraphs (e) through (g) as paragraphs (c) through (e), respectively.

**§ 7.79 [Amended]**

■ 9. In § 7.79, remove paragraph (c) and redesignate paragraph (d) as (c).

Dated: August 3, 2006.

**David M. Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

**Editorial Note:** This document was received at the Office of the Federal Register, National Archives and Records Administration, Washington, DC, on March 15, 2007.

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## ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

### 36 CFR Part 1191

RIN 3014-AA20

#### **Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines; Supplementary Material**

**AGENCY:** Architectural and Transportation Barriers Compliance Board.

**ACTION:** Final rule; supplementary material.

**SUMMARY:** The Architectural and Transportation Barriers Compliance Board (Access Board) revised its accessibility guidelines for the construction and alteration of buildings and facilities covered by the Americans with Disabilities Act and the Architectural Barriers Act in 2004. The Department of Transportation, General Services Administration, and United States Postal Service have adopted by

reference the revised guidelines as regulatory standards. The Department of Transportation has modified four sections of the revised guidelines that affect entities required to comply with the Department of Transportation's regulatory standards. This document adds notes to provide supplementary material on the agencies that have adopted the revised guidelines as regulatory standards. This document also adds a new appendix that reprints the modified sections of the revised guidelines adopted by the Department of Transportation for entities required to comply with the Department of Transportation's regulatory standards.

**DATES:** Effective March 23, 2007.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** The Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for establishing and maintaining guidelines to ensure that the construction and alteration of buildings and facilities covered by the Americans with Disabilities Act and the Architectural Barriers Act are accessible to individuals with disabilities. Other agencies are responsible for adopting the guidelines as regulatory standards. The agencies may modify the guidelines when adopting them as regulatory standards, provided the modifications are consistent with the guidelines.

The Access Board revised its accessibility guidelines for the construction and alteration of buildings and facilities covered by the Americans with Disabilities Act and the Architectural Barriers Act in 2004. 69 FR 44084, July 23, 2004. The Access Board published correcting amendments to the revised guidelines in 2005. 70 FR 45308, August 5, 2005. The revised guidelines and correcting amendments are codified in the July 1, 2006 edition of the Code of Federal Regulations (36 CFR part 1191) and consist of five appendices:

Appendix A—Table of Contents.  
Appendix B—Americans with Disabilities Act: Scoping (ADA Chapters 1 and 2).  
Appendix C—Architectural Barriers Act: Scoping (ABA Chapter 1 and 2).  
Appendix D—Technical (Chapter 3 through 10).  
Appendix E—List of Figures and Index.

As discussed below, three agencies have adopted by reference the revised guidelines as regulatory standards. The Access Board is adding notes to paragraphs (a) and (b) of § 1191.1 to provide readers supplementary material on the agencies that have adopted the revised guidelines as regulatory standards.

The Department of Transportation has amended its regulations implementing the Americans with Disabilities Act, and has adopted by reference Appendices B and D to this part as the regulatory standards for the construction and alteration of transportation facilities subject to its regulations, effective November 29, 2006. 49 CFR 37.9 and Appendix A to 49 CFR part 37, as amended at 71 FR 63263, October 30, 2006; and corrected at 72 FR 11089, March 12, 2007. The Department of Transportation has modified section 206.3 in Appendix B to this part; and sections 406, 810.2.2, and 810.5.3 in Appendix D to this part. The Access Board is adding a new Appendix F to this part that reprints the modified sections adopted by the Department of Transportation as a convenience for readers. Entities that are required to comply with the Department of Transportation's regulatory standards, must comply with the modified sections adopted by the Department of Transportation. The Department of Transportation has provided supplemental material on the modified sections in Appendix D to 49 CFR part 37.

The General Services Administration has published regulations implementing the Architectural Barriers Act, and has adopted by reference Appendices C and D to this part as the regulatory standards for buildings and facilities subject to its regulations. 41 CFR 102-76.65, as added at 70 FR 67786, November 8, 2005; amended at 71 FR 52498, September 6, 2006; and further amended at 72 FR 5942, February 8, 2007. The General Services Administration refers to its regulatory standards as the Architectural Barriers Act Accessibility Standard (ABAAS). ABAAS applies to the construction and alteration of facilities commenced after May 8, 2006; to leases awarded for lease construction buildings on or after June 30, 2006; and to all other leases awarded pursuant to solicitations issued after February 6, 2007. The General Services Administration has also revised its Facilities Standards for the Public Building Service PBS—P100 (March 2005), and has adopted ABAAS as a mandatory standard for the construction and alteration of General Services Administration owned buildings and