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Subject: Rebuttal to Dr. Berry
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I offer a limited number of talking points as follows:

- "Best available science" is widely used, but not necessarily fully agreed upon with respect to definition and details of what composes it. It can be referred to in both a generic and specific sense. The definition is still evolving. Perhaps a less contentious term is "incomplete" information.
- NPS has approached the recognized wildlife experts in the field relative to CAHAs protected species and been fully open to other research and information from the Neg Neg Committee and the general public if other information is available.
- NPS recognizes that the information for making decisions on protected species management is somewhat "incomplete" and that uncertainties exist. Even though it may be incomplete, NPS does believe it is the "best available" in the generic sense of the term. Regardless of whether the information is incomplete or best available, this does not necessarily constitute a valid reason to not go forward with management of subject species and the completion of the ORV management plan.
- Some of the public has taken the position that the current and past scientific process to make judgments on protected species management is deficient or doesn't constitute sound science. This opinion seems to gloss over the fact that "complete" scientific information is seldom available when management decisions are made and instituted. That's why it's sometimes referred to as "best available". It's also not necessarily a major issue since there is no requirement that information to make management decisions be fully complete. Incomplete information (lack of total scientific certainty) is permissible according to both the President's Council on Environmental Quality (40 CFR 1502.22) and tier-down Department of Interior regulations (Director's Order 12). Since absolutely certain information (100% confidence limits) is rarely available, information used for decision-making is qualified. The subject of "incomplete or unavailable information" and even "unknown or uncertain impacts" is recognized and addressed by both Council of Environmental Quality and Department of Interior law and guidance with respect to the NEPA process and has been for many years.
- The decision to gather more information when information is not considered complete is a judgment based on cost and time required to gather such information and potential impacts that may occur during the additional time that may be required. The National Park Service, while continuing to search for additional definitive information/research by recognized wildlife biology experts, is satisfied that sufficient information is available to make management judgments for the intermediate future, likely the next 5-10 years. Additionally, because NPS recognizes that uncertainties exist and to seek continuous improvement in its resource management practices, intends to employ the concept of "adaptive management" in CAHA resource management approach. This will allow for both additional research and on-the-ground realities to allow modification of management in the future when additional information and science is available. The framework for this adaptive management will be the Department of Interior

Adaptive Mangement Technical Guide.

- With respect to public review, the process which is being followed provides ample opportunity for public review and input when one considers that NPS is performing both the Regulatory Negotiation element and the National Environmental Policy element simultaneously. Those familiar with NEPA should understand that the entire process, which constitutes an "anchor" of federal environmental management law, was developed and implemented for the central purpose of providing the public with information and opportunities for input and inquiry with respect to agency decisionmaking. The NPS rejects any charge that the current process lacks full compliance with either the letter or intent of NEPA.
- Additionally and as a practical matter, the current process is being conducted in accordance with the Administrative Procedures Act (APA) since an Environmental Impact Statement (EIS) is being prepared in accordance with the National Environmental Policy Act (NEPA). Legal challenges to NEPA documents are brought under the APA which allows persons or entities to challenge federal government actions, including decisions such as rulemaking, formal adjudication, and informal decision making. Decisions under NEPA are generally considered to be informal. Under the APA, federal agencies are required to have statutory authority to act and to follow their own rules and regulations. APA's standards for review of agency actions under NEPA include determining whether an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or "without observance of procedure as required by law."
- Those that are of the opinion that current scientific information does not represent "best available" and therefore is not sufficient for making management decisions on CAHA protected species would seem to reinforce a decision for the non-accommodation of ORVs at Cape Hatteras. If the methods to protect the subject wildlife species cannot demonstrate the prevention of impairment of the resource, NPS is compelled to not allow them. The legal presumption is proposed ORV areas and trails that may adversely affect natural resources may only be allowed if the scientific information demonstrates the ORV trail will have no adverse effects on the natural resource values. Thus, the Executive Order places the burden on those advocating ORV areas and trails to provide scientific justification for measures that will prevent adverse impacts to natural resource values, or to demonstrate that suggested measures based on scientific studies or recommendations are not required.

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