

**CAPE HATTERAS NATIONAL
SEASHORE: NEGOTIATED
RULEMAKING FEASIBILITY REPORT**

PREPARED BY
THE CONSENSUS BUILDING INSTITUTE, CAMBRIDGE, MA
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UNITED STATES INSTITUTE
FOR ENVIRONMENTAL CONFLICT RESOLUTION

APRIL 4, 2006

EXECUTIVE SUMMARY

Introduction and Overview

In early 2005, the National Park Service (NPS) sought to explore the feasibility of using a consensus process to develop regulations for off-road vehicle (ORV) use within Cape Hatteras National Seashore (CAHA). NPS requested assistance from the U.S. Institute for Environmental Conflict Resolution, which worked with CAHA and stakeholders to select a team of neutral mediators to conduct a consensus process Feasibility Assessment. The assessment team consisted of Patrick Field, Managing Director of the Consensus Building Institute (CBI), Robert Fisher¹, of Fisher Collaborative Services (FCS), and Ona Ferguson and Veronica Morris of CBI.²

The purpose of this Feasibility Assessment is to evaluate whether a consensus-based negotiation process could be convened and, if so, whether it is likely to be successful in resolving issues around CAHA ORV management and regulations. This Feasibility Assessment is based on information gathered from interviews with 55 stakeholders regarding their experience with the current management of CAHA and their ideas for future management and regulations.

Description of the Assessment Process and Methodology

This Assessment is based on confidential, voluntary interviews with fifty-five (55) individuals who hold a range of views on ORV management at CAHA. The interviewees are affiliated with businesses, environmental groups, recreational and commercial fishing, local civic organizations, ORV groups, and other organizations concerned about ORV management at CAHA. Our interviewees gave us feedback on our draft Feasibility Assessment in June and July 2005. In August we released pre-convening applications, the forms stakeholder groups used to request that their group be on the Committee and through which they proposed members and alternates to represent their organization. We accepted the pre-convening applications in August and September 2005, while incorporating interviewee feedback on our draft Feasibility Assessment. After receiving the pre-convening application forms, we worked with stakeholder groups to determine who to recommend for committee membership. In December we made our preliminary recommendations for committee membership and draft Feasibility Report publicly available. We took public comment on these through January 2006. This final Feasibility Assessment incorporates the comments and feedback we received from interviewees and members of the public to the best of our ability to capture their questions, suggestions and concerns.

Please note that the assessment team's role is to provide an accurate, impartial analysis of the situation to assist the NPS and the other stakeholders in determining whether a consensus-based negotiation will meet their objectives. We do not advocate for any particular outcome or interest, and we conduct our work in a fair, deliberate, and non-partisan fashion.

¹ Greg Sobel and Kim Vogel of Environmental Mediation Services originally were selected as part of the assessment team with CBI. Following Mr. Sobel's unexpected death, Robert Fisher replaced him and Kim Vogel resigned from the team to attend to Greg's affairs. Robert Fisher was with RESOLVE, a non-profit environmental dispute resolution and consensus building organization, when he joined the assessment team and through October 2005.

² CBI is a non-profit organizations specializing in consensus-based solutions to public resource problems.

Negotiated Rulemaking Process

As explained in the interviews, the negotiated rulemaking process is based on the principle that agencies can create better regulations by developing new regulations jointly with the people affected by the contemplated regulation. Negotiated rulemaking is a consensus-based decision making process. The parties involved in the negotiation process agree in advance that they seek an agreement that all the members of the Committee can live with. The negotiated rulemaking process will run concurrently and be integrated with the National Environmental Policy Act (NEPA) process and study.

Description of the Situation

Cape Hatteras National Seashore (CAHA or the Park) was established in 1953. Of the 70 miles of Atlantic Ocean, beaches and inlets that front Bodie, Hatteras and Ocracoke Islands, CAHA encompasses approximately 53 miles of shoreline and inlet and 50 miles of sound-side habitats and beaches. The 13 miles of beach that comprise Pea Island National Wildlife Refuge are within the CAHA boundary, and are managed separately and under a different regulatory framework by the U.S. Fish and Wildlife Service (USFWS).

The use of ORVs to pursue recreational activities is popular in CAHA with certain visitors and attracts visitors throughout the year. Because ORV use may conflict with the protection of CAHA resources, including protected species, and with the use of CAHA for non-motorized activities, ORV use has been a much-discussed subject in the Outer Banks and beyond. Even though there are some marked ORV trails, concerns about resource loss and visitor conflicts continue to be unresolved issues. CAHA is required to have an ORV management plan and currently does not. These requirements stem from the Organic Act, the CAHA enabling legislation, 36 CFR 4.10 (b), and Executive Orders 11644 and 11989. Moreover, NPS received a Petition for Rulemaking on ORV management at CAHA under the Administrative Procedures Act from several environmental organizations and a Notice of Intent to Sue concerning protection of endangered species and consultation with the USFWS. A judge's recent order invalidating USFWS's Critical Habitat designation for the wintering piping plover is also at issue.

Findings: Summary of Key Themes

The following brief summary of the key points we heard in our interviews touches on the themes we heard most consistently and from a wide range of interviewees.

- Most people believe that ORV use, other uses, and protected species should be able to co-exist on the beach, though not necessarily on the same stretch of beach at the same time (and, not surprisingly, they differed in how this might work).
- There are concerns that protected species, as well as non-listed plants and animals, are being harmed due to unintentional or careless action by beach users and management action, and that wildlife species and plants are constantly at risk on the beach.
- There are concerns that the beach is gradually being taken away from ORV users and that ORV use prohibitions will become permanent, with accompanying effects on economics and activities that people love.

- There are likewise concerns that CAHA practices favor the interests of ORV users over other park users and resources.
- Many people are concerned that there are inadequate opportunities for wilderness-based recreation and that conflicts between those using ORV for recreation and those pursuing other forms of recreation need to be addressed.
- People want to avoid ad-hoc management of ORV use and to bring CAHA into compliance on ORV management through the certainty and predictability that a management plan and regulations will provide.
- All interviewees expressed an interest in the idea of using a negotiated rulemaking process.
- Many people believe the negotiated rulemaking process is the best way to address all of the needs and concerns.
- There is a range of willingness to participate in a negotiated rulemaking process, from enthusiastic to skeptical but willing, depending on how the process is structured and whether groups will refrain from pursuing litigation, political influence and other means to influence the process.
- There also is a range of views about the likelihood of success of a negotiated rulemaking process, from cautious optimism to skepticism about whether other stakeholders are willing to make compromises and find common ground.
- People need to understand and trust the information, science and other requirements justifying management decisions, including both biological and socio-economic impact data.
- People are aware of the legal, political, financial, resource, and other pressures on NPS.
- Many long-time residents have been frustrated and saddened by the present relationship between the community and NPS, want to improve it, and see the appointment of Mike Murray as permanent superintendent as a positive step.
- People are passionate about the place where they live and about their beliefs that protecting environmental resources is crucial.

This section is divided into 12 major subject areas that were consistently raised by the stakeholders the assessment team interviewed. These are: the unique and changing Outer Banks culture, economic impacts, park user conflicts, natural resources protection, ORV use and management, pressures on CAHA, relationship between the NPS and local communities, CAHA leadership, enforcement and staffing, approaches to managing ORV use, data and research needs, and process recommendations.

Review and Analysis of the Requirements for a Regulatory Negotiation

Based on our interviews and our analysis of the criteria in the federal Negotiated Rulemaking Act of 1990, we believe a regulatory negotiation for the CAHA situation will satisfy the requirements of the Negotiated Rulemaking Act, as more fully described below.

Recommendations for a Negotiated Rulemaking Process

Based on our interviews, analysis of that information, and on-going consultation with stakeholders, we have concluded:

In our best professional judgment, a consensus-based negotiation to develop a management plan and proposed implementing regulations can be convened, can yield

important benefits even if agreement is not reached, and has a modest chance of success if the conditions described below are met.

Our recommendation is based on the interviews, our analysis of the requirements for a negotiated rulemaking, our analysis of the current situation, and our experience with similar processes at other national seashores. Should the NPS decide to proceed, we suggest that the process would include the following steps.

1. Issue a Notice of Intent to Proceed with Negotiated Rulemaking.
2. Hold Collaborative Training Workshops for Stakeholders.
3. Develop Draft Groundrules for the Process.
4. Participate in Joint Education.
5. Develop a Charter and Final Membership for the Negotiated Rulemaking Committee under the Federal Advisory Committee Act.
6. Provide Advice on Developing the Preliminary Alternatives for the NEPA Management Planning Process.
7. Analyze Impacts and Seek Consensus on the Preferred Alternative for the NEPA Management Planning Process.
8. Seek Consensus on ORV Management Plan and Regulations for Cape Hatteras National Seashore.

We recommend that the NPS and the Committee establish a set of key milestones for assessing the Committee's progress and determining if the process is meeting the interests of the participants and, if not, for ending the process even if the Committee has not completed its work. This approach can ensure clarity on the process and provide opportunities to improve how the Committee is working together. We also recommend a consensus decision/rule for the Committee.

We also recommend that the NPS and Secretary of Interior establish a Committee exceeding the 25 member limit in the Federal Advisory Committee Act is warranted to ensure the Committee is balanced and the range of interests with a stake in the issues are adequately represented. We are putting forward to the Park a list of 28 individuals who represent the range of interests with a stake in the off-road driving issues. We offer these recommendations after extensive consultation with stakeholders, comment on earlier drafts by interviewees, a public application process, and a public comment period. Stakeholder representatives are from government agencies, local governments, homeowner associations, business, tourism, and visitors, environmental and natural resource advocates, off-road drivers, recreational fisherman, commercial fishermen, open access advocates, and other kinds of users of the resource.

With the release of this Feasibility Report, the list of recommended representatives and alternates will be forwarded to the NPS for review. NPS will then review it and forward the list, with any changes, to the Department of Interior. After approval by the Department of Interior, the Notice of Intent to Establish a Negotiated Rulemaking Committee identifying the proposed Committee members and alternates would be published in the Federal Register. There will be a 30-day public comment period after publication, followed by a NPS analysis of the comments, and a

final decision on whether to proceed and if so the composition of the Committee, based on public comments

Additional Recommendations for a Negotiated Rulemaking Process

The following additional recommendations could significantly improve the process and the likelihood for success.

1. The Committee's objectives and the scope of its authority as expressed in the charter needs to allow the Committee to advise the NPS on actions related to on-going ORV use management during the process in addition to the development of ORV regulations.
2. The NPS and potential Committee members need to commit sufficient resources to insure the likelihood of success.
3. NPS and the Department of the Interior should expedite the necessary administrative procedures to initiate negotiated rulemaking.
4. The NPS and Stakeholder representatives on the Committee need to provide consistent leadership during the multi-year process to develop final regulations.
5. NPS should take advantage of the period between publishing the Notice of Intent to Proceed with Rulemaking and the first meeting of the Committee to review the work of the assessment team and determine whether the CBI/FCS team working under the auspices of the U.S. Institute for Environmental Conflict Resolution is acceptable to the Committee members to facilitate the negotiated rulemaking process.

Conditions to Ensure Participation in the Negotiated Rulemaking Process

During the assessment process, we identified nine conditions that must be addressed for the process to commence and to increase the likelihood of success of the process:

- A. The focus and starting point of the negotiated rulemaking needs to be on *how* to manage ORV use on CAHA consistent with all applicable laws, regulations, orders, and policies, rather than *if* there will be any ORV use on the beach at CAHA. The proposed regulation developed by the Negotiated Rulemaking Committee (Committee) and recommended to NPS must (a) be consistent with and comply with all applicable laws, regulations, orders, and policies, (b) provide for a diversity of visitor experience, (c) include enforceable mechanisms to manage ORV use; and (d) be implementable.
- B. The NPS must establish interim plans for managing protected species and user conflicts while the Committee is conducting its work. The NPS must consult with the U.S. Fish and Wildlife Service (USFWS) under Section 7(a)(1) and 7(a)(2) of the Endangered Species Act (ESA) and put in place a legally defensible "livable" interim protected species management strategy.³

³ We note NPS released the Environmental Assessment on the Interim Protected Species Management Strategy (IPSMS) on January 18, 2006, and the public comment period closed on March 1, 2006. We understand NPS is in the process of evaluating comments, consulting with FWS, and waiting to receive a Biological Opinion from FWS

- C. To the greatest extent possible, the Committee should build a management approach to ORV use “from the ground up” to build a new approach that is not limited necessarily by previous interim plans.
- D. Participating organizations and their representatives need to commit to making the negotiated rulemaking process the primary and central focus of their efforts to address issues related to ORV use on CAHA and curtail using other means to influence the proposed regulations during the negotiated rulemaking process. This does not mean participating organizations are relinquishing or waiving any legal rights.
- E. To meet the requirements of NEPA and to generate new approaches and potential solutions, participating organizations and their representatives need to be willing to explore a range of management options and scenarios, even if they at least initially find those options unappealing or highly unlikely to be acceptable to their constituents.
- F. NPS must commit, to the maximum extent possible consistent with its legal and policy obligations, to use the consensus of the Committee as the basis for the regulation proposed by NPS for notice and comment.
- G. NPS must establish a firm deadline by which – (a) the Committee will complete its work and propose a regulation, or (b) if consensus is not possible, the negotiated rulemaking process will be terminated, and NPS will take appropriate and timely action to promulgate a regulation to regulate ORV use on CAHA.
- H. Management of ORV use at Pea Island National Wildlife Refuge will not be included in the negotiated rulemaking process, as the Refuge is managed by USFWS rather than by NPS and is managed under a different set of laws and regulations.
- I. Participating organizations and their representatives need to commit to working civilly and collaboratively, even with those with whom they may disagree strongly.

before finalizing the plan and preparing the decision document for the plan. We also understand completion of the approval process and implementation of the strategy is anticipated to occur in April 2006.

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INTRODUCTION AND OVERVIEW

In early 2005, the National Park Service (NPS) sought to explore the feasibility of using a consensus process to develop regulations for off-road vehicle (ORV) use within Cape Hatteras National Seashore (CAHA). NPS requested assistance from the U.S. Institute for Environmental Conflict Resolution, which worked with CAHA and stakeholders to select a team of neutral mediators to conduct a consensus process Feasibility Assessment. The assessment team consisted of Patrick Field, Managing Director of the Consensus Building Institute (CBI), Robert Fisher⁴, of Fisher Collaborative Services (FCS), and Ona Ferguson and Veronica Morris of CBI.⁵

The purpose of this Feasibility Assessment is to evaluate whether a consensus-based negotiation process could be convened and, if so, whether it is likely to be successful in resolving issues around CAHA ORV management and regulations. This Feasibility Assessment is based on information gathered from interviews with 55 stakeholders regarding their experience with the current management of CAHA and their ideas for future management and regulations.

CBI and FCS approach the Feasibility Assessment as a process of shared learning, creating a picture with the parties of what they could gain from a consensus process, what challenges they perceive, what process considerations would be constructive, and the problems and opportunities presented by the situation. To determine whether a consensus-based negotiation process is likely to be successful in resolving issues about ORV use regulations at CAHA, this Feasibility Assessment considers whether the key government agencies, organizations and individuals concerned with the issue (i.e., "the stakeholders") can be clearly identified, have sufficient overlapping interests, a willingness to work together despite differences and the capacity to negotiate. We also developed conditions that would have to be addressed for certain stakeholders to participate in a negotiated rulemaking process and conducted a pre-convening to determine potential members and alternates on a Negotiated Rulemaking Committee.

This assessment report presents a summary of (1) the information obtained from the interviews, (2) recommendations concerning the process, and (3) recommendations concerning convening the process, and (4) other considerations as NPS and the stakeholders determine whether to proceed with a negotiated rulemaking process.⁶

⁴ Greg Sobel and Kim Vogel of Environmental Mediation Services originally were selected as part of the assessment team with CBI. Following Mr. Sobel's unexpected death, Robert Fisher replaced him and Kim Vogel resigned from the team to attend to Greg's affairs. Robert Fisher was with RESOLVE, a non-profit environmental dispute resolution and consensus building organization, when he joined the assessment team and through October 2005.

⁵ CBI is a non-profit organizations specializing in consensus-based solutions to public resource problems.

⁶ Please note that this assessment is not a legal document, technical report, nor an exhaustive study of all those individuals and organizations with a stake in the management of CAHA. The assessment is limited by the information gathered in the interviews we conducted and our interpretation of that information. While it is not feasible to speak to every person with a stake in the management of the CAHA, we believe this assessment accurately reflects most, if not all, of the range of views held.

KEY RECOMMENDATION: In our best professional judgment, we conclude that a consensus-based negotiation to develop a management plan and proposed implementing regulations can be convened, can yield important benefits even if agreement is not reached, and has a modest chance of success if the conditions described below are met.

We make this recommendation based on our 55 interviews, on-going consultations with stakeholders and the National Park Service, and the information obtained and lessons learned from the pre-convening process. In summary, we offer our reasoning for the above recommendation.

- 1) Through our pre-convening process, described in more detail later in the report, we were able to identify representatives for the Negotiated Rulemaking Committee, although there is not broad agreement on the exact make-up and balance of the Committee. There is strong interest in participation from the full range of stakeholder groups interested in how ORV use is managed on the National Seashore. The pre-convening process did raise certain challenges to convening the Committee, including the 25-person limit on the size of the Committee, the difficulty in representing the interests and views of the general visitor at large to the Park on the Committee, and the balance of interests on the Committee. We discuss these issues later in the Report.
- 2) We conclude, and many stakeholders have suggested, that even if the Committee is not able to reach a final consensus on an ORV management plan and regulations, the process can and will produce many benefits. These benefits include:
 - a. A far more detailed, nuanced understanding of other stakeholders' interests by all who participate and by the public;
 - b. New and creative ideas for addressing some or all of the issues raised in considering different alternatives and developing a preferred NEPA alternative and the subsequent regulations for managing ORV use on Cape Hatteras National Seashore;
 - c. Improved communication, and possibly relationships, among the Park and its stakeholders, and among different stakeholder groups;
 - d. A far better informed NEPA process and rulemaking process that can take into account and better balance multiple interests, even if the Negotiated Rulemaking Committee does not reach a final consensus;
 - e. An opportunity to put into practice the federal government's Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving (See Appendix D for the Principles).
- 3) We conclude that the chances of reaching a final consensus on a final regulation for ORV use on Cape Hatteras National Seashore are modest. Most stakeholders have expressed hope in a collaborative process. Many stakeholders stated that the alternatives to engaging in a collaborative process are limited and uncertain, at best. These stakeholders worry that the Park could not issue a final rule balancing the multiple interests at stake without extensive stakeholder participation and furthermore, that if the courts were to

become the dictating force the outcome might even be less satisfactory. Many stakeholders have noted the benefits listed in number two above even if agreement is not reached. At the same time, many stakeholders recognize how difficult it will be to reach a final consensus. Numerous parties, at this time, have stated very strongly held and divergent positions on how to manage ORV use on Cape Hatteras. Litigation on or related to this matter is already underway. Some parties feel that differing voices among visitors and local residents are neither well-organized nor easy to surface or bring into the deliberations. While parties have stated a willingness to abide by groundrules, tensions are high, many do not believe the other parties are willing or in some instances capable of abiding by the groundrules, many parties feel under attack, and some have engaged in personal and *ad hominem*⁷ attacks. Given all these factors, reaching consensus will be time-consuming, challenging, and test the ability of everyone's patience.

We have identified nine conditions that we believe must be addressed for the process to commence and to increase the likelihood of success of the process:

- J. The focus and starting point of the negotiated rulemaking needs to be on *how* to manage ORV use on CAHA consistent with all applicable laws, regulations, orders, and policies, rather than *if* there will be any ORV use on the beach at CAHA. The proposed regulation developed by the Negotiated Rulemaking Committee (Committee) and recommended to NPS must (a) be consistent with and comply with all applicable laws, regulations, orders, and policies, (b) provide for a diversity of visitor experience, (c) include enforceable mechanisms to manage ORV use; and (d) be implementable.
- K. The NPS must establish interim plans for managing protected species and user conflicts while the Committee is conducting its work. The NPS must consult with the U.S. Fish and Wildlife Service (USFWS) under Section 7(a)(1) and 7(a)(2) of the Endangered Species Act (ESA) and put in place a legally defensible "livable" interim protected species management strategy.⁸
- L. To the greatest extent possible, the Committee should build a management approach to ORV use "from the ground up" to build a new approach that is not limited necessarily by previous interim plans.
- M. Participating organizations and their representatives need to commit to making the negotiated rulemaking process the primary and central focus of their efforts to address issues related to ORV use on CAHA and curtail using other means to influence the

⁷ An *ad hominem* attack consists of asserting that someone's viewpoint is wrong or they are wrong to state it purely because of something discreditable or not-authoritative about the speaker or people cited by the speaker, rather than addressing the soundness of the viewpoint itself. The implication is that the person's view or their ability to state it lacks authority in some way.

⁸ We note NPS released the Environmental Assessment on the Interim Protected Species Management Strategy (IPSMS) on January 18, 2006, and the public comment period closed on March 1, 2006. We understand NPS is in the process of evaluating comments, consulting with FWS, and waiting to receive a Biological Opinion from FWS before finalizing the plan and preparing the decision document for the plan. We also understand completion of the approval process and implementation of the strategy is anticipated to occur in April 2006.

proposed regulations during the negotiated rulemaking process. This does not mean participating organizations are relinquishing or waiving any legal rights.

- N. To meet the requirements of NEPA and to generate new approaches and potential solutions, participating organizations and their representatives need to be willing to explore a range of management options and scenarios, even if they at least initially find those options unappealing or highly unlikely to be acceptable to their constituents.
- O. NPS must commit, to the maximum extent possible consistent with its legal and policy obligations, to use the consensus of the Committee as the basis for the regulation proposed by NPS for notice and comment.
- P. NPS must establish a firm deadline by which – (a) the Committee will complete its work and propose a regulation, or (b) if consensus is not possible, the negotiated rulemaking process will be terminated, and NPS will take appropriate and timely action to promulgate a regulation to regulate ORV use on CAHA.
- Q. Management of ORV use at Pea Island National Wildlife Refuge will not be included in the negotiated rulemaking process, as the Refuge is managed by USFWS rather than by NPS and is managed under a different set of laws and regulations.
- R. Core democratic principles of decency, civility, and tolerance must be exercised if the process is to succeed. Parties must be willing to envision and shape a future for all users and people interested in CHNS, including descendants of families living on the Outer Banks when the national seashore was established, newer property owners and visitors, and those that care about the ecology or preservation of the national seashore and national parks. Parties also must be willing to accept there are different views (locally, regionally, and nationally) and the different stakeholders each have a right to be part of determining the solutions. Committee representatives must exercise leadership within their respective constituencies to foster a climate of joint problem solving on the Committee and publicly, to keep their constituencies informed, and to ensure their constituents support rather than undermine the process.

Additional recommendations regarding the process and the convening are set forth later in this report.

DESCRIPTION OF THE ASSESSMENT PROCESS AND METHODOLOGY

This Assessment is based on confidential, voluntary interviews with fifty-five (55) individuals who hold a range of views on ORV management at CAHA. The interviews were conducted in April and May 2005. The interviewees are affiliated with businesses, environmental groups, recreational and commercial fishing, local civic organizations, ORV groups, and other organizations concerned about ORV management at CAHA. Many interviews were conducted in-person in Manteo, Buxton, and Kill Devil Hills, North Carolina and in Washington, D.C., while some interviews were conducted by telephone.

The individuals we interviewed were drawn from an extensive stakeholder list. First, CAHA staff prepared a list of potential interviewees across a broad spectrum of interests and geographical areas. The assessment team contacted approximately 70 individuals and organizations and invited them to participate in an interview. Of the group of 15 or so we didn't end up interviewing, some we never managed to get in touch with while others didn't think it made sense to interview them and directed us to talk with additional people. In the interviews, participants identified additional people who were subsequently contacted to arrange a second round of interviews. In addition, a few individuals who heard about the interviews contacted the assessment team directly and requested an interview. During the interviews, we also gathered recommendations for organizations people thought should participate if a negotiation process is pursued.

We spent approximately 45-90 minutes talking with each of the interviewees. We explained to each interviewee that their answers would be confidential in that particular statements would not be attributed to individuals or organizations. We made extensive notes on each interview, and summarized the interviews for our internal use. We also reviewed various documents provided to us by NPS and some of the interviewees. We then compiled comments by subject and issue. The draft Feasibility Assessment was submitted to the interviewees in June 2005.

Our interviewees gave us feedback on our draft Feasibility Assessment in June and July 2005. In August we released pre-convening applications, the forms stakeholder groups used to request that their group be on the Committee and through which they proposed members and alternates to represent their organization. We accepted the pre-convening applications in August and September 2005, while incorporating interviewee feedback on our draft Feasibility Assessment. After receiving the pre-convening application forms, we worked with stakeholder groups to determine who to recommend for committee membership. In December we made our preliminary recommendations for committee membership and draft Feasibility Report publicly available. We took public comment on these through January 2006. This final Feasibility Assessment incorporates the comments and feedback we received from interviewees and members of the public to the best of our ability to capture their questions, suggestions and concerns.

In the interviews, the assessment team asked the interviewees about their views of:

- Current use of the seashore and ORVs on CAHA.
- What changes they'd like to see in the way ORV use is managed on CAHA.
- How the system currently in place for managing ORV use is working.
- What interests need to be involved in formulating ORV use regulations on CAHA.
- The potential for a collaborative process to result in an agreement by all stakeholders.
- Suggestions for making the collaborative process productive.
- Potential conditions to participation in a collaborative process.

Please see the attached interview protocol used by the assessment team as a general guide for conducting the interviews (Attachment A).

We have organized the individuals and representatives of organizations, agencies, and businesses interviewed in the following broad stakeholder categories. We attempted to ensure that the interviewees represented a broad range of interests. In this situation, many individuals play several roles in their communities, and may be part of several different organizations, which makes it challenging to assign individuals to one stakeholder category. See the attached list of interviewees and their primary affiliations (Attachment B).

Stakeholder Groups and Number of Representatives Interviewed:

STAKEHOLDER GROUP	# INTERVIEWED
Businesses	5
Environmental Groups – National	8
Environmental Groups - Regional/State	5
Government – County	1
Government – Federal	3
Government – State	6
Local Civic Associations	9
Unaffiliated Residents & Other Individuals	4
Park Use Groups	14
TOTAL # OF PEOPLE INTERVIEWED	55

Please note that the assessment team’s role is to provide an accurate, impartial analysis of the situation to assist the NPS and the other stakeholders in determining whether a consensus-based negotiation will meet their objectives. *We do not advocate for any particular outcome or interest, and we must conduct our work in a fair, deliberate, and non-partisan fashion.* Also, the assessment team is bound by the Association for Conflict Resolution Model Standard of Conduct, which provides that mediators must maintain impartiality toward all parties. “A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded.”

NEGOTIATED RULEMAKING PROCESS

As explained in the interviews, the negotiated rulemaking process is based on the principle that agencies can create better regulations by developing new regulations jointly with the people affected by the contemplated regulation. Negotiated rulemaking is a consensus-based decision making process. The parties involved in the negotiation process agree in advance that they seek an agreement that all the members of the Committee can live with. The negotiated rulemaking process will run concurrently and be integrated with the National Environmental Policy Act (NEPA) process and study.

When federal agencies such as NPS use negotiated rulemaking, they must comply with the Federal Advisory Committee Act (FACA) and other legal requirements.⁹ If the process results in a consensus whereby the entire Committee concludes that it can live with the new regulation

⁹ NPS has used a negotiated rulemaking process to develop management plans and regulations for two other National Seashores, Cape Cod and Fire Island. NPS also has initiated or used the process at other parks.

that it has developed, then that draft regulation can be used by NPS and moved through the standard review, notice and comment procedures. Thus, this consensus-based approach to developing regulations is a supplement to, not a substitute for, the usual federal rulemaking process. To see NPS FACA guidance, go to:
<http://www.nps.gov/policy/DOrders/facaguide.html>.

ORGANIZATION OF THE FEASIBILITY ASSESSMENT

This document presents the assessment team's findings and recommendations. It consists of 11 sections. These are:

1. Description of the Situation
 2. Findings, Organized by Topic
 3. Review and Analysis of the Requirements for a Regulatory Negotiation
 4. Recommendations and Conditions for a Negotiated Rulemaking Process
 5. Convening Recommendations
- Attachment A: Interview Protocol
Attachment B: People Interviewed
Attachment C: Proposed Stakeholder Recommendation for the Committee
Attachment D: Basic Principles for Agency Engagement in Environmental Conflict
Resolution and Collaborative Problem Solving
Attachment E: Responses from Organizations to Public Comments
Attachment F: Public Comments Received December 2005-January 2006 on the Draft List of
Proposed Stakeholders for Potential Regulatory Negotiation Committee

DESCRIPTION OF SITUATION

Cape Hatteras National Seashore (CAHA or the Park) was established in 1953. Of the 70 miles of Atlantic Ocean, beaches and inlets that front Bodie, Hatteras and Ocracoke Islands, CAHA encompasses approximately 53 miles of shoreline and inlet and 50 miles of sound-side habitats and beaches. The 13 miles of beach that comprise Pea Island National Wildlife Refuge are within the CAHA boundary, and are managed separately and under a different regulatory framework by the U.S. Fish and Wildlife Service (USFWS).

Currently, all CAHA beaches are open to ORV use during the winter, except a section near the Cape Hatteras Lighthouse. Some beaches may be closed to ORV use if they become too narrow. About half (approximately 26 miles) of the beaches are open to ORV use during the summer months. On the sound side, 17 access points are available to ORVs. However, only approximately four miles of sound-side areas are open for ORV use because CAHA prohibits ORV use on vegetated areas and most of the sound-side areas have vegetation. Closures vary from year to year depending on a range of management considerations.

Regulatory Framework

The use of ORVs to pursue recreational activities is popular in CAHA with certain visitors and attracts visitors throughout the year. Because ORV use may conflict with the protection of CAHA resources, including protected species, and with the use of CAHA for non-motorized activities, ORV use has been a much-discussed subject in the Outer Banks and beyond. Even though there are some marked ORV trails, concerns about resource loss and visitor conflicts continue to be unresolved issues. CAHA is required to have an ORV management plan and currently does not. These requirements stem from the Organic Act, the CAHA enabling legislation, 36 CFR 4.10 (b), and Executive Orders 11644 and 11989. Moreover, NPS received a Petition for Rulemaking on ORV management at CAHA under the Administrative Procedures Act from several environmental organizations and a Notice of Intent to Sue concerning protection of endangered species and consultation with the USFWS. A judge's recent order invalidating USFWS's Critical Habitat designation for the wintering piping plover is also at issue.

The NPS Organic Act (16 U.S.C. §1) applies to all units of the National Park System, including CAHA. It mandates NPS to manage park units to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

CAHA was established by legislation, enacted in 1937, which provides that,

“ . . . said area shall be, and is hereby, established, dedicated, and set apart as a national seashore for the benefit and enjoyment of the people. . . (16 U.S.C. §459).

...the legal residents of villages...[within CAHA] shall have the right to earn a livelihood by fishing within the boundaries to be designated...subject to such rules and regulations...necessary in order to protect the area for recreational use....” (16 U.S.C. §459 a-1).

Except for certain portions of the area, deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing, and other recreational activities of similar nature, which shall be developed for such uses as needed, the said area shall be permanently reserved as a primitive wilderness and no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing in this area....“ (16 U.S.C. §459 a-2).

NPS regulations applicable to all units of the National Park System require that, “routes and areas designated for off-road motor vehicle use shall be promulgated as special regulations. The designation of routes and areas shall comply with Section 1.5 of this chapter and Executive Order 11644 (37 FR 2887). Routes and areas may be designated only in national recreation areas, national seashores, national lakeshores and national preserves.” (36 CRF 4.10 (b)).

Executive Order 11644, signed in 1972 by President Nixon, defines an ORV as “any motorized vehicle designed for or capable of cross-country travel on or immediately over, land, water, sand, snow, ice, marsh, swampland, or other natural terrain....”¹⁰ The purpose of Executive Order 11644 is to:

“...establish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands.” (Section 1).

Executive Order 11644 states:

“Each respective agency head shall develop and issue regulations and administrative instructions ... to provide for administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, and areas in which the use of off-road vehicles may not be permitted.... (Section 3(2)).

[The] regulations shall direct that the designation of such areas and trails will be based upon the protection of the resources of the public lands, promotion of the safety of all users of those lands, and minimization of the conflicts among the various uses of those lands. The regulations shall further require that the designation of such areas and trails shall be in accordance with the following-- (1) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands. (2) Areas and trails shall be located to minimize harassment of wildlife or significant

¹⁰ For several years, CAHA has prohibited personal watercraft, so their use will not be part of the ORV management plan.

disruption of wildlife habitats. (3) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors. (4) Areas and trails shall not be located in officially designated Wilderness Areas or Primitive Areas. Areas and trails shall be located in areas of the National Park system, Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.

Additionally, Executive Order 11989, signed in 1977 by President Carter and amending Executive Order 11644, requires that:

“... the respective agency head shall, whenever he determines that the use of off-road vehicles will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources of particular areas or trails of the public lands, immediately close such areas or trails to the type of off-road vehicles causing such effects, until such time as he determines that such adverse effects have been eliminated and that measures have been implemented to prevent future recurrence....”

NPS in its vehicle and traffic safety regulations provides that:

“...operating a motor vehicle is prohibited except on park roads, and parking areas and on routes designated for off-road motor vehicle use.” 36 C.F.R. § 4.10.

In addition, the agency head is authorized to close portions of public lands. Consistent with this general authority, NPS Management Policies 2001 states, as to ORVs, “routes and areas may be designated only in locations in which there will be no adverse impacts on the area’s natural, cultural, scenic, and esthetic values, and in consideration of other visitor uses” (NPS Management Policies 2001, 8.2.3.1).

In 1978 CAHA prepared a draft Interim ORV Management Plan as a basis for ORV regulation. A regulation was never promulgated, however CAHA has used sections of this plan to guide ORV management since 1978.

Some people who favor ORV use on CAHA also cite an open letter to the people of the Outer Banks dated October 27, 1952 from Conrad Wirth, then Director of NPS, and published in *The Coastland Times* on October 31, 1952. They describe it as providing an important commitment from the federal government about open access to the beach on the Outer Banks for all people, whether they are local residents, or visitors from the outside; preservation of traditional uses (hunting and commercial fishing); and the federal government’s activities on CAHA.

Some people take a different interpretation from the letter, and they state that it makes clear that access for all people, particularly those driving vehicles, is subject to regulation, and that the enabling legislation protects only commercial, not recreational, fishing. They also state that the letter made no commitment to permit recreational fishermen to use off-road vehicles, particularly

without any limitation, pointing to the part on the letter in which Wirth states that it will be necessary to establish regulations to manage certain aspects of use. Some noted that Wirth's letter cannot forever preempt the federal government from making changes in its regulatory policy, as reflected by the adoption decades later of Executive Order 11644 and the regulation embodied in 36 C.F.R. § 410.

Many also cite the enabling legislation CAHA enabling, which provides for village residents the right to earn a livelihood through (commercial) fishing within CAHA.

FINDINGS

This section summarizes the views of the interviewees conducted in April and May 2005 without attribution by name or organization. This Findings section reflects what we heard from interviewees and does not represent the views of the assessment team. We have not attempted to develop “one view” of the situation, nor do we present this information as “facts.” Rather, the findings are intended to reflect the range of views and concerns we heard in our interviews. Please note that because this situation is dynamic, this is a summary of how the situation appeared at the time the assessment was conducted. The role of the assessment team is to reflect as accurately as possible the range of views identified during interviews. Our role is not to judge the merits of arguments, ascertain the accuracy of statements, or verify “facts.”

SUMMARY OF KEY THEMES

The following brief summary of the key points we heard in our interviews touches on the themes we heard most consistently and from a wide range of interviewees.

- Most people believe that ORV use, other uses, and protected species should be able to co-exist on the beach, though not necessarily on the same stretch of beach at the same time (and, not surprisingly, they differed in how this might work).
- There are concerns that protected species, as well as non-listed plants and animals, are being harmed due to unintentional or careless action by beach users and management action, and that wildlife species and plants are constantly at risk on the beach.
- There are concerns that the beach is gradually being taken away from ORV users and that ORV use prohibitions will become permanent, with accompanying effects on economics and activities that people love.
- There are likewise concerns that CAHA practices favor the interests of ORV users over other park users and resources.
- Many people are concerned that there are inadequate opportunities for wilderness-based recreation and that conflicts between those using ORV for recreation and those pursuing other forms of recreation need to be addressed.
- People want to avoid ad-hoc management of ORV use and to bring CAHA into compliance on ORV management through the certainty and predictability that a management plan and regulations will provide.
- All interviewees expressed an interest in the idea of using a negotiated rulemaking process.
- Many people believe the negotiated rulemaking process is the best way to address all of the needs and concerns.
- There is a range of willingness to participate in a negotiated rulemaking process, from enthusiastic to skeptical but willing, depending on how the process is structured and whether groups will refrain from pursuing litigation, political influence and other means to influence the process.
- There also is a range of views about the likelihood of success of a negotiated rulemaking process, from cautious optimism to skepticism about whether other stakeholders are willing to make compromises and find common ground.

- People need to understand and trust the information, science and other requirements justifying management decisions, including both biological and socio-economic impact data.
- People are aware of the legal, political, financial, resource, and other pressures on NPS.
- Many long-time residents have been frustrated and saddened by the present relationship between the community and NPS, want to improve it, and see the appointment of Mike Murray as permanent superintendent as a positive step.
- People are passionate about the place where they live and about their beliefs that protecting environmental resources is crucial.

We have divided this section into 12 major subject areas that were consistently raised by the stakeholders we interviewed. These are: the unique and changing Outer Banks culture, economic impacts, park user conflicts, natural resources protection, ORV use and management, pressures on CAHA, relationship between the NPS and local communities, CAHA leadership, enforcement and staffing, approaches to managing ORV use, data and research needs, and process recommendations. Note that for the sake of simplicity we have used the term “park user,” rather than visitor or guest, to mean anyone other than NPS staff members who spends time on the beach for any reason. Also, bear in mind that opinions and views expressed (whether paraphrased, quoted, or noted) are those of interviewees, not of the assessment team.

1. UNIQUE AND CHANGING OUTER BANKS CULTURE

The Outer Banks has a unique culture and history, shaped by the unusual geographic formations of the islands and their remote location. For some on these islands, driving on the beach has been a way of life for generations. Residents are proud of the fishing culture that brought people here and has sustained them over the years. They are accustomed to living in a beautiful place, with beaches that are accessible to all. The beaches are responsible for originally drawing many year-round residents to the area, as well as for bringing in the substantial number of tourists that now sustain the local economies. All park users (residents and visitors alike) care about the health and maintenance of the beaches.

Population and development pressures, as well as federal environmental laws enacted since the 1970s, have caused the local way of life to change. While the Outer Banks once seemed remote and isolated, with a culture based primarily on commercial fishing, this has changed. Recent visitors and second-home buyers are more affluent than their predecessors and have different priorities and interests. Some long-time residents are upset because of the changes and disappearance of the old culture due to development pressures, an influx of new homeowners, and an increasingly narrow beach. This cultural shift shapes residents’ and visitors’ perspectives of the ORV situation on CAHA.

The designation of CAHA as the first national seashore rather than as a national park is considered very important by many residents. CAHA and the local communities are closely integrated and intimately connected because of the narrow and elongated geography of the barrier islands. The beach shifts from CAHA into the adjoining communities and back again in a way that many describe as seamless. This close relationship between CAHA and the local communities is considered unique by many. It was reflected in the provision regarding commercial fishing in the original legislation authorizing creation of CAHA. Some note that

there are other national seashores that have towns along their boundaries that rely on NPS visitor use for income.

2. ECONOMIC IMPACTS

The economic impact of ORV use on the beach is a much-discussed topic. Some believe that the positive economic impacts of regulating ORV use are underestimated. They note that a minority of CAHA visitors drive on the beach, and that regulations affecting that number of people would not significantly adversely affect the local economy. In addition, they believe that positive economic benefits could result from such regulations because those interested in non-motorized recreation would be more likely to visit CAHA if they could hike, fish, or photograph on the beaches without the presence of ORVs. They cited examples in which ORV restrictions may have benefited local economies by attracting visitors previously displaced by ORV use. They say that, in their experience, only storm-related events, adverse weather, and bridge and road access difficulties impact the local economy. In addition, they feel that the CAHA enabling legislation provides opportunities to generate revenue through commercial fishing on the beach by local residents, not that ORV use on the beach for recreational purposes was an intended or guaranteed economic benefit of CAHA. Many also believe that regulating ORV use at a sustainable level is a responsible economic action because it will permit constant and appropriate levels of ORV use both for the resource and for driver enjoyment.

On the other hand, many people from a range of perspectives want the potential economic impacts of ORV use to be considered during the development of an ORV management plan. These people see calls to limit or prohibit ORV use on the beach as a significant economic threat to local businesses because they believe the local economy is based primarily on industries connected with use of CAHA and fishing and ORV use (from commercial fishing, to local hotels and restaurants, to the many shops that supply tourists and locals with fishing and recreational gear). They believe that when the area became a national seashore, the intent was to enable residents to continue to make a living locally, and that fishing on the beach was guaranteed. There is concern that limiting ORV use also will limit easy access to the beach. Some believe that this could significantly reduce the number of people who choose to visit the area and decrease the customer base for the many businesses on Hatteras and Ocracoke Islands and other nearby communities. Although commercial fishing is decreasing, recreational fishing has increased, and many advocate that the beach and fishery should and must be kept open for recreational fishermen using ORVs.

3. PARK USER CONFLICTS

Conflicts between beach users and ORVs have increased and intensified due in part to rapid population growth, increased development along the CAHA boundary, the increase in CAHA visitation and the resulting increased use of the beach, and the narrowing of the beach itself. In general, there are diverse uses on CAHA that may or may not be tied to ORV use on the beach. In general, these activities fall into several broad types: (a) those who choose to or need to drive, whether for fishing, getting to special places on the beach, or bringing their friends and families with them, (b) those who choose not to use vehicles on the beach as they swim, surf, walk, picnic, or photograph, and (c) those who both do not want to use an ORV on the beach and are also there for a wilderness-type experience, and so want no ORVs and few other people nearby. In narrow areas of the beach (where the beach is less than 150 or 100 feet wide) and along

beaches with heavy use, conflicts between drivers and non-drivers arise. Depending on how vehicles park, there are sometimes conflicts on the beach between ORV users. Similar conflicts occur between ORV users and sunbathers, photographers, hikers, swimmers, walkers and fishermen not using ORVs. A few interviewees described conflicts between people using the beach in front of their villages and ORV users, citing safety concerns due to the close proximity between ORVs and children. Some park users also described being intimidated or harassed by ORV advocates. Most people expressed the desire to find ways to remedy these conflicts among park user groups. Everyone expressed concern about the health of the local communities, the beach itself, and the CAHA experience.

4. NATURAL RESOURCE PROTECTION

Almost everyone interviewed, if not everyone, considers protection of the natural resources of CAHA to be important. Most people interviewed believe this can be done while providing for some level of managed ORV use. Everyone understands and accepts that CAHA staff are required by federal law to protect certain species at CAHA. Several people noted that NPS responsibilities are broader than just protecting listed species, and include conservation of unlisted plants and animals, including migrating and wintering shore birds, and protection of all CAHA natural resources. Some say the cumulative impacts to CAHA natural resources have to do with a range of causes, visitor use being only one among many. Wildlife attracts visitors and the beach provides unique wildlife habitat for shore birds. Primitive wilderness areas, natural viewsapes and soundscapes provide wilderness experiences for visitors. While everyone recognized the importance of protecting wildlife species, they differed in how to provide that protection, and offered a range of suggestions for managing the species while also taking other park user groups into account.

ORV Users as Conservationists

Several interviewees stated that ORV users have acted as conservationists over the years. They have protected turtles and nesting grounds. They teach children about ways to conserve beach resources. They love the beach and want it to be available to all for years to come, and work to protect the beach. In addition, several ORV groups have contributed actively to the beaches through beach clean-ups, turtle monitoring, and the young ranger program. They would like to continue helping with efforts to protect these species. They want regulations that will serve as a tool for protecting a highly valued resource.

Others describe ORV use on CAHA having a detrimental impact on conservation efforts. They describe ORV use causing damage to vegetation patterns, species, natural dune formation, invertebrates, and causing sand compaction. Some of these noted that some ORV users have acted to weaken the ESA and have intensely criticized those working to ensure ecosystem conservation.

Closures

Closures of specific areas of CAHA to ORV or human use are put in place by CAHA staff for a number of different reasons. They may be established to protect species or heavy pedestrian use beaches, or due to narrowness of beach that makes it unsafe for ORV use.

Some interviewees stated that actions taken to protect species to date have been inadequate. They assert that there have been violations of the Endangered Species Act (ESA), which provides Recovery Plan guidance that some believe should be strictly observed unless CAHA has completed formal consultation with the USFWS. Some interviewees expressed concern that summer ORV use greatly detracts from piping plover and other shorebird and colonial water bird breeding, nesting and feeding areas. Some have noted that unfledged chicks and fledglings of various shore birds have been run over and killed over the years, some in the same locations every year. Some say that even if ESA-listed species themselves have not been killed, the intensity of ORV use has degraded habitat and prevented these birds from nesting, fledging, and thriving. They say that ORV use has also adversely affected migrating and wintering shorebirds. These interviewees want broader closures to better protect species and habitat. Some also declared that CAHA is out of compliance with the ESA and other federal laws and regulations in terms of how they manage protected species.

Other interviewees stated that species protection has gone too far in past years. They say that closures of the beach to ORV use around nesting grounds have been too extensive, and the NPS is managing only to protect wildlife rather than to support the range of uses for which CAHA was created and intended. They would like to see other techniques besides closures used to protect these species. Many interviewees described a sense of loss as the NPS “takes” more and more land at CAHA for plover and other species at the expense of human uses.

Ecosystem Requirements

Some interviewees want an ORV management plan to be based on and developed from the part of CAHA’s mission directed towards maintaining natural resources and then expanded to include recreational uses and the attendant impacts. Several people noted that CAHA is the only National Park System unit that has the word “wilderness” in its authorizing legislation but has never been studied for wilderness suitability. They would like a suitability study to be completed that includes consideration of both critical habitat and the many human uses of CAHA. Some interviewees noted that CAHA, as a unit of the NPS, is required to comply with a range of legislation including the NPS Organic Act, the 1970 National Park System General Authorities Act, as amended in 1978 (Redwood amendment) and other provisions which provide limitations on recreational activities when they damage CAHA resources. These people also raised concerns about the adequacy of protection for plants and animals in CAHA.

Dune Management

Although the question of dune management is outside the scope of the negotiated-rulemaking, we mention it because many people believe there is a connection between dune management and the availability of the beach for ORV use and other uses. The man-made dunes (berms), which exist along CAHA, protect North Carolina state-maintained Route 12 and private homes and businesses. Some told us that the NPS should be doing more to maintain the dunes for the protection of the villages, while others said that letting overwash occur naturally is a geologically healthier way to manage a barrier island, and will best provide habitat for wildlife species. We heard a wide range of reasons for maintaining dunes and also for letting tidal and weather conditions change them. NPS management policy on rebuilding dunes changed in the mid-1970s. Current policy is to allow natural overwash processes to occur and not to rebuild dunes changed by natural processes. The purpose of this is to prevent habitat loss from shoreline

stabilization, as some noted that repairing man-made dunes exacerbates coastal erosion. This has caused a change in the way the NPS approaches dune management. While in past years the NPS actively repaired and maintained dunes (some of which were man-made) if storms and tides altered the dunes, the NPS now does not repair the dunes, but may permit home or business owners or state or local agencies to do so. This raises concerns for some about the protection and viability of local property, beaches, and businesses if the dunes are allowed to change significantly or be washed away. Woodland-type habitat that has, over the years, succeeded open habitat westward of the man-made dunes may also be affected by ocean overwash. Finally, some suggested the NPS provide access points to the sound-side so that people do not disturb the dune habitat while accessing those beaches.

Predators

Some noted that pets and other “non-native predators,” such as feral cats, foxes and unleashed dogs might be causing significant decline in species populations despite the best efforts of CAHA staff. We heard that those fishing on CAHA sometimes feed predators or leave scraps of fish on the beach, which artificially inflate predator numbers of gulls and raccoons, and adversely affect shorebirds and water bird chicks.

Turtles

Many generally support current NPS management strategies for protecting turtle species at CAHA. Others have concerns that turtle eggs, turtle nests, and newly hatched turtles are not adequately protected, noting a rulemaking petition from 2004 regarding the existing turtle management process. They stated that turtle monitoring should begin earlier in the spring, and that ORV tracks may cover turtle tracks, making it difficult for resource managers to find turtle nests.

5. ORV USE AND MANAGEMENT

Stakeholders hold a wide range of, and sometimes opposing, views on the current and desirable amount of ORV use and the regulations to guide ORV use on CAHA beaches. Beach users want solid, consistent, transparent management of ORV use of the beach. While some want ORV use to be guided by a definitive, detailed, and high predictable management plan and regulations, others note that such certainty may not be possible given the numerous legal responsibilities of the NPS and the rapidly changing ecological conditions. Some stated that CAHA’s lack of a basic ORV management regulation is negligent and a clear-cut violation of federal law.

Amount of ORV Use

Some people believe the current level of ORV use, with some restrictions of geographical areas and times of year is adequate.¹¹ Others told us that they oppose any management system based on the carrying capacity of the beach. We heard a desire for a balance between personal safety, the health of protected species, and human use of the beach. Some believe that ORVs and nesting birds can co-exist within the level of use now permitted on CAHA, in part because the waves wash away the ORV tracks. Others see ORV use as an issue of beach access in general

¹¹ Note: this information was gathered in early May 2005 before CAHA instituted the ORV escort program and closures.

and believe ORV use rights have diminished over time and the amount of beach where people are allowed to drive should be increased.

Others believe ORV presence on the beach has increased due to (a) more vehicles, (b) smaller beaches due to diminishing beach width, and (c) ORV restrictions in other places that have redirected ORV users to CAHA. They argue that this increased concentration of ORV users is causing erosion, habitat destruction, and a decrease in wildlife presence on CAHA. Several people noted that there haven't yet been any studies completed to determine the current rate and impact of ORV use.

Some also believe that parts of the beach should be preserved from ORV use so that beach users can experience a beach in natural "wilderness" type setting that they see as an important value for a national park site. They noted that the increasing number of vehicles on the beach makes it unlikely for a visitor who wants a wilderness type of experience to find a beach free of ORVs. Some have safety concerns that lead them to want specific places on the beach where families and ORVs are kept separate. A few people suggested that in certain areas ORV use should only be permitted on the beach in cases of emergencies and for disabled access. We also heard from a few people that a significant portion of residents want a year-round ban on ORV use. Still others note that the protection of listed species and the conservation of natural resources have to take priority in CAHA management, and that ORV use must be modified in some way if it is causing resource damage.

The Need: Clear, Consistent Closure Guidelines

People who use CAHA want clear, consistent guidelines for ORV use on the beach. Many interviewees indicated that current management of CAHA is not working for park users, and that people are frustrated by perceived inconsistencies in implementing on-the-ground closures. Some want the guidelines to be scientifically determined (data-driven), and many want them to be transparently created and consistently enforced. Some people expressed concern that parts of CAHA might be closed because of a lack of NPS personnel for monitoring and enforcement.

Others noted that closures might be based on a variety of reasons (habitat changes, buffer distance guidelines, situation specific requirements). They described that closures must comply with the law and be based upon the sound professional judgment of NPS staff. They elaborated that NPS biologists must have the authority to close areas to ORV or pedestrian use as needed prior to explaining their decisions to users.

Inconsistent Interim Plan Application

While the 1978 Interim Management Plan is being used, in part, to guide current management decisions, it was never formally adopted. People said to us that NPS staff might not be applying the plan consistently and in its entirety, which furthers distrust between some park users and the NPS. In addition, some interviewees stated that the plan is inadequate for current conditions because it was written at a time when there were many fewer ORVs on CAHA and beaches were wider.

The Desire for Clear Closure Demarcations

Many park users stated that they frequently do not understand why certain management actions are being taken. Others state that they know that CAHA staff can't explain every closure in detail. There are many reasons for closures under current management, including public safety and species protection. The range of regulations protecting different species is especially confusing to some. Some people wonder why the NPS appears to be protecting American oystercatchers in the same way they protect ESA-listed species. Others would like to better understand the ESA requirements. Still others think they understand the requirements and are concerned that the NPS is not meeting them. They want management decisions about determining habitat to be based on the best available science. Finally, we heard a range of particular concerns about unique closure areas and questions about why certain areas were closed, including Bodie Island and the south side of Ocracoke.

The Challenge of Re-Opening Closures

There is an ongoing fear held by some park users that the NPS will keep enlarging closures until there is no beach left to walk or drive on. Though there has not been an effort by the NPS to completely close CAHA to ORVs, this worry has been fueling many of the actions of those seeking to protect beach access. Every time there is a temporary closure, there is a perception that it could be the beginning of a permanent closure. Many ORV users describe the uphill battle to reopen areas that have been closed. Some noted that if the NPS re-opened closed areas as soon as it was appropriate to do so, this might reduce worry or fears about closures. Several people want criteria for reopening closures that can be applied systematically, rather than on a case-by-case basis.

CAHA representatives have expressed to the assessment team recognition that ORV use in CAHA is in need of regulation, and that there is no intention by the NPS to close the entire seashore to ORV use.

Some believe that CAHA, under political pressure, is slow to close areas that ought to be closed and may be re-opening closures too early without giving birds a chance to re-nest after chick or egg loss. They are concerned about the effect of such management practices on protected species.

Wildlife Preserve or ORV Park

Some people are concerned that the NPS seems to be managing CAHA, as a wildlife preserve, rather than for recreational use. It appears to them that management has gradually shifted over the years to be more and more wildlife-focused. They perceive that the NPS has become interested in preserving and protecting natural resources, and increasingly less interested in preserving the cultural and human use aspects of CAHA.

Other people are concerned that the NPS seems to be managing CAHA, a national seashore which was intended to preserve "primitive wilderness," as an ORV park, rather than for resource protection as required by the NPS Organic Act and other statutes. They describe management practices that have shifted over the past few years to be more ORV-use focused. They perceive that CAHA has become interested in providing for ORV-based recreational access and increasingly less interested in providing for pedestrians and beach-goers who don't fish, nesting

birds, turtles and indigenous plants. Others, looking for a natural beach experience at this national seashore, are disappointed in the extensive amount of ORV use. They want CAHA managed for a full range of uses in a way that is compatible with resource protection.

Access for People with Disabilities

It was noted that ORV access could also mean handicapped access to the beach. Some people we spoke with noted that allowing ORV access for people with disabilities might be dealt with separately from general ORV access in management plan development. They want to distinguish between ORV access for seniors, disabled, or emergency vehicles and ORV access for recreational uses.

Other Concerns

While many people are comfortable with turtle closures, some of these are uncomfortable with closures of “potential habitat.” Others describe long-standing management standards for busy beaches that indicate that nesting areas should be closed before nests are laid to prevent disruption of territorial establishment and courtship behaviors. Some of these believe that the ORV corridors allowed in front of closures are damaging to the successful nesting of protected species. They are uncomfortable with the lack of closures of “potential habitat” for feeding, breeding and nesting prior to the beginning of bird breeding season in mid-March. Closures that stretch all the way down to the water are a concern for some because they completely prevent passages, effectively closing down a portion of the beach to ORV users and pedestrians, and possibly creating a safety hazard for drivers who cannot pass. Others note that such closures protect shorebird-feeding habitats and provide necessary buffers for nesting birds and unfledged chicks.

6. PRESSURES ON CAHA

People recognize that CAHA is operating under many pressures. Most people describe the NPS as doing its best under myriad demands. Some see the NPS as doing too much to protect species (because they want to or because they must under federal regulations), and others see it as making ORV considerations a priority in management decisions because of local interests and/or political pressure.

Using all available means, including pressuring the NPS politically or legally, is seen by many (across interest groups) as a legitimate way to accomplish objectives. Others see these actions as a last resort.

The different “pressures on CAHA” include:

Funding Pressure

We heard that a significant funding problem has made it difficult for the NPS to adequately meet its mandate. People said that CAHA seems under-staffed, in law enforcement, resource monitoring, and education. This contributes to tensions around issues of resource protection, beach use, enforcement of regulations, and the education of the public about CAHA resources and regulations.

Legal Pressure

Some consider the threat of litigation and involvement by advocates for environmental conservation as a primary reason for increasing nesting area closures. Some see the NPS as taking management action only when threatened with litigation, and believe that some of the CAHA staff responsible for resource protection use these threats to favor pro-species protection rather than multiple use. Others noted that representatives from ORV organizations have threatened CAHA with litigation over bird closures, and that ORV advocate groups recently completed legal action against the federal government over piping plover critical habitat designation at CAHA. Some argue that litigation is used only as a last resort, and sometimes the only way to get CAHA to marshal the resources to take appropriate action. Others see it used too early and too often, decreasing CAHA management effectiveness by depleting CAHA personnel and financial resources.

Political Pressure

Political pressure from outside CAHA by ORV user advocates was cited as the likely cause of various NPS actions, from lack or delay of beach closures to premature openings, to personnel changes. Several people believe that this pressure has influenced CAHA management to less strictly follow the guidelines for species protection.

Pressure in the Field

Interviewees described that different park users have been intimidated on the beach by other park users, and that CAHA staff have intimidated, and have been intimidated by, various park users. We heard that CAHA management has not responded strongly or appropriately to such actions.

7. RELATIONSHIP BETWEEN NPS AND LOCAL COMMUNITIES

There is a wide range of perspectives on the relationship between NPS and people on the Outer Banks. We heard many positive comments such as: CAHA staff members work hard; committed rangers do their utmost to fill myriad roles and to protect a range of types of resources and uses; and rangers return phone calls promptly and managers and superintendents strive to do their best work. People respect the CAHA staff for working under the many pressures described above. People perceive CAHA staff as highly committed to their jobs and passionate about what they do. Some recognize that they serve a national seashore and are responsible to national constituencies and guided by national regulations. Other users would like CAHA staff to respond more directly to local needs and concerns.

Yet many people interviewed believe the relationship between the CAHA and local residents has significantly deteriorated. People representing many different interests would like CAHA staff to be more friendly with and helpful to park users. They want the NPS to make relationship-building a priority. Local residents want rangers to be a resource for people using CAHA and for them to provide outreach to park users. People want the NPS to act as a good neighbor and to assist the local community in times of crisis.

While some people trust CAHA staff and see that they are operating in a situation where no matter what they do some park users will disagree with their choices, others distrust the CAHA staff. Some local residents feel they have been betrayed and ignored as historical uses become more restricted, and describe times when CAHA staff have solicited input from people and then

not used it. Oregon Inlet was cited as an example in which the NPS gathered input from the public and then did not make any decisions based on that input. Many people are skeptical that the NPS will listen to their input regarding developing a proposed management plan on ORV use. Most people want the NPS to be forthcoming with information in a straightforward way in order to rebuild trust.

Some local residents also are concerned about the NPS citing events dating as far back as the formation of CAHA. When CAHA was established, one of the primary ways to traverse the Outer Banks on land was to use ORVs on the beach and on inter-dunal areas. ORV use on the beach was due largely to a lack of paved roads. Many local residents believe they were assured that traditional and commercial uses of the beach could continue. Some believe that Congress and the federal government guaranteed local people the right to make a living on the beach, whether through commercial fishing (the greatest source of local income at the time) or tourism (the source of income today), and CAHA would be managed for recreational uses. Many federal environmental laws that apply today to CAHA were created after CAHA was already established (the NPS Organic Act of 1916 and the Migratory Bird Treaty Act of 1918 being notable exceptions), and while people understand that NPS staff have to obey those more recent laws, some believe these laws conflict with the perceived “guarantee” of continuing traditional and recreational uses on the beach.

Others interviewed noted the enabling legislation contains no “guarantee or promise” about ORV use in CAHA and mentions only commercial fishing as a permitted commercial activity. They stated that while legal residents have the right to earn a livelihood within the boundaries of CAHA, this right is subject to compliance with all applicable legal requirements, including CAHA’s management regulations.

Some interviewees stated that community members should take some responsibility for the relationship between them and CAHA staff. The described community members who have been hostile toward CAHA staff and intolerant of NPS actions, and said they think that community members should make an effort to improve relations if they hope to see a similar effort made by the NPS.

Relationships and Communication in CAHA

Most people describe the communications between the NPS and local communities as strained and inadequate over the years, particularly in the last several years. We heard of actions by local community members and CAHA staff that contributed to these strained relations, including uncivil and disrespectful behavior in community meetings, a lack of transparency on management actions, and negative and threatening comments on websites.

Others describe CAHA staff as providing many opportunities for input by interested parties in the form of public meetings or opportunities for submitting comments, and people not taking advantage of those opportunities by not showing up or not submitting comments. The primary concern we heard is that people wish there was more NPS presence on the ground.

Casual Communication

Many local residents also would like CAHA staff to significantly increase informal interactions with people in the communities. More than a decade ago, CAHA staff regularly visited businesses and homeowners. Many see this as done far less frequently, if at all, today. By being engaged on a regular basis, it will be easier for the NPS to share what is happening on the ground and to provide more effective information to the community about CAHA. It was noted also that such an effort can take limited staff time from competing resource protection tasks.

Civility

We heard that there has been a breakdown in civility and that people want better opportunities to talk to each other and move forward. We heard descriptions from a range of interviewees about their disappointment in uncivil and disparaging behavior (e.g. name calling, personal attacks, etc.) between park users as well as between park users and staff.

Transparency

Many people feel that decisions made by CAHA staff have not been transparent. Some attribute what appears to be “ad hoc” management to changing Superintendents, poor communication skills, and the sheer geographic size of CAHA. Others argue hard that management decisions require that CAHA staff be flexible enough to make site-specific decisions. People expressed the importance of being included in, rather than surprised by, changes to management of CAHA. Some suggested that if they are educated and informed about what decisions are being made and why, they will be much less likely to be upset and might be supportive. People want to know why the NPS is making certain decisions and what the process is for making decisions before the decisions are implemented. People have been frustrated in the past when such information has not been provided.

Distinguishing Types of Closures

Many park users described having difficulty distinguishing between different types of closures (whether for human safety or species protection). They would like the NPS to label and make distinct the type of closure as they manage the land. Some described cases in which there may be many reasons for a closure, or in which the reason for a closure may change over time, explaining the complexity of clear labeling. Some would like to see clear communication from the NPS on sensitive areas, piping plovers, clear rerouting of vehicle traffic, the ESA and other important issues. They want improved frequency, consistency, and quality in communications from the NPS regarding the rules, types of birds, and closures. Others feel that if the NPS works hard to communicate and be civil, then park users also need to be more civil to CAHA staff.

Bureaucratic Requirements

Given staffing levels and procedural requirements that may delay responses to citizen comments and questions, we heard a range of perspectives about response times. Some describe CAHA staff responding in a prompt manner to citizen requests, while according to others, the NPS has sometimes been slow to respond to citizen comments and questions. They attribute this response time to bureaucratic requirements. They would like to see less bureaucracy and quicker responses from the NPS.

Printed Material

Finally, people would like CAHA handouts on ORV regulations to be kept current, adequately distributed and contain complete information. Several noted that they have not seen a serious attempt by CAHA to educate or inform ORV users of the rules, and that the outdated documents are an indication of this.

8. CAHA LEADERSHIP

For many, the NPS-community relationship depends largely on the superintendent. They said frequent turnover of CAHA superintendents has shaped public views of the NPS. Interviewees said that the lack of consistent NPS leadership has made it difficult for CAHA staff and some local residents to develop trusting relationships. Some local people also believe that CAHA management is not committed to being part of the community in recent years. Many people perceive the NPS as turning inward and managing based on what they can legally accomplish rather than working for and sharing with the local communities. Some noted that each of the last several Superintendents was sent for a specific purpose (i.e., moving the lighthouse or implementing the Wright Brothers centennial) rather than for the broad, diverse management of a complex seashore.

We also heard concerns that CAHA staff and rangers are not following the Superintendent's guidance about on-the-ground management actions, and that this practice undermines the effectiveness of any protocol or policy. Others believe that CAHA employees in the field follow superintendent and other high-level NPS managers' directions.

We heard that people would prefer that the person serving as superintendent remain in that position for more than a year or two to have time and an incentive to learn about the place, community, issues, and local flavor. The superintendent should have a good understanding of policy and law, the capacity to deal with public pressure, the willingness to understand local people and talk with them, and the desire to reach out to the local community. We heard that a permanent superintendent (as opposed to a succession of acting superintendents) for CAHA would greatly enhance the relationship between the NPS and Outer Banks residents.

9. ENFORCEMENT AND STAFFING

Many people we spoke with described CAHA staffing and enforcement challenges relating to ORV and other types of use.

We heard from many stakeholders that existing regulations are sufficient (though several said speed limits are too high). For these people, the primary challenge on the beach today is inadequate enforcement.

Some stakeholders say there is limited (or almost no) ranger or law enforcement presence during the shoulder season and during certain times of the day. People would like more NPS presence on the beach to prevent irresponsible use. People also want greater enforcement of existing ORV use regulations, including no ORV use through bird areas or dunes, and no speeding. They think that greater visibility could easily decrease irresponsible behavior. Other people are concerned

that the NPS seems to be setting out large closures because they have insufficient manpower to implement and monitor other enforcement mechanisms. Yet others noted that human escorts in 2005 were very human resource intensive and very expensive.

Many people said all beach users (with the possible exception of renegade or irresponsible drivers) want to be good stewards and help with enforcement. However, some people believe that if they cooperate with enforcement efforts this will result in more extensive closures than are necessary. Enforcement is needed for more than just ORV use (also for dogs, firework use, and destructive driving.) In addition, more education staff would be helpful in increasing public understanding of CAHA resources management and ORV regulations and use.

Interviewees noted the following points about enforcement challenges and irresponsible use on CAHA. ORVs have been seen in restricted areas, driving over fences and nests. People have witnessed speeding, destructive driving, and reckless or drunken driving on the beach. Some suggested that such drivers may see CAHA as an ‘unenforceable zone’ where they can do what they want. We heard that some members of ORV user groups do tell people if they are using the beach irresponsibly, and that the vast majority of people driving on the beach do so appropriately. Trouble-makers are often teen-agers or young adults. When people use the beach irresponsibly, it can set wildlife breeding back for weeks and can lead to failed bird mating and therefore lengthier beach closures. We heard that CAHA lacks enforcement personnel to stop ORVs from breaking the rules on the beach, and to get an accurate count of violations.

10. APPROACHES TO MANAGING ORV USE

There are a range of views on the many possible systems for managing ORV use. These systems could manage ORV use dependent on species life cycles, archaeological concerns if appropriate, or other recreational uses. They could include speed limits, clearly designated routes, limitations of time of day or time of year, escorts to certain points, and training requirements. They could designate routes and close off certain areas. Some noted a desire to have any approaches adopted be equitable among all groups, and others noted that some sort of management system is the only way to educate ORV users of beach resources and policies. Comparing these views is challenging because the terms, such as passes and permits, have different meanings to (and cause different reactions from) different people.

The following are two examples (not suggestions) for managing ORV use from the interviews. There are certainly other possible approaches that could be developed during the NEPA scoping process or the regulatory negotiation. For convenience we have labeled them as “Tracking ORV Use” and “Limiting ORV Capacity.”¹² The enforcement and staffing issues listed above (namely lack of personnel) may pose problems in effectively implementing any approach for managing ORV use. Please do note that one of the potential benefits of a collaborative approach is that by bringing diverse, thoughtful people together, new ideas, options, and solutions can emerge out of dialogue.

¹² We recognize the enforcement and staffing issues listed above (namely lack of personnel) may pose difficulties in effectively implementing any approach for managing ORV use. We also note that one potential benefit of a collaborative approach is that new ideas, options, and solutions can emerge out of dialogue among a diverse, thoughtful group of people.

Tracking ORV Use

Under this approach, ORV users would register their vehicles, perhaps pay a fee, and get a sticker or other form of proof that they may drive on the beach. This would enable everyone to know what ORVs are permitted on the beach. Vehicle owners could be required to sign a statement that they understand and will follow NPS regulations and could be provided with information on various aspects of ORV regulations and use on CAHA.

Potential Benefits:

- Encourages appropriate use of the beach. Those caught driving irresponsibly could suffer strict violation penalties such as having their permission to drive on the beach revoked or paying substantial fines.
- Could give those who use CAHA responsibly a high quality experience by reducing the number of irresponsible drivers.
- Provides the NPS with a structure for encouraging good behavior.
- Encourages ORV drivers to police themselves.
- Might reduce irresponsible behavior and “joyriding” in part through peer pressure.
- Enables park users of all kinds to report bad behavior to rangers.
- Could help fund enforcement efforts.
- Would ensure that all ORV users are aware of their rights and responsibilities.
- Strongly supported by some.

Concerns:

- Might have a negative impact on local economies.
- Fees could mean that certain park users were paying much more than other park users.
- CAHA would need increased funding to support staffing, supplies, and infrastructure needed to support an ORV tracking operation.
- “Permits” for accessing the beach in an ORV are strongly disliked by some.

Limiting the Number of ORVs on the Beach

Under this approach, ORV use would be limited to a fixed number of vehicles on CAHA per day, week or year. While some of our interviewees supported the idea of fees, permits, and limitations, many others are opposed to setting limits on the number of vehicles on CAHA in a management plan.

Potential Benefits:

- Similar benefits as described for “Tracking ORV Use.”
- Might increase protection for protected species.
- Might provide for an enhanced experience for ORV drivers and fishermen.
- Could be scientifically based (i.e. carrying capacity).
- Might increase beach user satisfaction due to maintenance of appropriate level of ORV use.
- Might stimulate the NPS to provide a variety of means to access the beach so that those who don’t have an ORV have improved access, thus giving visitors more choices on how to access the beach.

Concerns:

- Considered by some to be onerous for all ORV users.
- Possibly damaging to commercial fishermen's ability to work.
- Possibly damaging to local businesses.
- ORVs might have to line up and wait to access any part of CAHA.
- Might result in ramp closures or reduced access points to enable the NPS to monitor use.
- Impinges on right of access to the beach perceived by some to be in CAHA's authorizing legislation.
- The scientific basis for determining the vehicle capacity on the beach is questionable and may be nonexistent.
- CAHA would need additional funding for staffing, supplies and infrastructure needed to support an ORV limit program.

11. DATA AND RESEARCH NEEDS

We heard from some that there is enough information known already to make informed management decisions. Others told us that additional data might be helpful. Several people noted that the techniques used for gathering data should be unbiased, perhaps carried out under review by a wide range of stakeholders. Several others stated that the biological needs of protected species must serve as a foundation for management decisions.

The following data, information and potential research questions were identified as important in the development of an ORV management plan. Some people said there are gaps in the current data needed to make informed decisions about beach management and that resource protection measures should be science-based. We heard that using broadly accepted and supported data in a negotiated rulemaking process could increase the process' likelihood for success and political support.

- **Beach** – percentage of the beach closed and open for ORV use, importance of closures on habitat protection, implications of closures for fishermen, surveys of those who wish to engage in non-motorized recreational activities, number of parking spaces available
- **Economics** - effect of resource protection on the economy, socioeconomic data, effect of closures on businesses near the closures, economic impact of ORV management on other national seashores like Cape Cod National Seashore
- **ESA** – Piping Plover Recovery Plan
- **Human** – number of visitors on the beach each season, number of visitors to other parts of CAHA, literature on human disturbance effect on species
- **Legal** – relevant federal laws and regulations, formal purpose of the CAHA, provision for primitive wilderness in enabling legislation
- **ORVs** – number of ORVs on the beach daily and yearly, number of ORV users, ramp usage, impact on habitat and erosion, ORV complaint statistics, ORV accident statistics
- **United States Geological Society** – review of USGS work and protocols supporting the interim species protection plan.
- **Species** – bird and turtle population counts, identification of critical habitat that needs to be protected, mapping land changes, information about piping plover and other protected species specific to the CAHA region, shorebird, water-bird and turtle behavior and

management (e.g. site fidelity, sensitivity to disturbances, breeding biology), winter and migration ecology, beach vegetation.

12. PROCESS SUGGESTIONS

During the interviews, a range of ideas was presented on how best to develop the ORV management plan for CAHA. Some pertained to the negotiated rulemaking process, while others can be applied whether or not such a formal process goes forward.

Almost all people we interviewed stated that a consensus process may be a good idea in this situation, and that it can be successful if everyone at the table is willing to accommodate a range of views and interests. Consensus may be possible if the final agreement is reasonable, rational and balances the needs of the protected species and a variety of human uses. As one person said “if a reasonable, transparent process for developing a management plan were put into place based on the best science, and all parties participated in its development, then it would be possible for all park user groups and species to co-exist.”

We heard that success could be achieved (a) if stakeholders are part of the process, (b) if all parties behave honorably at the table, and (c) if the participants believe their and others’ perspective are worthy of attention and consideration. Many interviewees noted that a consensus process could build ownership of a resulting management plan that will create the conditions for success and peace rather than ongoing conflict in the coming years.

Others are concerned about possible implications if the negotiated rulemaking process turned out to be unsuccessful. These issues are very contentious, people are deeply divided, and the situation and relationships could worsen if the process does not work.

Possible advantages of a collaborative process include: the opportunity for stakeholders to better understand the needs and concerns of other groups; the possibility of coming to an agreement that is more responsive to everybody’s needs than a NPS-prepared management plan; and that good facilitators and a fair process will be a step towards moderation and away from the hard feelings and contention of the past few years.

Several people described the selection of the neutral assessment team as the first step toward collaboration among stakeholder groups. They described a tendency among those selecting the neutral team to reach out and find reasonable solutions. Even though the participants represented distinct positions, they came to unanimous agreement in selecting the team, demonstrating a willingness to move forward and find resolution to ongoing conflicts.

The following suggestions for conducting a negotiated rulemaking process were offered by interviewees:

- Participants need to commit to come to the table with any concerns prior to taking further legal or political action to find long-term solutions.
- The NPS must be transparent about its process and commit to work with the group, and should not go forward with its own proposed regulation if the group reaches consensus on a proposed regulation. The NPS must dispel the impression that it is developing its

own plan outside the NEPA and negotiated rulemaking process and should state publicly its commitment to the concurrent and integrated regulatory negotiation and NEPA processes and explain these processes.

- The proposed regulation must comply with all laws and represent the concerns of all park users, including those who want to see it preserved for future generations and those that want to ensure continued ORV use.
- Ground rules will have to be well established, followed, and enforced (examples of potential ground rules include no talking while someone else is talking; no talking down to each other, and no personal attacks or harassment by organizational representatives or their constituents).
- The interests, and the number of national and local groups, have to be balanced at the negotiating table.
- Meetings should occur on the Outer Banks.
- Everyone must understand that motorized access is a traditional, historical, and necessary method of getting to CAHA beaches.
- The conversation must start from a clean slate, not from the 1978 Interim Plan.
- Park users have to be engaged in shaping the regulations to prevent them from resorting to legal or political means to influence the process and to ensure support for the regulations.
- Local users must accept that national groups can legitimately represent users who are not part of the local community.
- Local groups should have training on the regulations and laws prior to or as part of the process to enable them to work more effectively with national groups, who are perceived as being better funded, more experienced, and less attuned to local conditions.
- National groups should have training on the local culture, economy, and on-going local activities to enable them to work more effectively with local groups, who are perceived as more attuned to local conditions and directly economically affected by Park decisions.
- Stakeholders need to learn about and understand each others' organizational missions and purposes.

REVIEW AND ANALYSIS OF THE REQUIREMENTS FOR A REGULATORY NEGOTIATION

Based on our interviews and our analysis of the criteria in the federal Negotiated Rulemaking Act of 1990 (for more information, see http://www.archives.gov/federal_register/public_laws/negotiated_rulemaking_act/561.html), we believe a regulatory negotiation for the CAHA situation will satisfy the requirements of the Negotiated Rulemaking Act, as more fully described below. Those requirements are:

- 1) there is a need for the rule;
- 2) there are a limited number of identifiable interests that will be significantly affected by the rule;
- 3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who: (a) can adequately represent the identified interests; and (b) are willing to negotiate in good faith to reach a consensus on the final rule;
- 4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
- 5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
- 6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
- 7) the NPS, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

1. NEED FOR A RULE

NPS has stated that it intends to proceed with ORV management planning and rulemaking for CAHA, whatever the process used. In addition, there is a petition requesting that NPS do so. And, in our interviews, most interviewees stated that NPS should proceed with some kind of rulemaking in order to meet laws and regulations and bring greater certainty to the management of ORV use on CAHA. Almost all parties we spoke with believe that a rule is essential for the Park to meet its own regulatory and policy directives, as well as to provide greater certainty and stability for ongoing management. Thus, there is clearly a need for this regulation.

2. LIMITED NUMBER OF IDENTIFIABLE INTERESTS SIGNIFICANTLY AFFECTED BY THE RULE

We believe this criterion involves two key issues, first, the subject matter must be sufficiently focused, and second, there should be identifiable interests who can organize and discuss that subject.

ORV use on the beach raises a host of issues, from protecting endangered and threatened species to balancing multiple uses and minimizing conflicts among park users to the quality of life for year-round residents to the overall quality of visitors' experience. However, the focus of the proposed regulatory negotiation would be on ORV management planning and development of implementing regulations. This would be a sufficiently narrow focus to scope, frame, and undertake dialogue and would have specific products as its outcome: a management plan and regulations for ORV access and use of the beach.

For this focused subject, there are a limited number of identifiable interests who likely would be significantly affected by the proposed regulation. These interests are identified further in our findings, and include: federal, state, and county government interests; local civic and neighborhood association interests; environmental and conservation interests; various park user interests, including ORV, fishing, water sports, walking, bird watching, and other general uses; and local visitor, business, and tourism interests.

3. REASONABLE LIKELIHOOD A BALANCED, REPRESENTATIVE COMMITTEE CAN BE CONVENED

There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the interests identified in the Findings section and are willing to negotiate in good faith to reach a consensus on the proposed regulation.

As outlined elsewhere in our report, we have identified well-organized, capable organizations representing the range of interests outlined above. These include government agencies, civic and neighborhood associations, a number of environmental advocacy groups, a number of park user advocacy groups representing fishermen, drivers, water users, and other uses, and both local business associations and specific local businesses.¹³

We do highlight three particular challenges to this criteria we identified in our pre-convening process.

- We found it difficult to identify specific representatives of the Park's general non-local visiting public. While various stakeholder groups and their representatives clearly represent segments of the general visiting Public, there is no single organized group that claims to or is able to represent this general category. This is not surprising and is not unique to Cape Hatteras. The general visiting public may not join local groups, may visit infrequently, and do not generally focus on Park issues through participation in any group. We do find that the Visitor's Bureau provides, at least in part, a means to represent this category, as do other groups representing a range of Park user interests. Furthermore, public comment periods during the Committee process as well as the

¹³ In our draft list of recommended Committee members we included the National Park Conservation Association (NPCA). NPCA, and two other organizations that did not apply for seats on the Committee, filed a lawsuit against NPS concerning ORV use. Some stakeholder groups have intervened in the lawsuit. NPCA subsequently withdrew its request for a seat on the Committee.

broader National Environmental Protection Act (NEPA) public involvement process will at least provide additional opportunities for the general non-local visiting public to participate.

- Through our pre-convening and its public comment period, we found it difficult to establish a “balance” of representation in the eyes of diverse stakeholders. The public comments on the preliminary list of proposed Committee members demonstrate that there is not broad agreement on the exact make-up and balance of the Committee. We do believe that the requirements of FACA in terms of general balance on this Committee ultimately can be met. FACA’s requirements are general and broad and there is no clearly defined legal test established in the law or in case law, as we understand it, for precisely determining what “balance” entails. However, given the public comments we received on the draft make-up of Committee members, it is clear to us that at least the perception of balance in the eyes of all stakeholders will be difficult to meet and it is likely that one group or another will believe interests are underrepresented as more fully described below. We do believe that by operating by consensus (in terms of both process and decisionmaking) all interests will have a voice on the Committee, be able to raise concerns, issues, and ideas, and can and will have a say in whether consensus can or cannot be achieved.
- Thirdly, we find that given the strong interest in the issue from a range of groups, the Committee cannot be convened and be representative with only twenty-five members. The Negotiated Rulemaking Act limits membership on a committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. Thus, we recommend that the National Park Service make this determination and expand the size of the Committee. We explain the details of this issue later in the Report.

4. REASONABLE LIKELIHOOD THE COMMITTEE WILL REACH CONSENSUS WITHIN A FIXED PERIOD OF TIME

From our interviews, we have concluded that there are a number of shared interests and incentives to negotiate. There are also uncertain alternative outcomes if there is not a negotiation process. These suggest that reaching consensus on many, if not all, issues is possible within a fixed time.

First, almost everyone shares a strong interest in bringing certainty and clarity to CAHA’s ORV use management. The ad hoc and interim approach over the last several years prior to the appointment of a permanent superintendent led to conflict, confusion, miscommunication, and inconsistency that all stakeholders wish to change. Furthermore, from our interviews we learned that almost all local stakeholders over the years have been saddened and frustrated by the relationship between the NPS and its neighbors. Almost all interviewees want to improve the working relationship with the NPS and see the negotiated rulemaking as one way to do so.

Second, there are certainly advocates for ORV use who would prefer unfettered access and advocates for the environment and others who would prefer the elimination of ORV use on

CAHA beaches all together. Nevertheless, both of these opposing views – which mark the ends of the spectrum of views on ORV use – recognize that the NPS must establish a management plan and regulations for ORV use, that NPS must comply with the ESA and other statutes, and that ORV use on CAHA can and will continue.

Third, different stakeholders have enough uncertainty about their abilities to influence the outcome of a rule-making process to develop the management plan outside of a negotiated rulemaking so as to make such a dialogue feasible. For some stakeholders, limited national and state political influence suggest that the regulatory negotiation can provide a more direct, effective means to influence the NPS. For others, uncertainty in the courts and the possibility that the courts will dictate management of ORV use in CAHA suggest that a regulatory negotiation may provide a direct, effective means to shape the management of ORV use in CAHA.

Fourth, there appears to be a broader, more nuanced, diverse set of views on the issue of ORV use on CAHA than may be apparent at this time in public discourse, media reports, and general public conversation. This suggests that there are opportunities to build understanding, more constructively define the problem, and generate a range of diverse options that might solve the problems and adequately address stakeholders' concerns. However, some people with views that differ from those of the people advocating for ORV use have felt threatened and intimidated from speaking or making themselves known.¹⁴ It will be important for these views to be aired as a part of the process and to bring diverse stakeholders together in an organized, ongoing conversation.

Fifth, the negotiated rulemaking process will be designed to be completed within a fixed time, running contemporaneously with the NEPA process.

However, we do believe that the chances for a final consensus are modest, for the following reasons.

- (a) We cannot fully ascertain at this time if there is a sufficient “bargaining range” to ensure that a regulatory negotiation will certainly succeed. To do so would require more in-depth discussions with key stakeholders. We also believe that the range of options to address the conditions on CAHA, and the factors affecting those options, are not yet identified or developed, and will require in-depth understanding and balancing of different scientific, legal, technical, economic, and practical considerations.
- (b) We recognize that people have very diverse and strong views on this subject. For some, ORV use is seen as a right and is embedded in the very culture and life of the Outer Banks. For them, limiting ORV use would be painful, to say the least. For others, ORV use at CAHA is seen as an unregulated activity that is “out of control,” has been unmanaged for too long, threatens the ecosystem, and must be brought in compliance with the rest of the National Park System now. The strength of views and the deeply held values that inform those views will require patience and respect of others from

¹⁴ We encourage community leaders, organizational leaders, and governmental leaders to pro-actively create an atmosphere for full involvement in the dialogue and process.

participants and careful process design and facilitation from the mediation team to be channeled effectively into constructive dialogue and negotiation.

- (c) When stakeholders pursue channels outside of a negotiated process, such as filing a lawsuit or using political influence, we believe this both reduces the willingness of at least some stakeholders to participate in negotiated rulemaking (either to initiate the process or to stick with it) and reduces the chances of success. As we have learned during this assessment process, the filing of litigation and pursuing political intervention increases tensions. Lawsuits engender counter lawsuits. Both approaches make it more difficult to explore the full range of views and the options for addressing them. Furthermore, once litigation is filed that may directly or indirectly affect the issues under discussion in a potential regulatory negotiation, the Committee's options for resolution as well as resources available to NPS and other participants to develop, hone, and agree may be constrained, possibly severely. These actions may also make it less likely that stakeholders will share information with each other. As noted elsewhere, it will be important for Committee representatives to use the Negotiated Rulemaking process as the venue for exploring and working through these issues and reaching a resolution. Also, the DOI and NPS leadership need to demonstrate support for the process by directing stakeholders who come to them back to the process.
- (d) While parties have stated a willingness to abide by groundrules, tensions are high, many do not believe the other parties are willing or in some instances capable of abiding by the groundrules, many parties feel under attack, some parties feel intimidated and threatened, and some have engaged in personal and ad hominem attacks and threats. In this climate of fear, anxiety, hostility, and conflict, it will be even more challenging for parties with very divergent views to sit down at the table, clearly express their interests and ideas, and jointly explore options. Committee representatives also will bear the burden of not getting too far ahead of their respective constituents and working to with those constituencies to foster joint problem solving on the Committee and publicly to ensure they support and do not undermine the process. Representatives on the Committee will need to participate in good faith. We describe what we mean by good faith later in this report. In our view, core democratic principles of decency, civility, and tolerance will have to be exercised if the process is to succeed.

5. NEGOTIATED RULEMAKING WILL NOT UNREASONABLY DELAY THE NOTICE OF PROPOSED RULEMAKING

Given current frustrations with the status quo by all involved (including NPS), the negotiated rulemaking process should not delay either the notice or the final regulation. The NPS will be conducting a related NEPA process for the proposed plan and regulation, and the negotiation process should be completed within the same time period. In the absence of a negotiation process, the NPS could be subject to significant (and perhaps multiple) litigation and conflicts may only grow worse. Given this likely litigation if a consensus approach is not reached, we find that Negotiated Rulemaking might even speed up, in comparison, the establishment and implementation of a final rule.

Legal considerations, including the petition for rulemaking, the notice of intent to sue, and lawsuits against NPS¹⁵ provide a powerful incentive for the NPS to proceed expeditiously on finalizing a plan and a regulation. The level of tension and frustration with NPS management is high and needs to be de-escalated.

We believe that organized, formalized negotiated rulemaking offers the best opportunity available at this time for de-escalating conflict, rebuilding relationships, producing regulations in a timely manner, reducing the threats of litigation, providing a forum to explore (and as appropriate develop) the science that can form the basis for informed decision-making, and offering diverse stakeholders a direct and meaningful role in shaping regulations. At their best, collaborative processes generally and regulatory negotiations specifically offer the opportunity for an agency to develop regulations that are far better informed. They are shaped by diverse interests, organized around innovative ideas that emerge through dialogue, and are actually complied with after being put into effect.

We do have a few concerns, however.

- (a) The rulemaking needs to be carefully coordinated with the NEPA process that will guide the management planning and assessment of impacts leading to a record of decision. This is doable if there is careful coordination among various offices of NPS and with the mediators, and clear communication with stakeholders about the complexities of integrating these two processes.
- (b) It can take time for the formal Committee charter and membership to be approved by the Secretary of Interior, sometimes longer than anticipated. If approval of the charter and Committee membership were significantly delayed for whatever reasons, this would increase the chances that the negotiated rulemaking could unduly slow the rulemaking process, particularly as we are sensitive to the expressed needs of the local stakeholders for the process to be conducted during the “off-season” with no intensive Committee work during the summer months to avoid adversely affecting their livelihoods.

6. AGENCY HAS AND IS WILLING TO COMMIT ADEQUATE RESOURCES TO SUPPORT THE COMMITTEE

NPS has indicated a willingness to commit resources, financial and technical, for the process.

Regulatory negotiation, while holding the promise of reducing or avoiding litigation costs and producing a regulation with greater acceptance and compliance, does require an intensive commitment of time and resources, by NPS and other participating agencies and stakeholders.

¹⁵ Recent lawsuits include The Cape Hatteras Access Preservation Alliance, et al. v. Department of the Interior, et al., (344 F.Supp. 2d 108 (D.D.C. 2004)) and the lawsuit concerning ORV use in national parks filed by NPCA, Friends of the Earth, Bluewater Network Division, and The Wildlands Center for Preventing Roads against DOI.

While we cannot predict accurately at this time the extent of the financial or time commitment or the exact work plan¹⁶ for the negotiated rulemaking, past experience suggests that:

- committees usually have to meet no less than four times and often more than six times, two days each, over a year to two years (we anticipate that, in this case, the Committee may need to meet as many as eight separate times);
- committees have to generate ideas and explore and narrow issues through work by subcommittees and workgroups between plenary meetings of the full committee;
- stakeholders have to take time to inform and organize their constituents, get and give feedback, and review documents and proposals;
- information (some scientific and technical) has to be developed and analyzed to support the committee in generating options and in decision-making;
- the agency has to do extensive work to prepare for meetings and coordinate among various levels of the agency; and,
- the agency has to fund the facilitation and technical services resources necessary to make the process a success.

Accordingly, both the NPS and the stakeholders should consider if they are willing to commit sufficient resources to the negotiation process and if the benefits of expending those resources outweigh the costs of doing so.

Given the intensity of the conflict, the diverse range of interested parties, and the expectation that the Committee will advise both on the general NEPA management planning effort as well as the specific rulemaking, we conclude that this particular negotiated rulemaking will likely take additional resources and time as compared to other similar efforts elsewhere.

We do encourage everyone to consider the “as compared to what” question. Because a rulemaking has to proceed in any case, there are various costs associated with the standard approach to rulemaking under the Administrative Procedures Act and planning under NEPA, and potential costs associated with ensuing litigation, political intervention, or delay. The regulatory negotiation ought to be compared to these alternatives.

7. AGENCY, TO THE MAXIMUM EXTENT POSSIBLE CONSISTENT WITH LEGAL OBLIGATIONS, COMMITS TO USE COMMITTEE CONSENSUS AS THE NOTICE OF PROPOSED RULEMAKING

NPS, to the maximum extent possible, consistent with its legal obligations, has indicated a willingness to use the consensus of the Committee with respect to the proposed regulation for the regulation proposed by the agency for notice and comment, as described in the Negotiated Rulemaking Act, if the process proceeds.

¹⁶ A detailed process map and workplan laying out the steps and schedule for the Committee will be developed with the Committee once the charter is approved.

RECOMMENDATIONS AND CONDITIONS FOR A NEGOTIATED RULEMAKING PROCESS

RECOMMENDATIONS

We offer the following process recommendations and explain them in more detail below.

1. PROCEED WITH REG NEG:

In our best professional judgment, we conclude that a consensus-based negotiation to develop a management plan and proposed implementing regulations can be convened, can yield important benefits even if agreement is not reached, and has a modest chance of success if the conditions described below are met.

Our recommendation is based on the interviews, our analysis of the requirements for a negotiated rulemaking, our analysis of the current situation, and our experience with similar processes at other national seashores and elsewhere. We believe that the diverse interests, complex issues, and current positions will test the problem-solving abilities of all participants, as outlined in our findings. And, if the parties are not able to create a basic atmosphere of collaboration, consensus will be even more difficult if not impossible to achieve. At the same time, we do find that diverse parties are strongly interested in participating in the process to see if it can be a means to resolve some or even most of the issues.

2. STAGE THE PROCESS:

The Park and its stakeholders should undertake a “staged” process to initiate and conduct this unique and challenging Regulatory Negotiation.

Should the Park decide to proceed with Negotiated Rulemaking, we suggest that the process might take the following form.

2.1 Issue a Notice of Intent to Proceed with Negotiated Rulemaking.

The NPS should issue a Notice of Intent to proceed with Negotiated Rulemaking laying out the need for the effort (based in part on this final assessment) and a proposed list of interests and representatives to make up a Committee as soon as possible. We have recommended and implemented a pre-convening process for identifying the interests and representatives that would constitute this Committee (explained further below). We recommend that the Park use the results of this pre-convening process, including the public comment received on our suggested Committee make-up, in formulating their final list of Committee members and alternates.

2.2 Hold Collaboration Training Workshops for Stakeholders.

The NPS should sponsor one or more collaboration training workshops with the proposed members and alternates of the Committee and interested members of the public. This joint training will provide an opportunity for diverse stakeholders to interact with one another prior to formal negotiations, and to learn more about collaborative processes and how to effectively participate in them. Because the Committee will not be final nor formal at this point, this training should be open to both proposed members and alternates and members of the public to ensure any FACA requirements are met. A notebook should be prepared for participants that includes the most significant documents relevant to the management of ORV use. In addition, NPS should consider holding additional workshops as appropriate once the Committee charter is approved.

2.3 Develop Draft Groundrules for the Process.

The proposed Committee and interested members of the public, jointly with the mediators, should develop a draft set of groundrules for the process. These groundrules would be based on the results of this Feasibility Assessment, recent interactions between some of the stakeholders, groundrules of similar past processes, and discussion among stakeholders. The groundrules would not become final or be operable until the Committee was formally appointed and convened in its first formal meeting. Again, because the Committee will not be formally constituted or authorized at this point, this discussion should be open to both proposed members and alternates and members of the public. Furthermore, the advice on groundrules that emerges should be directed at the mediators, not the Park (who should, of course, be part of the discussions). This dialogue might take part at the end of the collaborative training recommended above. Ultimately, the groundrules will serve as a social contract among participants about how they will interact with one another during the process to ensure at a minimum basic respect, civility, and tolerance. Furthermore, participants need to be able to operationalize those groundrules in the behavior they exhibit toward one another in meetings and workshops, as well as between face-to-face meetings. An inability to establish civil behavior among stakeholders will likely hamper the process, if not end it early.

2.4 Participate in Joint Education.

The stakeholders have a wealth of information and knowledge about the human, ecological and cultural resources associated with Cape Hatteras National Seashore. In order to ensure the Committee can start with all members and alternates fully informed, we recommend that the Park, the proposed Committee members and alternatives, and interested members of the public engage in a joint education process. This might take place over two days and include Park presentations on its rules, regulations, and policies, and Executive Orders; local stakeholders' presentations on the local economy and culture; stakeholders' presentations on ecological and environmental resources, and the piping plover recovery plan; and national groups' presentations on the kinds of rules and regulations developed or considered elsewhere in other national parks or at similar seashores and barrier islands.

2.5 Develop a Charter and Final Membership for the Negotiated Rulemaking Committee under the Federal Advisory Committee Act.

For the Committee to begin working, the Secretary of Interior must approve final committee membership, designate a federal official to serve as the formal coordinator/point of contact for

the process, and approve a charter that, among other things: defines the Committee's objectives and the scope of its authority; sets forth the estimated number and frequency of Committee meetings; and identifies the period of time necessary for the Committee to carry out its work. This process can take time to complete and is subject to the final and sole discretion of the Secretary of Interior and the Office of Management and Budget. If the NPS decides to proceed, the final charter, Committee membership, and the date and location of the first meeting of the Committee are published in the Federal Register least 15 days prior to the first meeting of the Committee.

2.6 Provide Advice on Developing the Preliminary Alternatives for the NEPA Management Planning Process.

Once formally convened, the likely first steps of the Committee will be to finalize its groundrules, identify critical issues for committee discussion, determine how those issues should be analyzed and approached by the Committee, and identification of information needs. The Committee then will provide the NPS advice on the development of preliminary alternatives for the broader NEPA management planning and public involvement process. While the Committee will only be one source of input to the Park in the broader NEPA process, it will play an important role in identifying, discussing, and developing the range of alternatives for managing ORV use.

2.7 Analyze Impacts and Seek Consensus on the Preferred Alternative for the NEPA Management Planning Process.

The next likely steps in the process will be for the Committee to analyze impacts and explore ways to address them. After that step is completed, the Committee will then seek consensus on the preferred alternative to be put forward in the draft final Management Plan, which will in turn be subject to public comment as part of the NEPA process. Again, it is important to stress that the Committee's participation in developing the management plan development will supplement and not supplant the public involvement steps required under NEPA. If the Committee cannot reach agreement on a likely preferred alternative (again, still subject to public input and final adoption by the NPS), it may not make sense to proceed further with the Committee's work, given that the rule must be based on and detail the preferred alternative that would be formalized in the Management Plan's Record of Decision.

2.8 Seek Consensus on ORV Management Plan and Regulations for Cape Hatteras National Seashore.

Finally, after the above steps are completed, the Committee would seek consensus on a detailed set of regulations for managing ORV use on Cape Hatteras National Seashore. The Committee would not likely seek to draft the exact language of the regulations, but rather, to develop the outlines and details of a final regulation that the NPS could then, if consensus were reached, develop into the specific language required for federal rules and regulations. Please do note that once the Park developed that rule language, the proposed rule would still be subject to the formal and final rulemaking process, which includes listing in the federal register, public comment, and final acceptance by the Department of Interior.

3. ESTABLISH MILESTONES:

We recommend that the NPS and the Committee establish a set of key milestones for assessing the Committee's progress and determining if the process is meeting the interests of the participants and, if not, for ending the process even if the Committee has not completed its work. This approach can ensure clarity on the process and provide opportunities to improve how the Committee is working together.

We recommend that the NPS and its stakeholders establish a set of key milestones for assessing the Committee's progress and determining if the process is meeting the interests of the participants. At each step of the process, the parties can jointly review progress and make adjustments or improvements as needed. At each step, NPS and stakeholders can also determine whether to continue to the next step or to "exit" the process if parties cannot collaborate and/or if the process is not meeting their needs or interests. One example would be negotiating, putting into practice, and abiding by collaborative groundrules. If the parties couldn't come to agreement on groundrules, this would be a good indication that the process could not go forward. Successful adoption of groundrules helps lay a solid foundation for effective collaboration.

We also have proposed a set of activities prior to final and formal approval of the Committee. These activities will help initiate the process while completing the formal paperwork process, which can take some time, and will need to be open and available to members of the public to abide by all proper FACA requirements. In this way, when the Committee is formally and finally constituted, it can immediately begin specific and substantive work.

4. USE CONSENSUS:

We recommend a consensus decision/rule for the Committee.

According to the Negotiated Rulemaking Act, "consensus" means "unanimous concurrence among the interests represented on a negotiated rulemaking committee . . . unless such committee agrees to define such term to mean a general but not unanimous concurrence; or agrees upon another specified definition." We recommend a consensus decision/rule for the Committee, should one be convened.

The Committee will have to determine, by unanimous agreement of all Committee members, the definition of consensus, whether it will require "full unanimous concurrence of all Committee members" or "almost unanimity (i.e., agreement of all but one of the Committee members, excluding NPS)." Using the "almost unanimity" definition prevents one party from derailing the entire process. In any event, NPS will have to be part of an agreement for it to be considered the "consensus of the Committee." Similarly, the Committee will have to decide, again by unanimous agreement, how to handle any lack of consensus

Consensus ensures that minority views are respected and considered, that all who take part are taken seriously by others in the process, and that agreements reached have the ownership and broad support of a great number of participants. Consensus also means a process by which participants seek to listen to and understand the interests of others, to generate ideas and options, to offer proposals as well as raise concerns and criticisms, and to work diligently to meet all participants' needs and interests to the greatest extent possible. When a group reaches consensus that does not necessarily mean that everyone equally likes the final agreement. Some participants may love the agreement, some may like it, and some may reluctantly go along with it. Consensus does mean that everyone who consents will support the agreement going forward, or, at the least, not fight or undermine its implementation. Consensus decision making also ensures that a Committee can be composed of a diversity of interests and organizations without having to resort to careful and contentious "vote counting" when forming the Committee (see below). The notion of consensus is that it calls for much broader support than majority or even super-majority voting.

5. EXPAND THE COMMITTEE SIZE:

We recommend that the NPS and Secretary of Interior establish a Committee that exceeds the 25-member limit in the Federal Advisory Committee Act. This is warranted to ensure the Committee is balanced and the range of interests with a stake in the issues are adequately represented.

As noted, the Negotiated Rulemaking Act allows for up to 25 members (unless a greater number is determined to be necessary for the functioning of the committee or to achieve balanced membership). In the draft recommendations, we sought to abide by this constraint and issued a list with 25 names and in most cases a designated alternate. As described below in the Recommendations to the NPS for Composition of the Committee, for the Committee to be balanced and represent the range of substantial interests in the issues, we believe that the Committee must exceed the 25 member limit, as permitted under the Negotiated Rulemaking Act. At this time we are recommending to the National Park Service that the final Committee include membership as listed in Appendix C.

We also recommend that there may be others that wish to have a specific liaison to the Committee. Liaisons do not have formal membership on the Committee, but receive all Committee correspondence and are provided opportunities to speak in addition to general public comment periods. There are two potential kinds of liaisons. First, liaisons who can provide advice on national commitments such as the Americans with Disabilities (ADA) Act. In addition, the Committee may need to avail itself of various kinds of technical expertise, potentially outside of the expertise of the Committee members.

Please also note that the NPS still is obligated to provide an opportunity for the public to comment on the proposed Committee membership and balance if NPS decides to proceed. The Negotiated Rulemaking Act states: "[p]ersons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice...may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule."

The public will be able to comment for 30 days once the Notice of Intent to Proceed with Negotiated Rulemaking appears in the Federal Register. Please also note that the National Park Service and the Department of Interior have the full and final authority to revise, refine, or alter this recommendation for the number of Committee members.

ADDITIONAL CONSIDERATIONS

The following additional considerations could significantly improve the process and the likelihood for success.

The Committee's objectives and the scope of its authority as expressed in the charter needs to allow the Committee to advise the NPS on actions related to interim ORV use management while the reg neg process is underway.

This negotiated rulemaking would be unique. No formal regulations exist. The 1978 interim ORV plan, or its variations, has never been formally and finally approved. ORV use will be affected by the interim actions the NPS takes regarding protected species management and user conflicts, the process and outcomes of the NEPA-guided ORV management planning process, and the final regulations developed for ORV management on CAHA. Thus, we recommend that the Committee have as its primary scope and decision-making authority (by consensus under the Negotiated Rulemaking Act) the development of ORV use regulations. And, secondarily, but importantly, the Committee should also be able to advise the NPS on: 1) interim issues directly related to ORV use that may emerge during the negotiated rulemaking process, provided that it can do so in a timely fashion without adversely affecting its ability to reach its primary goal of agreeing on the content of a proposed regulation; and 2) alternatives development and analysis in the NEPA process for management planning, including making a consensus recommendation for a preferred alternative.

While the NEPA process and the negotiated rulemaking process will support and provide input to the other, it must be clear that they are separate processes, occurring under different legal authorities. The negotiated rulemaking process must not hinder or limit the NEPA study, especially the identification and analysis of impacts or alternatives. As part of the NEPA process, NPS must consider a full range of reasonable alternatives and involve the general public. Similarly, the NEPA process must sufficiently document the analysis of alternatives and impacts for NPS to make all necessary legal determinations concerning ORV use and the management plan, including whether ORV use in particular areas adversely affects the natural, aesthetic, or scenic values of that area. We are confident the negotiated rulemaking process can be successfully and properly integrated with the NEPA process to meet the necessary legal requirements while avoiding duplicative efforts and costs.

NPS and the Department of the Interior should expedite the necessary administrative procedures to initiate negotiated rulemaking.

Getting underway with management planning and rulemaking is essential given the heightened intensity of concerns and conflicts, pending and threatened litigation, and the need for the NPS to come into compliance with its regulations. Approval of a negotiated rulemaking process and committee membership can be a lengthy and complicated process, sometimes taking many months. If NPS decides to go forward with the process, both we recommend the NPS and

Department of the Interior expedite the administrative review and approval to initiate the process as soon as possible

The NPS and Stakeholder representatives on the Committee need to provide consistent leadership during the multi-year process to develop final regulations.

For stakeholders to trust in the process, for the Committee to build effective working relationships, and to ensure that the NPS representative at the table will understand the range of interests and possible trade-offs among various choices, the negotiated rulemaking will require consistent, capable representation by someone from the NPS with appropriate authority. If the process is to succeed, it will require both consistent personal NPS presence on the Committee and on-going, steady commitment from NPS as an organization to the process as a whole. Thus, we encourage the NPS, both organizationally and via staff, to provide the necessary leadership during the process.

Similarly, Committee representatives must exercise leadership within their respective organizations and constituencies to foster a climate of joint problem solving on the Committee and publicly, to keep their constituencies informed, and to ensure their constituents support rather than undermine the process. Committee representatives also must work with their organizations and constituencies to foster joint problem solving by the Committee and through the negotiated rulemaking process.

NPS should take advantage of the period between publishing the Notice of Intent to Proceed with Rulemaking and the first meeting of the Committee to review the work of the assessment team and determine whether the CBI/FCS team working under the auspices of the U.S. Institute for Environmental Conflict Resolution is acceptable to the Committee members to facilitate the negotiated rulemaking process.

Under the Negotiated Rulemaking Act, the facilitator for the negotiations of the committee is subject to the approval of the committee by consensus. To ensure the Committee can get started promptly once the charter is approved, the NPS should take advantage of the period between publishing the Notice of Intent to Proceed with Rulemaking and the first meeting of the Committee to review the work of the assessment team with the proposed Committee members and determine whether the CBI/FCS team working under the auspices of the U.S. Institute for Environmental Conflict Resolution (USIECR) is acceptable to the Committee members to facilitate the negotiated rulemaking process. If not, the NPS will need to propose a substitute facilitator to the Committee members. The USIECR can assist the NPS and proposed Committee members with the review to determine whether the CBI/FCS team is acceptable, and if necessary identify other potential facilitators.

CONDITIONS TO ENSURE PARTICIPATION IN THE NEGOTIATED RULEMAKING PROCESS

We have identified the following conditions that most likely need to be met for key stakeholders to be willing to participate in the process. These conditions are based on our interviews, on-going consultation with and feedback from stakeholders, and our best professional judgment from past experiences.

A. The focus and starting point of the negotiated rulemaking needs to be on *how to manage ORV use on CAHA consistent with all applicable laws, regulations, orders, and policies, rather than if there will be any ORV use on the beach at CAHA. The proposed regulation developed by the Committee and recommended to NPS must (a) be consistent with and comply with all applicable laws, regulations, orders, and policies, (b) provide for a diversity of visitor experience, (c) include enforceable mechanisms to manage ORV use; and, (d) be implementable.*

From our interviews, we have concluded that most, if not all, stakeholders recognize that ORV use will continue in some fashion and in some areas within CAHA, provided that all legal requirements can be met, including the specific requirements of Executive Order 11644 that ORV use will not adversely affect natural, aesthetic or scenic values.

Though some would prefer to end ORV use completely on the beach, many of these interviewees also recognize that ORV use is important to the experience of some users and to their values about the local culture and economy. Some recognize that if managed appropriately, ORV use could be compatible with natural resource protection and other visitor uses and could be in compliance with federal laws and regulations. Though we cannot determine at this time what specific management and regulatory options are likely to be acceptable, stakeholders and Committee members should accept that the discussion would be centered on how best to manage ORV use, not whether ORV use is an appropriate use within CAHA generally. In raising this as the starting point for discussion, we make no judgments about whether ORV use is or is not an appropriate use. For the collaboration and negotiation to be fruitful and for Committee members to strive for resolution, the focus must be on “how” and “where” to manage ORV use on CAHA consistent with all applicable laws, regulations, orders, and policies, rather than *if* there will be any ORV use on the beach at CAHA.

Even with this starting point for the Committee’s deliberations, we note that during the NEPA process the public will be invited to develop a full range of possible alternatives for analysis, which may include no ORV use, areas of seasonal closure, or areas of temporary closures for protected species and various other management strategies.

To be successful, the Committee must agree on the outlines of a proposed regulation that meets all applicable laws, regulations, orders, and policies, including providing for different uses of CAHA by different visitors. The recommended plan/regulation should provide for a diversity of visitor experience, accommodating both visitors who want to experience CAHA using ORVs and those who want to experience a natural beach without vehicles or tire tracks. The development of a plan to manage ORV use at CAHA must, by NPS policy and the Executive Orders, include

designating clear routes for ORV use, provide for a diversity of visitor experience, and address the primitive wilderness of the enabling legislation establishing CAHA. Moreover, under Executive Order 11644, ORV use, as managed by the plan and proposed regulation, must not adversely affect natural, aesthetic, or scenic values. Also, certain portions of CAHA may need to be temporarily closed at certain times to meet legal requirements under the ESA and Migratory Bird Treaty Act.

The Committee also must create a regulation that is enforceable both legally (meaning that NPS can lawfully enforce the requirements and a court would uphold NPS authority in enforcing those requirements) and practically (meaning that the NPS will have resources available to ensure the regulation's requirements can be enforced effectively). Almost all stakeholders recognize the importance of, and expressed the need for, adequate mechanisms to enforce the regulation on the beach, particularly so that law-abiding visitors are not penalized for the actions of those who disregard the regulations or abuse their use of the beach. Many stakeholders also pointed out that NPS presently has insufficient resources to monitor activity on the beach and handle the current enforcement responsibilities. Given the current shortage of funding and resources for both CAHA and NPS generally, the Committee and the NPS will have to address both the legal enforceability of any regulation requirements and the availability of resources to ensure those requirements can be enforced effectively.

B. The NPS must establish interim plans for managing protected species and user conflicts while the Committee is conducting its work. The NPS must consult with the USFWS under Section 7(a)(1) and 7(a)(2) of the ESA and put in place a legally defensible “livable” interim protected species management strategy. NPS also needs to address conflicts between ORV and non-ORV users during the negotiated rulemaking process.

The Petition for Rulemaking and Notice of Intent to Sue and the lawsuits concerning wilderness designations and ORV use in national parks have put the NPS on notice that it must have in place and effectively implement an approach to managing protected species within CAHA as soon as possible.

Until an interim protected species management strategy is established: 1) the NPS will remain vulnerable to litigation; 2) stakeholders will be highly and understandably anxious (and perhaps dubious) about how the NPS will act and what the NPS will do; and 3) protected species and other management actions will be seen by some or many as ad hoc, unclear, and inconsistent. Thus, the NPS needs to bring some measure of order, stability, and clarity to addressing protected species in CAHA. In fact, many prospective participants in the negotiated rulemaking process are waiting for NPS to develop and begin implementing an interim protected species management strategy before finally and fully committing to participate in the negotiated rulemaking process.

We note that NPS released the Environmental Assessment on the Interim Protected Species Management Strategy (IPSMS) on January 18, 2006, and the public comment period closed on March 1, 2006. We understand the NPS is in the process of evaluating comments, consulting with FWS, and waiting to receive a Biological Opinion from FWS before finalizing the plan and preparing the decision document for the plan. We also understand completion of the approval process and implementation of the strategy is anticipated to occur in April 2006.

Once completed, the NPS needs to determine whether the interested stakeholders are willing to live with the Interim Protected Species Management Strategy and commit to participating in the negotiated rulemaking.

Similarly, we encourage the NPS to address conflicts between ORV and non-ORV users likely to occur during the time the Committee is working on the proposed regulation.

If the NPS is not able to adequately address interim management of protected species and visitor conflicts while the negotiated rulemaking is underway in a manner that most stakeholders are willing (however reluctantly) to live with during the regulatory negotiation the effort could be hampered if not outright undercut by the immediate issues, actions and conflicts.

C. To the greatest extent possible, the Committee should build a management approach to ORV use “from the ground up” so as to build a new approach that is not limited by previous interim plans.

We recommend that the Committee have the latitude to build a new approach that is consistent with all relevant statutes and regulations but not limited by previous interim plans. Many of the interviewees expressed concern about the starting point of the negotiations. Many do not find the current implementation of the 1978 interim ORV plan or its variations widely accepted, understood, or appropriate for the current situation. Thus, we recommend that the Committee not be bound by any interim ORV plan or strategy (in whole or in part) now in effect or that might be put into effect on an interim basis, and that the Committee have the freedom to generate and explore a range of options for managing ORV use that will allow for innovation, creativity, and a possible outcome that meets the needs of diverse constituents for the draft regulation. The Committee certainly may be informed by past efforts at CAHA and elsewhere.

D. Participating organizations and their representatives need to commit to making the negotiated rulemaking process the primary and central focus of their efforts to address issues related to ORV use on CAHA and to curtail using other means to influence the proposed regulations during the negotiated rulemaking process.

For a negotiated rulemaking process to succeed, it needs to become the forum for and the focus of the stakeholders’ primary efforts to address ORV management at CAHA. Based on information from the interviews, it appears at the current time that various stakeholders are pursuing their available methods and opportunities to influence NPS actions. These methods include media and web campaigns, political campaigns, litigation, threats of litigation, and other actions. The combination of practices by different stakeholders has created an environment of confusion, distrust, conflict, impasse, and instability. If the negotiated rulemaking process is well-designed and implemented, it holds the promise of bringing order, focus, and energy to collaborative efforts to solve multiple problems and to meet diverse needs and interests.

However, if parties continue to pursue other actions outside of a collaborative process, the negotiated rulemaking will be less effective, if not outright unhelpful or irrelevant. For instance, if significant litigation is filed during the convening or once the negotiated rulemaking process is underway, the litigation has the potential to usurp the collaborative process and send most stakeholders into their respective “litigating corners.” Litigation will make communications and

information sharing among the parties, particularly the named defendants, extremely difficult, if not impossible. Attempting to influence decisions or other actions through political channels or the media could have a similar effect on other stakeholders. Stakeholders may choose to pull out of the collaborative process. The potential effectiveness of the negotiated rulemaking process may be undermined, and the ability to build a shared, innovative, solution to the various problems of ORV management could be lost.

To address these situations, we recommend that participation in the collaborative negotiated rulemaking process enter into a “truce” with a few key commitments. These include the commitment to:

- use the negotiated rulemaking and concurrent NEPA process for developing the management plan as the primary forums for working out the management plan and proposed regulations, and directing parties and constituents to the negotiated rulemaking process to air and address concerns and resolve conflicts;
- engage in dispute resolution with Committee members and commit to trying to resolve differences and concerns with Committee members or the Committee as a whole before taking action outside the Committee;
- follow a “no surprises” policy – meaning a Committee member will give the Committee advance notice before taking any significant unilateral legal or political action related to the proposed ORV management plan and regulations;
- deal externally with the media and others and on websites in accordance with the Committee’s agreed upon guidelines and groundrules;
- disclose relevant activities to keep the Committee reasonably informed of activities that relate to ORV use in CAHA; and
- negotiate in good faith (which is explicitly required under the Negotiated Rulemaking Act), which means a commitment to seeking a consensus on a proposed rule, supporting the Committee as a forum during its term, and not taking actions to undermine Committee efforts to build consensus.

Of course, Committee members are not expected to and will not waive or give up any rights to taking other, independent actions, including litigation, even though their primary commitment and effort will be to resolve issues through the collaborative process first, if possible. As part of establishing the operating procedures for the Committee, the Committee will have to determine the parameters of the “truce” in regard to process and behavior. Participants will need to discuss how they will disclose and share with others their actions on related but separate issues such as year-to-year protected species management within CAHA, USFWS critical habitat designation process, and national-level NPS ORV management issues.

E. Participating organizations and their representatives need to be willing to explore a range of management options and scenarios, even if they at least initially find those options unappealing or highly unlikely to be acceptable to their constituents.

Many stakeholders hold publicly stated strong views on one or another option for how ORV use on Cape Hatteras National Seashore will be managed and regulated. It will be essential for representatives on the Committee to explore a range of options for how driving might be managed including options that, at least at initial reaction, might not be acceptable to them. First, management planning requires the generation of multiple options, including no action and

often its “opposite” – new and extensive action that some or many may find unacceptable – and the possible options in between. Second, inventing and exploring a range of options, including ones that some may find unappealing, helps to surface interests, concerns, and new ideas. Sometimes by discussing unappealing options stakeholders respond by generating new ideas and options that allow an altogether new and acceptable approach to emerge.

F. NPS must commit, to the maximum extent possible consistent with its legal and policy obligations, to use the consensus of the Committee as the basis for the regulation proposed by NPS for notice and comment.

NPS has indicated it will use a consensus product from the Committee, provided “consensus” means the agreement of the whole Committee, including NPS. For stakeholders to determine whether the process can meet their objectives and trust the process, NPS must indicate their commitment to use the product from the Committee if they reach consensus. Otherwise, stakeholders may be reluctant to engage fully in the process and may seek to influence decisions by NPS in other ways.

G. NPS must establish a firm deadline by which – (a) the Committee will complete its work and propose a regulation, or (b) if consensus is not possible, the negotiated rulemaking process will be terminated, and NPS will take appropriate and timely action to promulgate a regulation to regulate ORV use on CAHA.

Many if not all stakeholders are dissatisfied with the current situation. To forgo pursuing other actions and decide whether to participate in the negotiated rulemaking process, stakeholders want to know that the current situation will not go on indefinitely. They also want to understand the expectations for participating in the negotiated rulemaking process and what will happen if the Committee does not reach consensus. Clear deadlines established upfront are an important part of a collaborative process to keep the group focused and working on development of the plan.

Establishing a deadline also is consistent with the requirements of FACA and the Negotiated Rulemaking Act. Under FACA, the charter for the Committee must specify the time period for the Committee to carry out its work, and a FACA committee automatically terminates two years after it is established, unless sooner terminated or extended (Section 9(c)(C), and 41 CFR 102-3.55). We strongly encourage the NPS to establish the deadline in consultation with facilitation team and taking into consideration the key milestones recommended above.

H. Management of ORV use at Pea Island National Wildlife Refuge will not be included in the negotiated rulemaking process as the Refuge is managed by USFWS, rather than by the NPS.

The Pea Island National Wildlife Refuge is managed by the USFWS according to a different set of laws and regulations than those that apply on CAHA, including the National Wildlife Refuge System Administration Act. Consequently, it is not possible or appropriate for NPS to address ORV use at the Refuge in a NPS regulation process.

I. Participating organizations and their representatives need to commit to working civilly and collaboratively, even with those with whom they may disagree strongly.

Collaborative processes only work if the participants are committed to working civilly and collaboratively, even with those who they may disagree strongly. In collaborative processes such as regulatory negotiation, we don't expect that everyone will agree with (or even like) each other. We do expect that people will be passionate about the issues and be assertive in sharing and seeking to meet their interests. We also expect people to behave civilly and respectfully. We would also expect all participants, to the best of their ability, to work with their constituents and publics to encourage civil behavior. In this spirit, we have seen people with very different interests create inventive options, solve complex problems, and reach agreements that were hard to imagine when they began discussions. Core democratic values of respect, civility, and tolerance must be exercised in order for these processes to proceed.

One of the first acts of any FACA-chartered Committee is to review, revise as needed, and to approve its operating procedures and groundrules. We also recommended that the proposed Committee and interested members of the public, jointly with the mediators, develop a draft set of groundrules for the process.

The following are examples of groundrules used by others in collaborative processes.

Openness: Committee members will be open to all representatives and other points of view, and to possible outcomes. To enhance creativity during meetings, individuals are expected not to restrict themselves to the prior positions held by their organizations, agencies or constituencies.

Listening: Committee members will focus on the speaker and what is being said rather than preparing your response. One person will speak at a time, with no interruptions.

Fairness: Everyone is expected to participate. Committee members are expected to speak briefly, without grandstanding. Anyone (including the mediators) can call a break (i.e. caucus) for any purpose during a meeting.

Respect: Committee members will disagree without being disagreeable and focus on the problem, not the person. Personal attacks in or outside of Committee meetings will not be tolerated.

Communication: Committee members will keep their constituencies informed of deliberations and actively seek their input; avoid surprises; and inform other Committee members early and often of any issues, concerns, or worries. All members will be given an opportunity to be heard with the intention of encouraging the free and open exchange of ideas, views, and information prior to achieving consensus.

Commitment: Committee members are expected to prepare for and attend each session; honor and stay on track with the meeting agenda and make changes to the agenda by agreement with the whole Committee; begin and end meetings on time; and get up to speed if you miss a session.

Good Faith: All Committee members agree to act in good faith in all aspects of the Committee's operation. They further agree that specific offers made in open and frank problem-solving conversations will not be used against any other member in future litigation or public relations. Good faith requires that individuals not represent their own personal or organization's views as views of the entire Committee, and that the views and opinions they express in the Committee deliberations are consistent with the views they express in other forums.

Media Contact: Contact with the media during the negotiations is inevitable. The expectation is that contact with the media about the Negotiated Rulemaking effort will not be initiated by Committee members. "Negotiating through the media" will likely increase, not decrease, conflict. If contacted by the media, the expectation is that no one will characterize the behavior of another organization or its representatives participating on the Committee, or attribute motives. There should be no comments aimed at other participants, i.e., personal attacks are inconsistent with good faith. The Committee could, as part of its adopted guidelines, either decide on a self-imposed "gag order," or designate a person(s) who would interact with the media on its behalf.

Web Sites: Many organizations planning to participate in the negotiations rely on the Web for a range of purposes. The Web can be used consistent with a good faith standard by avoiding characterizations of behavior, negative comments, or claims about the motives of other Committee members or their organizations in any web posting. Likewise, it is expected that Websites will not be used to speculate on information provided to the Committee or on the outcomes of discussions during the negotiations. Websites will be used for meeting notification and process updates rather than as a venue for debating or characterizing the process, or rebutting comments made by a Committee member or alternate, at least while the Committee is going about its tasks.

Disclosure of Relevant Activities: There is an expectation that Committee participants will keep the Committee reasonably informed of their activities that relate to ORV use on CAHA and likely would be of interest to others. This includes legislative or policy initiatives, fundraising campaigns, or litigation, as well as other activities (e.g., such as rallies or similar campaigns).

FOIA: All parties are expected to focus on the Committee as the forum for seeking information, so that desired information can be made available to all participants.

RECOMMENDATIONS TO NPS FOR COMPOSITION OF THE COMMITTEE

In accordance with the provisions of the Negotiated Rulemaking Act, NPS has asked the assessment team to make recommendations regarding the proposed membership of the Committee. The final authority for selecting and finalizing the membership of the Committee rests with the Secretary of the Department of the Interior. We offer below our recommendations for the Committee. These recommendations are intended to help ensure that a balanced Committee of stakeholder representatives is convened to participate in the negotiated rulemaking process.

In order to expedite the formation of a regulatory negotiation committee, should the NPS decide to proceed, we initiated a “pre-convening” process to develop the potential make-up of a Committee. We initiated this process with some trepidation because it placed us, the mediators, working at the behest of all stakeholders, in the role of pre-selecting specific representations to a potential committee and making judgment calls about one or another stakeholder group or individual applicant. Nonetheless, to help expedite the process, potentially shorten the formal administrative process, and assist the Park, the mediation team agreed to proceed.

In undertaking this pre-convening process: 1) we developed a list of general stakeholder categories and solicited feedback on those categories; 2) we identified the possible number of representatives for each stakeholder group, and provided multiple opportunities for feedback on total numbers and balance among groups; 3) we solicited names of proposed representatives and alternates via a public process for organizations or groups representing these broader stakeholder groups; 4) we issued a draft list of potential members and alternates, based on those suggestions and in consultation with each stakeholder group; and 5) we received and analyzed extensive public comments on this potential list of recommended members and alternates.

PRE-CONVENING PROCESS

In April and May 2005, we completed our interviews for this feasibility report. In the draft Assessment report, we listed the categories of stakeholders (but not names of possible representatives) to be represented on a Committee. The draft report was provided to those we interviewed in mid-June, and we received comments and feedback on the draft report from twenty-six (26) people or organizations by the July deadline. We then worked to incorporate concerns and suggested changes, including making the names of stakeholder categories more specific, correcting names of organizations, increasing the proposed number of seats on the Committee to achieve a better balance between the different stakeholder categories, and adding additional perspectives to the findings section. We also adjusted allocation of seats to different stakeholder groups based on extensive input from the interviewees.

To further the pre-convening, we developed a process through which organizations could propose specific representatives and alternates for the Committee.

- In August 2005, we issued a press release and sent an email to interviewees and other interested parties describing the process for proposing representatives and directing them to the forms to complete to propose individuals to the Committee.
- We welcomed these proposals until the end of September, and received proposals from over thirty different organizations.
- To ensure the legitimacy of nominations, we encouraged nominations to come from the President, Executive Director, Board, or other head of the nominating organization, agency, or coalition, in order to indicate the full backing of that nomination by the nominating group.

During the months of October and November 2005, we worked closely with nominees in each stakeholder category to help them determine how they wanted to allocate the available seats. Within the stakeholder groups we identified through our interviews, we encouraged organizations to work among themselves to “self-select” their representatives. Within any one stakeholder category, we encouraged all interested organizations to work together to select their members and alternates, and then to collectively put these nominees forward. We recommended this kind of self-selection process to: 1) allow stakeholders to select the individuals who would best represent their interests; and 2) ensure support from within a stakeholder group for their selected representatives.

In some cases, applicants within a stakeholder category were able to work out among themselves how best to represent themselves on a Committee and we fully incorporated their advice to us. In some cases, applicants within a stakeholder category could not agree on how the seats should be filled. In these cases, we used our best professional judgment to suggest members and alternates who were inclusive of a range of interests and geographic areas within stakeholder groups, who might most fully and effectively represent the interest on the Committee.

In November 2005, we issued to all interviewees and via public notice, a list of potential members and alternates for the Committee. We opened a “mediators” public comment period so that the public could advise us further on the potential composition of a Committee. By the January 30, 2006 deadline for comments, we received public comments on the draft recommendations for the make-up of the Committee from more than 140 individuals. We analyzed these comments and in this final report, include revised recommendations to the NPS for the make-up of a Committee, should one be formed.

With the release of this Feasibility Report, the list of recommended representatives and alternates will be forwarded to the NPS for review. NPS will then review it and forward the list, with any changes, to the Department of Interior. After approval by the Department of Interior, the Notice of Intent to Establish a Negotiated Rulemaking Committee identifying the proposed Committee members and alternates would be published in the Federal Register. There will be a 30-day public comment period after publication, followed by a NPS analysis of the comments, and a final decision on whether to proceed and if so the composition of the Committee, based on public comments.

Once public comment is analyzed and the NPS determines whether or not to proceed, there are additional steps under FACA to create the actual Committee and to begin deliberations. The

NPS must prepare a Charter for the Committee and a final list of members (and alternates) and submit these to the Secretary of Interior for approval. Once the Secretary of the Department of the Interior approves such matters, these are published again in the Federal Register along with a notice of the first meeting date. We have not ascribed times to these steps because we cannot determine at this time how long such a final approval process will take.

STAKEHOLDER IDENTIFICATION

Through our interviews, we have identified the following broad, stakeholder groups. We recognize that stakeholder groups include individuals and organizations with multiple interests and concerns, and that many individuals may fit into a number of different named stakeholder groups. Despite these limitations, we think the identification of stakeholder groups is useful to help identify the diversity and range of views that need to be represented in a collaborative process. The stakeholder groups we have identified are:

- | | |
|---|--|
| <ul style="list-style-type: none"> • Federal government • State government • County government • Civic and homeowner associations • Tourism, visitation and businesses • Commercial fishermen | <ul style="list-style-type: none"> • Environmental and natural resource conservation advocates including national, regional and state groups • Park user groups including those that favor open access, ORV use, recreational fishing, and other park uses such as bird watching, swimming, water sports and beach combing |
|---|--|

COMMITTEE BALANCE OF STAKEHOLDER REPRESENTATIVES

In determining the number of seats on the Committee for each stakeholder group, we have sought to be inclusive of the range of interests and to balance those interests with sufficient representatives from each of a range of possible views. We have attached as Attachment C our revised list of suggested representatives and alternates per stakeholder category. We offer this revised list after extensive consultation with diverse stakeholders, comment on earlier drafts by interviewees, a public application process, and a public comment period. We do provide below a summary of public comments received on the December 2005 draft list of recommended Committee members.

In order for interviewees and others to determine if the recommended composition of the Committee is balanced, it is important to be clear about the decision/rule that we would recommend for the Committee. In our view, because we recommend a consensus decision/rule (see above), the exact numbers do not matter nearly as much. Any few members in a consensus process can raise issues and concerns and the group has to seek to address those concerns and issues, because agreement requires a high hurdle of all or almost all members saying “I can live with it” to proceed.

As noted above, we recommend that the final Committee include membership of those representatives and their alternates listed in Attachment C.

MEMBERS, ALTERNATES, OBSERVERS, AND LIAISONS

To provide for more inclusion and participation, and to have replacements for those members who may be absent, we also recommend that Committee members each have an alternate. Alternates should attend every meeting and work closely with their member representatives. Members should reflect their own views, as well as the views of their alternate, especially if the alternate is from a different organization. To increase inclusiveness and participation, we recommended, in some cases, that some alternate seats be filled with members from different organizations than the member's organization.

Even if someone is not a member or alternate, we encourage the process to allow individuals to sign up as interested observers to receive all Committee mailings and documentation.

CRITERIA FOR REPRESENTATIVES

We recommend the following membership criteria for representatives in the Negotiated Rulemaking process.

- Able to represent their organization or constituency.
- Able to speak with authority and make commitments on behalf of their organization or constituency.
- Seen as a legitimate and capable representative in the eyes of their organization or constituency.
- Willing to complete any necessary federal paperwork for FACA membership.
- Able and willing to abide by the ground rules of the process.
- Able to commit to the negotiated rulemaking as the primary focus of their efforts at addressing ORV use on CAHA.
- Able to advocate effectively for their organization or constituency's interests and *also* able to consider the perspectives of others and seek common ground wherever possible.
- Able to attend meetings on the Outer Banks.

In short, representatives must be capable of effectively representing their group's interests and also be able to work effectively and collaboratively with others, including those whose views and opinions may be quite different from their own.

Please note that in our pre-convening we determined that, at times, some of these criteria may be in conflict with each other. In addition, in some cases a recommended member or alternate did not meet all of these criteria but was recommended because they represented an interest that otherwise would have no representation.

SUMMARY OF PUBLIC COMMENT ON THE PRE-CONVENING RECOMMENDATIONS

By the January 30, 2006 deadline we received public comments on our recommendations for the make-up of the Committee from more than 140 individuals. We are attaching those comments, verbatim, as an appendix to this final report (Appendix F). Below we summarize the key comments, recognizing that the reader should review the comments directly to capture the full range of nuanced views provided by those who took the time to comment.

- *Due Diligence:* Some commenters asked CBI to conduct due diligence with some organizations on the nominations of certain individuals for membership. The general concern raised was that the proposed member and/or alternate did not adequately represent the range of views of the organization or that he or she was appointed without due process within that organization. After the public comment period, we sought clarification from the Greater Kinnakeet Shores Homeowners, the Cape Hatteras Bird Club, and the Avon Property Owners Association on this issue. We received confirmation from each of these three organizations that they had indeed selected the proposed representatives. Their confirmation/clarification is attached as Attachment E.
- *Balance:* Many commenters raised concern about balance of the draft recommended Committee. Some commenters stated that too few local interests were represented on the proposed Committee, thus unfairly weighting the Committee toward national or environmental interests. Others raised concern that not enough environmental and conservation advocates were represented, thus unfairly weighting the Committee toward ORV interests. Others noted that too many Committee members were affiliated with the Outer Banks Preservation Association (OPBA), thus providing an imbalance of organizational participation. In short, we received conflicting and strongly felt views on the balance of interests on our recommended Committee. We do note that given the diversity of public comments received, obtaining unanimous support on the exact composition of a Committee is unlikely.
- *Underrepresented Interests:* Some commenters raised concern about missing or underrepresented interests. Many comments raised concern that local Hatteras Island businesses were not adequately represented by the Chamber of Commerce or by the Dare County Visitor's Bureau. The comments stated that these broader organizations generally have not been able to express the unique interests of numerous small businesses on Hatteras Island specifically versus on the Outer Banks as a whole. Others stated that few to no lifetime residents were represented on the Committee. Others noted that the general visitor to Hatteras was not clearly represented by any proposed members or alternates. Others noted that ORV groups are underrepresented vis a vis fishing, open access, and environmental interests. A few noted that Park visitors with disabilities were under or not represented. In addition, the state requested two seats on the Committee, one for the Marine Fisheries and one for the Wildlife Resources Commission, given their different missions and interests. More specifically,
 - Local Hatteras businesses stated clearly that they have historically not been served as well as they would have liked by the larger, umbrella business and visitors organizations on the Outer Banks and that they have a very direct stake in the

outcome of the process, economic and otherwise. Furthermore, they have gone to substantial effort to organize over one hundred businesses during the assessment process.

- The general visiting public may not be adequately represented by existing recommended members, although such groups as the OPBA, the Dare County Visitor's Bureau, and homeowners associations should represent at least some visitors. The National Parks Conservation Association, the one group that nationally represents visitors as an active part of their mission, filed litigation during the assessment process, raised concern among other stakeholders, and ultimately withdrew their application for membership. Thus, it is not clear if there is any one organization that can fulfill this national interest.
- Some commenters raise concern that there was no direct representative users/drivers with disabilities as related to the Americans with Disability Act (ADA). Although, some organizations such as the North Carolina Beach Buggy Association and OPBA noted that their memberships include individuals with disabilities and that they include these issues in their purview.
- *Legitimacy*: Some commenters raised concerns about the legitimacy of certain recommended members or alternates. Comments ranged from expressing concern about certain individuals' ability to abide by groundrules, to past, negative interactions on similar issues, to certain organizations not being clearly established or legitimate. We note the following specific issues or concerns raised under this broad category of concern.
 - Several commenters raised concern about whether Real Kiteboarding, a business, adequately represented the broader interest of water sports. Commenters stated that this interest was too narrow and could better be represented by one kind of umbrella group or another. Since no general non-industry water sport organization exists at the local level and none applied at the regional or national level, some noted that such interests might better be represented by local business groups such as the Chamber, the Visitor's Bureau, the Cape Hatteras Recreational Alliance, and/or the Cape Hatteras Business Alliance (depending on how they view their interests).
 - Some commenters raised concern about the Cape Hatteras Recreational Alliance. Comments included that the proposed representative has a conflict because he is married to a Park Service employee, that the group exists in name only, and that membership is not publicly posted nor can one find a way to join the organization. We received other comments strongly supporting this nomination. We do note that while this group is not as old or well-established as many others, there was no other local organization we identified that represented primarily non-driving beach interests. We also recognize the concern we heard at length during this assessment that those with local views differing from ORV interests are discouraged from speaking out and do not have a clear voice for their viewpoint.
 - Some commenters raised concern about the Hatteras and Frisco Homeowners Coalition. Comments included that the group exists in name only, that membership is not publicly posted nor can one find a way to join the organization, and that the interest is too narrow (i.e. a small number of property owners concerned about beach

use in front of their properties) and should be folded into a broader organization or coalition. While we recommend the Hatteras and Frisco Homeowners Association as an alternate to the Cape Hatteras Recreational Alliance, we note their interests are not fully overlapping. We believe that the Hatteras Landing organization's interests are aligned with the Hatteras and Frisco Homeowners Association. We note that there is no Outer Banks-wide organization that represents non-resident property owners. We also note that some organizations such as the Visitors Bureau, Chamber of Commerce, and Homeowners Associations represent at least the interests of some, if not many, non-resident property owners. We note that there is no known, organized local or regional group whose primary interest is pedestrian beach use and public safety (although we recognize the counties have public safety responsibilities within their respective jurisdictions). By recommending Hatteras and Frisco Homeowners Coalition we are seeking to recognize the concern that those with views differing from ORV interests are discouraged from speaking out and do not have a clear voice for their viewpoint.

- *NPS Proposed Representatives:* Some commenters requested that the National Park Service provide the names of its nominees.

RECOMMENDATIONS TO THE NPS FOR A COMMITTEE COMPOSITION

In Attachment C, we recommend to the NPS the makeup of a Committee, should one be formed. Again, please note that the NPS and the DOI have the full authority to revise, alter, or differ from these recommendations. We expect that all recommended individuals will abide by all groundrules to ensure a productive and constructive dialogue.

6. COMPOSE THE COMMITTEE:

We recommend in Appendix C twenty-eight (28) representatives for the make-up of the potential Regulatory Negotiation Committee.

Below, please note the changes to the draft composition in response to the public comments.

1. Added an additional seat for the State so that the differing interests of the Marine Fisheries and Wildlife Resources Commissions can both be represented.
2. Added an additional seat for environmental and natural resource interests, given public comment about overall Committee balance.
3. Added an additional Business and Tourism seat for the Cape Hatteras Business Alliance, given public comment, to ensure sufficient representation of local businesses on Hatteras Island and because the Alliance has the support of over 100 local businesses.
4. Identified the NPS representatives – Michael B. Murray, Superintendent, Cape Hatteras National Seashore, as member; and, R. Thayer Broili, Chief of Resources Management, Cape Hatteras National Seashore, as alternate, though the NPS reserves its right to make changes.

5. Changed the alternate recommendation for the Coalition of NPS Retirees, upon their willingness and agreement to do so.
6. Identified a broader, more inclusive organization to represent water sport users on the Committee. After receiving public comment about the need to broaden the constituency and interest of water sports users, we worked with the applicants to bring into the potential process a larger, broader organization with national scope and reach to represent those involved in water sports.

In addition, we make the following suggestions.

1. We suggest that, if appropriate, the Park consider creating a liaison role for a legitimate individual, group, or organization who can monitor the proceedings of the Committee to ensure compliance with the Americans with Disability Act (ADA).
2. We have not recommended adding an additional seat for the ORV stakeholder category. We believe that the interests of ORV drivers are capably, effectively, and broadly represented by a national and regional group, the United Four Wheel Drive Associations and the North Carolina Beach Buggy Association. Their representatives are experienced and respectful advocates, who will bring a national, regional, and local view to the issues. Though we know that not all active ORV groups will have a seat at the table, they can and will be able to work with their Committee representatives to ensure their interests are met. Furthermore, other groups such as the OBPA, and representatives of other organizations who also are OBPA members, actively and capably represent ORV interests, among others, as well.
3. We encourage the Hatteras and Frisco Homeowners Coalition to broaden its membership and constituency by representing all non-resident property owners across the National Seashore who do not otherwise feel represented by existing homeowners or business associations.
4. In order to ensure further legitimacy and credibility, whenever possible, we encourage recommended groups that are not currently incorporated (i.e., as a non-profit or other form) to seek to do so. For these groups, a clear, public charter, by-laws, decision rules, and other more formal organizational elements will help the group to participate on a Committee and to represent, reach out to, and gain the consent of their members.

ATTACHMENT A – INTERVIEW PROTOCOL

[DRAFT] Interview Protocol

INTRODUCTION

As you know, the National Park is considering the possibility of using collaborative processes such as negotiated rulemaking to develop an ORV Management Plan and associated regulations for Cape Hatteras National Seashore. The U.S. Institute for Environmental Conflict Resolution and the NPS have asked us to assess the feasibility of using negotiated rulemaking to address these ORV issues. The idea of regulatory negotiation, or reg-neg for short, is straightforward. Representatives of the responsible agency and those with a stake in the regulations work together to prepare the content of a proposed rule before the agency submits the rule to the formal rulemaking process (listing in the federal register, public comment and hearings, and so forth). Just such a process was used by Cape Cod National Seashore and Fire Island National Seashore to develop off-road vehicle regulations.

Our immediate task is to interview representatives of the range of interests and views on the issues. Our intent is to identify the points of agreement and disagreement among the interested parties and determine the opportunities for, and obstacles to, building consensus on how to manage ORV issues. This conversation is confidential meaning that we will not attribute specific comments or findings to anyone by name or position. Confidentiality protects your interests and, we hope, encourages open conversation.

Points to note:

- Based on these interviews, we will assess whether or not a regulatory negotiation or other collaborative approaches are likely to be productive at this time.
- If such a process seems fruitful, we will suggest a process for how to proceed as part of our Assessment Report. The draft Assessment Report will be sent to all parties whom we interviewed for your feedback before the report is finalized.
- We understand that our final Assessment Report will be an important consideration as NPS determines how to proceed with the ORV Management Plan and regulations.
- Do you have any questions about EMS/CBI before we begin?

BACKGROUND

1. What is your affiliation to Cape Hatteras National Seashore?
2. Do you represent an organization that is concerned about vehicle use on Cape Hatteras? If so, what is your position and role in that organization?

3. What is your mailing and email address, phone, fax, and so forth, so that we can send you a copy of the draft Assessment Report?

THE ISSUES

1. How do your organization's members use the Seashore?
2. Tell us about your organization's views on the current use of off-road vehicles on the Seashore? Generally? In particular geographic areas of the Seashore?
3. What changes, if any, would you like to see in the ways ORV use is managed in the Seashore?
4. If you were to imagine Cape Hatteras National Seashore twenty years from now, ideally, what would you like it to be?

THE CURRENT MANAGEMENT

1. What are the best points of the current system for managing off-road vehicles on the Cape Hatteras National Seashore?
2. What are the worst points of the current system for managing off-road vehicles on the Cape Hatteras National Seashore?
3. What improvements for managing off-road vehicles in the Seashore have promise, given your organization's interests?

INTERESTED PARTIES

1. Here are the groups and organizations that might represent the parties we've identified so far who have an interest in CAHA ORV planning and regulation. Looking at the list of interviewees, are there important perspectives not included? What are your views on how we have categorized the interested parties' interests?
2. Which organizations might most credibly represent these broad categories?
3. Have any key groups been excluded in discussion on these issues in the past? If so, who are they and do you know why they were excluded?
4. 4. What kinds of information (and why) are needed to help address ORV use on the Seashore? Is this readily available? How could the needed information be gathered?

THE PROCESS

1. What are the advantages of undertaking a collaborative effort at preparing a management plan and regulations for ORV use on Cape Hatteras?
2. What do you expect would be the most significant barriers to achieving a consensus on such a plan and regulations? How can these barriers best be overcome?
3. Would your organization be willing to work together with other parties in a collaborative planning and negotiated rulemaking process? Why or why not?
4. What kind of forum for negotiations (number of players, length and number of meetings, meeting times and locations) would be most successful in garnering widespread support for the effort?
5. What kind of groundrules or protocols are needed to ensure constructive interaction?

NOTE: Please note that this interview protocol was used as a guide for interviews among the neutral EMS/CBI team and Cape Hatteras stakeholders. All questions may or may not have been asked depending on the interests and comments of the stakeholder and the length of time available for the interview.

ATTACHMENT B – PEOPLE INTERVIEWED

We recognize that individuals who may represent an interest often have multiple interests and affiliations. The distinctions we make are based on what individuals themselves told us was their primary affiliation for the purpose of these interviews.

David Allen, North Carolina Wildlife Resources Commission
Robert Barritt, Jr., 4 Plus Four Wheel Drive Club
Pete Benjamin, USFWS Ecological Services
John Bone, Outer Banks Chamber of Commerce
Carla Boucher, United Four Wheel Drive Associations
Michael Bryant, USFWS Pea Island National Wildlife Refuge
Derb Carter, Southern Environmental Law Center
Chuck Clusen, Natural Resources Defense Council
John Couch, Outer Banks Preservation Association
Jeffrey Crow, State Historic Preservation Office
Jan DeBlieu, Community Member
Jeffrey DeBlieu, The Nature Conservancy, Nags Head Woods Preserve
Jim Donofrio, Recreational Fishing Alliance
Ann Drain, Rodanthe-Waves-Salvo Civic Association
Betty Duke, Rodanthe-Waves-Salvo Civic Association
C.A. Duke, Rodanthe-Waves-Salvo Civic Association
Michelle Duval, Environmental Defense
Bob Eakes, American Sportfishing Association
Frank Folb, Avon Property Owners Association
Michael Gery, Surfrider Foundation
Matthew Godfrey, Sea Turtle Project, North Carolina Wildlife Resources Commission
Walker Golder, North Carolina Audubon Society
Mary Helen Goodloe-Murphy, Rodanthe-Waves-Salvo Civic Association
Dave Goodwin, Outer Banks Preservation Association
Michael Halminski, Community Member
Larry Hardham, Cape Hatteras Anglers Club
Steve Hissey, Outer Banks Preservation Association
Destry Jarvis, Outdoor Recreation and Park Services, LLC
Charles Jones, North Carolina Department of Coastal Management
Leslie Jones, The Wilderness Society
David Joyner, North Carolina Beach Buggy Association
Natalie Kavanagh, Outer Banks Preservation Association
Stephen Kayota, Frisco and Hatteras Village Homeowners Coalition
Jim Keene, North Carolina Beach Buggy Association
Roy Kingery, Hatteras Village Civic Association
Scott Kovarovics, The Wilderness Society
Scott Leggat, Outer Banks Chamber of Commerce
William Lomnicki, United Mobile Sportfishing Association
Virginia Luizer, Community Member

Jim Lyons, Community Member
Sidney Maddock, Community Member
Wayne Mathis, North Carolina Marine Fisheries Commission
Noah Matson, Defenders of Wildlife
Carolyn McCormick, Outer Banks Visitors Bureau
Jason Rylander, Defenders of Wildlife
Joyce Salmon, Capital City Four Wheelers
Bob Sebrell, Ocracoke Civic and Business Association
Britan Shackelford, Charter Boat Association
Ricki Shepherd, Hatteras Village Civic Association
Sean Smith, Bluewater Network
Dennis Stewart, USFWS Pea Island National Wildlife Refuge
Susan West, Hatteras-Ocracoke Auxiliary of the North Carolina Fisheries Association
Pat Weston, Greater Kinnakeet Shores Homeowners, Inc.
Stan White, Dare County Board of Commissioners
Sarah Winslow, North Carolina Department of Marine Fisheries

**ATTACHMENT C: CAPE HATTERAS NATIONAL SEASHORE:
NEGOTIATED RULEMAKING FEASIBILITY REPORT
PROPOSED STAKEHOLDERS FOR POTENTIAL REGULATORY NEGOTIATION COMMITTEE***

Prepared by the Consensus Building Institute, Cambridge, MA, and Fisher Collaborative Services, Alexandria, VA,
Under Contract to the United States Institute for Environmental Conflict Resolution

STAKEHOLDER GROUP <i>See Note #1</i>	# SEATS	SUB-STAKEHOLDER GROUPS	MEMBER NAME AND ORGANIZATION	ALTERNATE NAME AND ORGANIZATION
Federal Government	2		Michael Murray, Superintendent, Cape Hatteras National Seashore	R. Thayer Broili, Chief of Resources Management, Cape Hatteras National Seashore
			Pete Benjamin, US Fish and Wildlife Service, Ecological Services, Raleigh Field Office	David Rabon, US Fish and Wildlife Service
State Government	2		Wayne Mathias, North Carolina Marine Fisheries Commission	TBD
County Government	2		David Allen, North Carolina Wildlife Resources Commission	Susan Cameron, North Carolina Wildlife Resources Commission
			Warren Judge, Dare County	Ray Sturza, Dare County
Civic and Homeowner Associations	3		Bob Sebrelle, Hyde County (and Ocracoke Business and Civic Association)	Kevin Howard, Hyde County
			C. A. Duke, Rodanthe-Waves-Salvo Civic Association	Pat Weston, Greater Kinnakeet Shores Homeowners, Inc. and Rodanthe-Waves-Salvo Civic Association

			Frank Folb, Avon Property Owners Association	Pat Weston, Greater Kinnakeet Shores Homeowners, Inc. and Rodanthe-Waves-Salvo Civic Association
			Roy Kingery, Hatteras Village Civic Association	Jeffrey Wells, Hatteras Landing Homeowners Association
User Groups	1	Open Access	David Goodwin, Outer Banks Preservation Association	John Alley, Outer Banks Preservation Association
	2	Off-Road Vehicle Use	Carla Boucher, United Four Wheel Drive Associations	Lyle Piner, United Four Wheel Drive Associations
	3	Recreational Fishing	Jim Keene, North Carolina Beach Buggy Association Larry Hardham, Cape Hatteras Anglers Club	David Joyner, North Carolina Beach Buggy Association Robert Davis, Cape Hatteras Anglers Club
			Patrick Paquette, Recreational Fishing Alliance (RFA)	TBD
			Bob Eakes, American Sportfishing Association (ASA)	Carol Forthman, American Sportfishing Association
	3	Other Users	Rickey Davis, Cape Hatteras Bird Club	Raymond Neal Moore, Cape Hatteras Bird Club
			Jim Lyons, Cape Hatteras Recreational Alliance	Steven Kayota, Hatteras and Frisco Homeowners Coalition
			Trip Foreman, Watersports Industry Association, Inc.	Matt Nuzzo, Watersports Industry Association, Inc.
Commercial Fishermen	1		Michael Peele, North Carolina Fisheries Association	William Foster, North Carolina Fisheries Association

Tourism, Visitation and Businesses	3		Scott Leggat, The Outer Banks Chamber of Commerce Carolyn McCormack, The Outer Banks Visitors Bureau <i>See Note #2 Below</i>	Sam Hagedon, The Outer Banks Chamber of Commerce TBD
Environmental & Natural Resource Conservation Advocates	4	National	Judy Swartwood, Hatteras Island Business Alliance	Stacy Stacks, Hatteras Island Business Alliance
			Jason Rylander, Defenders of Wildlife	TBD
			Destry Jarvis, Natural Resources Defense Council and the Wilderness Society	TBD
			Robert Milne, Coalition of NPS Retirees	Dwight F. Rettie, Coalition of NPS Retirees
			TBD, <i>See Note #3 Below</i>	TBD
	2	State/Regional/ Local	Derb Carter, Southern Environmental Law Center	Jeffrey DeBlieu, The Nature Conservancy
			Walker Golder, North Carolina Audubon	Sidney Maddock, National Audubon Society
TOTAL PROPOSED MEMBERS	28			

EXPLANATORY NOTES:

- (1) Please also note that groups who identify themselves primarily as user or access groups may also have strong environmental and conservation values. Likewise, groups who identify themselves primarily as environmental advocacy groups also may have many members who are users of the Park. The distinction we make here is for the purposes of convening the Committee and is based on how groups characterize their primary mission and objectives. We recognize that individuals who have been proposed to represent a particular interest often have multiple interests and affiliations.

- (2) The Outer Banks Visitors Bureau represents a wide range of tourism, visitor, and business interests within Dare County. The Outer Banks Visitors Bureau is funded by the occupancy and prepared meals taxes, collected in Dare County.
- (3) In order to address the balance of interests as raised in public comment, we are recommending an additional environmental and natural resource advocacy seat. This seat might be filled by our national, regional, state, or local environmental group, but will require identifying an appropriate representative. This should be done by the NPS during their convening, should they decide to proceed.

ATTACHMENT D: BASIC PRINCIPLES FOR AGENCY ENGAGEMENT IN ENVIRONMENTAL CONFLICT RESOLUTION AND COLLABORATIVE PROBLEM SOLVING¹⁷

Informed Commitment	Confirm willingness and availability of appropriate agency leadership and staff at all levels to commit to principles of engagement; ensure commitment to participate in good faith with open mindset to new perspectives
Balanced, Voluntary Representation	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives
Group Autonomy	Engage with all participants in developing and governing process; including choice of consensus-based decision rules; seek assistance as needed from impartial facilitator/mediator selected by and accountable to all parties
Informed Process	Seek agreement on how to share, test and apply relevant information (scientific, cultural, technical, etc.) among participants; ensure relevant information is accessible and understandable by all participants
Accountability	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public
Openness	Ensure all participants and public are fully informed in a timely manner of the purpose and objectives of process; communicate agency authorities, requirements and constraints; uphold confidentiality rules and agreements as required for particular proceedings
Timeliness	Ensure timely decisions and outcomes
Implementation	Ensure decisions are implementable consistent with federal law and policy; parties should commit to identify roles and responsibilities necessary to implement agreement; parties should agree in advance on the consequences of a party being unable to provide necessary resources or implement agreement; ensure parties will take steps to implement and obtain resources necessary to agreement

¹⁷ This is a joint Office of Management and Budget – Council on Environmental Quality memorandum on environmental conflict resolution dated 11/28/05.

**ATTACHMENT E: RESPONSES FROM ORGANIZATIONS TO
PUBLIC COMMENTS**

Avon Property Owners' Association. Inc.

**P. O. Box 9
Avon, NC 27915-0009
www.avonpoa.org**

March 15, 2006

The Consensus Building Institute
238 Main Street, Suite 400
Cambridge, MA 02142

Attn: Ona Ferguson

Dear Ms. Ferguson,

Pre your request I am writing concerning the appointment of Frank Folb, President, APOA as our representative to the Cape Hatteras National Seashore: Negotiating Committee for off road management of vehicular use.

Mr. Folb was approved for the position by a majority of our board at our December meeting.

Please advise if any other further information is needed.

Sincerely,



Leslie Painter
Secretary

President: Frank Folb
Vice Pres.: Richard Wright
Secretary: Leslie Painter
Treasurer: Howard Meyer

Directors- Bob Boyer
Joe Gallagher
Jean Meyer
Pete Groom

February 14, 2006

Ona Ferguson
The Consensus Building Institute
238 Main Street, Suite 400
Cambridge, MA 02142

Dear Ona Ferguson,

Thank you for your continued patience in dealing with the stakeholders of the Cape Hatteras National Seashore Negotiated Rulemaking Process.

In case there is any concern about the selection of a representative for the Cape Hatteras Bird Club, here is a discussion of the process of finding a person for that seat.

On August 21, 2005, the local newspaper, *The Coastland Times*, published an article about the rule-making process, listing possible stakeholders. I found the Bird Club on the list and realized the urgency of selecting representation and sending documentation before the September 22 deadline. At that time at least four of the club's board members were not in town.

I began to organize my thoughts regarding qualifications of a representative:

- (1) An experienced, respected, active birder in the field
- (2) A member of the club
- (3) A person without conflicting affiliations
- (4) A person able to express himself and put forth the interests of the club in an articulate manner
- (5) A person aware of the confrontation and difficulties going on between the National Park Service and the persons who advocate wide open beach driving

During the time between the August publication of stakeholders and the deadline for submitting nomination forms for the club and its representatives, I contacted and consulted only with members who had no conflicting affiliations, including Ricky Davis, Raymond Neal Moore, and Elizabeth Hanrahan. At some time between August 26 and early September, after all three consented to represent the club, I chose Ricky Davis as first representative. Davis and Moore submitted their personal information to me and I compiled the bird club documents and mailed them to you, meeting the deadline of September 22. Hanrahan sent her personal information under separate cover.

To explain the choice of Ricky Davis:

- (1) He not only fulfills the first qualification, but he is an eminent member of the North Carolina birding community. He writes regularly published reports in journals such as *The Chat*, a bulletin of the Carolina Bird Club, and *North American Birds*, a quarterly journal, and he

edits NC Christmas Counts for the National Audubon Society. He is a member of the NC Bird Records Committee, a highly prized position.

- (2) He has been a member of the bird club since 1996. He has a long association with birding on the Outer Banks, having first started coming here in the 1970's. During those early years he birded Cape Point with a 4x4, so he has experience with beach driving and understands the topography of the Point.
- (3) He has no conflicting affiliations in local organizations.
- (4) He can handle himself in a discussion and feels comfortable with supporting the mission of the club.
- (5) Because he is a frequent birder/visitor he has become fully aware of the conflict between the National Park Service and ORV users.

Both alternate candidates, Moore and Hanrahan, also meet the five qualifications.

As President of Cape Hatteras Bird Club, I feel that I made a decision that is in the best interests of the club's original and expanded mission. I believe that the chair of a club as informally organized as ours may make an executive decision so long as it does not involve money. There was no opportunity to bring the matter up in a meeting because (a) the club does not meet in the summer, (b) the September 16 meeting was postponed because of Hurricane Ophelia, and (c) the September 22 deadline had to be met before the next scheduled meeting in October.

Respectfully,

Patricia J. Moore
President

Ona Ferguson

Wed, Mar 8, 2006 12:25 pm

Subject: Representative for GKSHOA to Neg. Rulemaking Committee

Date: Sunday, March 5, 2006 4:24 pm

From: BCMONS1@aol.com

To: <oferguson@cbuilding.org>

Cc: <pfield@cbuilding.org>, <rcf@fisherco.com>, <Gr8rkinnakeet@aol.com>

Conversation: Representative for GKSHOA to Neg. Rulemaking Committee

To Whom It May Concern:

At a meeting of the Board of Directors of Greater Kinnakeet Shores Homeowners, Inc. held on January 27, 2006, the Board ratified the appointment of Pat Weston as their designated representative on the Negotiated Rulemaking Committee, with Barbara Cleveland as Alternate, thereby making official a previous verbal approval given last September."

Respectfully,
Barbara Cleveland, Secretary/Treasurer
Greater Kinnakeet Shores Homeowners, Inc.
Avon, NC



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EXECUTIVE OFFICE
PO Box 568512
Orlando, FL 32856-8512
PH/FAX: (407) 251-9039
wsiaheadquarters@earthlink.net
www.wsia.net

April 1, 2006

Superintendent
Cape Hatteras National Seashore
1401 National Park Road
Manteo, North Carolina 27954

To Whom It May Concern:

I am the Executive Director of the Water Sports Industry Association (WSIA), whose stated mission is "to provide visionary leadership to increase participation in water sports and to supply members with education and legislative action." I write this letter to acknowledge the WSIA's endorsement of Trip Forman, and his alternate, Matt Nuzzo, both of REAL Kiteboarding, Inc., to a chair on the Cape Hatteras National Seashore Negotiated Rulemaking Committee.

Trip and Matt seek this chair to represent a unique stakeholder – all watersports users of the Park, including those individuals participating in windsurfing, kiteboarding, wakeboarding, surfing, sailing, kayaking, swimming and bodysurfing. Both long-time residents of Cape Hatteras and watersports enthusiasts, Trip and Matt have vowed to represent the entire watersports community who use the Cape Hatteras National Seashore by actively canvassing the community and ensuring that varied opinions on the access issues presented are voiced and heard.

We support Trip and Matt's involvement on this Committee on behalf of watersports users.

Very truly yours,


Larry Meddock
Executive Director

Cc: Trip Forman
Matt Nuzzo



March 30, 2006

Superintendent
Outer Banks Group
Cape Hatteras National Seashore
1401 National Park Road
Manteo, North Carolina 27954

To Whom It May Concern:

The Water Sports Industry Association ("WSIA") has recommended me as a representative and Matt Nuzzo as an alternate to the proposed Negotiated Rulemaking Committee in a seat designated to represent watersports enthusiasts and users of the Cape Hatteras National Seashore. Watersports include kiteboarding, windsurfing, surfing, skimboarding, sailing, kayaking, wakeboarding, skimboarding and other water-based active sports. To avoid any confusion, fishing will be represented under several seats dedicated to that activity. For your information, Matt and I are both Co-Founders and Co-Vice-Presidents of REAL Kiteboarding, Inc.

Matt and I both have the support of the WSIA to represent watersports users on this Committee. Please see the WSIA letter specifically endorsing our appointment to the Committee.

It is vital that the Committee not overlook the watersports-user group. This group comprises a large number of individuals using the National Seashore each year, who are both local residents and business owners as well as travelers from all over the country and world. Many estimate the number of participants in this group who travel to Cape Hatteras specifically to practice these sports to be in the hundreds of thousands. Watersports users, as a whole, are not represented by other proposed Committee seats, such as the Chamber of Commerce or CAHA Recreational Alliance. The Chamber of Commerce and CAHA Recreational Alliance are much broader-based interest groups. While these organizations may nominally include watersports participants and/or watersports businesses, they do not adequately represent the specific interests of watersports.

REAL Kiteboarding, Inc.

Post Office Box 1614 · 47170 Highway 12 · Buxton, North Carolina 27920
(t) 252.995.6596 · (f) 252.995.6597 · 866.REAL.KITE · www.realkiteboarding.com

The watersports-user group stresses the fact that Cape Hatteras is internationally recognized as a leading travel destination for many, if not all, of these watersports and therefore should be given serious consideration for a separate seat to sufficiently represent the participants in these sports. Watersports enthusiasts' use of the National Seashore is unique and should not be represented in a *de minimus* fashion by other groups.

Cape Hatteras, with its oceanside and soundside access and optimal weather conditions, is a popular worldwide destination for numerous watersports users. Each year, hundreds of thousands of people visit this area specifically to participate in watersports. Indeed, the watersports group may be one of the largest combined user groups of the National Seashore. All users flock to the National Seashore for perfect waves combined with offshore winds. These conditions can be discovered due, in large measure, to the current beach access plan, allowing any combination of wind and swell direction to be found.

Active watersports users represented under this proposed seat appreciate ORV access to the beach, both sound and oceanside. Participants typically drive to the water's edge, park, and partake in their given sport in the water. There is generally very little driving up and down the beaches. Access to the water is the main issue. Currently, our position is to maintain current ORV access to the beaches, while effectively addressing concerns, watersports-related, for beach preservation over the long haul. Matt and I have been involved in other beach communities in Massachusetts, Rhode Island, New York and New Jersey and therefore have seen how some plans work and do not work, both within those communities and also within our own. Many of the users who we represent have their personal and professional lives in the hands of these negotiations. Many of them have moved here or built their businesses specifically around the current ORV beach access and therefore are concerned about how these rules may change.

While REAL Kiteboarding is mainly a kiteboarding-based company, Matt and I are also actively involved in surfing and have over 40 years of combined windsurfing experience between the two of them. We are also active members of the WSIA. Our goal is to equally represent the entire watersports community through our present and past backgrounds as well as by actively canvassing the community's watersports enthusiasts to make sure that all opinions are heard and voiced. Our daily schedules put us in touch with hundreds of participants from the entire spectrum of watersports represented in this group. This personal contact allows us to know first hand what the specific interests and needs are of each individual sport contained within the group. Our interests are genuinely contained within the description of "watersports user access," and while REAL Kiteboarding is our employer, kiteboarding represents only 1/8 of the people that we will represent. Matt and I plan to live in Cape Hatteras for the long term and securing a proper plan for all watersports for future generations of users.

We are committed to remaining open-minded and level-headed and to diligently participate in the Committee process. We encourage all watersports enthusiasts to email their input and opinions to trip@realkiteboarding.com. We also will directly canvass watersports users to make sure that we adequately address all options, opinions and

REAL Kiteboarding, Inc.

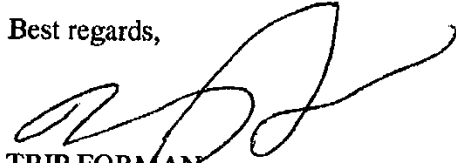
Post Office Box 1614 · 47170 Highway 12 · Buxton, North Carolina 27920
(t) 252.995.6596 · (f) 252.995.6597 · 866.REAL.KITE · www.realkiteboarding.com

0073954

concerns with the Committee. Furthermore, we commit to communicate with our broad constituency by emailing updates on the Committee meetings and its progress.

Thank you in advance for your time and support.

Best regards,



TRIP FORMAN
REAL Kiteboarding
Co-Founder

cc: Pat Field, Consensus Building Institute
Ona Ferguson, Consensus Building Institute
Matt Nuzzo, REAL Kiteboarding, Inc.

REAL Kiteboarding, Inc.
Post Office Box 1614 · 47170 Highway 12 · Buxton, North Carolina 27920
(t) 252.995.6596 · (f) 252.995.6597 · 866.REAL.KITE · www.realkiteboarding.com

**ATTACHMENT F: PUBLIC COMMENTS RECEIVED DECEMBER
2005-JANUARY 2006 ON THE DRAFT LIST OF PROPOSED
STAKEHOLDERS FOR POTENTIAL REGULATORY
NEGOTIATION COMMITTEE**

We included in this attachment any correspondence we received from stakeholders regarding the draft report or the draft preconvening recommendations.

Due to the large size of this attachment (9.3MB and 480 pages), it can be found at:
<http://www.cbuilding.org/projects/hatteras/appendixF.pdf>