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Bcc: [Sandra Hamilton](#); [Cyndy Holda](#); [Mike Murray](#)
Subject: Re: Routes and Areas Subcommittee
Date: 09/12/2008 02:31 PM

Frank,

Thank you for sharing your thoughts. Please understand that my feedback goes beyond a simple preference for one approach vs. another. The reason that Sidney/Burnie/Destry's (S/B/D's) proposal would clearly meet the requirements of the executive orders is because of the process they followed, not necessarily because of the specific content, criteria, or outcomes. In basic terms, it is the order of your thought process that doesn't satisfy the executive orders. As a reminder, the NPS general ORV regulation (36 CFR 4.10 b) requires that the designation of routes and areas "shall comply with E.O. 11644". In other words, we must follow it in order to lawfully authorize ORV use. The E.O. indicates that we can only designate ORV areas and routes that will minimize the conflicts mentioned above.

The S/B/D proposal clearly followed a step-by-step approach to dealing with the issues identified in Section 3 of the Executive Orders, which include:

"...the designation of such areas and trails will be based upon the **protection of the resources** of public lands, the **promotion of the safety** of all users of those lands, and **minimization of 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:

- (2) Areas and trails shall be located to **minimize harassment of wildlife or significant 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.**

The E.O. language clearly implies that these issues must be considered before an area can be designated for ORV use (not after). S/B/D's proposal states principles and criteria for ORV routes and areas, pedestrian areas, and resource areas up front, which are then used to determine what to designate as open to ORV or not. Your proposal starts with the premise that everything as being open to ORV use, then after that would rely on "overlays" to address resource protection and pedestrian issues. That approach won't fly. NPS could not approve a plan based on that approach, since we can only legally designate ORV areas and routes in locations that minimize those conflicts. From the discussion at the RegNeg meeting, I better understand your interest in having a flexible plan. I am all for that, but at the moment don't have a good solution (yet) as to how we can meet both the requirements of the executive orders and 36 CFR 4.10b, and still retain some flexibility. I'd like to think there is some way to do it and am following up with the NPS regulations office to get some advice on how to do that.

In the meantime, my suggestion is that you, Dave and Jim restructure your proposal along the lines of how the other proposal is organized; for example, have sections on: General Framework; ORV Routes and Areas Principles and Criteria; Resource

Area Principles and Criteria; Pedestrian Area Principle and Criteria, etc.; then apply those principles and criteria to come up with the designated routes and areas. Here is some specific feedback:

FORMAT:

1. Separate the principles and the criteria which are mixed together in the draft.
2. Add an application section at the end that applies the criteria on the ground.
3. Remove statements that aren't principles or criteria, but are interpretations/opinions, arguments or accusations (a lot of this is on pages 4-5, but it occurs throughout). They are not helpful.
4. Work for a non-judgmental, non-confrontational tone.

CONTENT

1. It needs to move beyond arguments for a return to past practices that did not satisfy the requirements of the Executive Orders. It needs to be in step with current law and policy that guide the management of the Seashore, and it needs to produce an alternative that meets the purpose, need and objectives of the ORV management plan. For the purposes of the negotiated rulemaking, the DOI and NPS interpretations of relevant legislation and policy need to be used as the starting point and solutions found that are consistent with those interpretations, even though other interpretations continue to exist and may ultimately be tested in court at the conclusion of the process if any of the parties decide to do so.
2. It needs to be consistent with the E.O. requirement to only locate trails where there would be no adverse effects on resources and where visitor conflict would be minimized. This is different from the old way of doing business at CAHA, where the entire ocean beach was open to ORV unless the park closed areas temporarily for resource, safety, or administrative reasons as an "overlay". Principles and criteria need be consistent with a process that identifies resource and other areas that are not suitable for designation as ORV trails or areas, either seasonally or permanently, and then locates ORV trails or areas outside these areas, either seasonally or permanently.
3. It needs to provide for vehicle free areas of sufficient size, number and geographic dispersion to **minimize conflicts** with those current or future visitors who seek a natural beach experience without the sight of vehicles or their ruts in the sand. Some beach visitors who access the beach by foot find that vehicles mar their experience; others don't. It is just a fact that not everybody likes the same kind of experience. NPS seeks to provide a quality experience for both this type of visitor and for those who desire to access the beach by vehicle. An acceptable technique for minimizing conflicts between visitor uses is separation by location or time.
4. It needs to provide adequate protection for natural resources, which includes taking into account the predictable breeding season and winter foraging/roosting issues.
5. On the "wilderness study area" issue, which we have not talked about much during the RegNeg, it needs to be consistent with a recent court finding that CAHA has already been assessed by Congress and found suitable for a wilderness study. NPS is not planning to prepare a wilderness study as part of the ORV management planning process; but we cannot avoid doing one in the future (e.g., as part of the

General Management Plan), which could include beach areas as part of the study.

In essence, you can propose whatever principles and criteria you want for designating what is ORV and what is non-ORV, but you need to articulate them. Ideally, the principles and criteria should be easily understood and practical to implement. If you want to retain flexibility to the extent possible, then that could be one of the principles. If you want to maintain reliable access to Cape Point (or wherever) during the breeding season to the extent possible, then that could be a principle as long as you offer criteria to address the resource protection concerns (it could be as simple as "resource protection measures to be determined by NPS"). You could identify key "recreation areas" (just as S/B/D's proposal identifies 7 key resource areas) and identify criteria for prioritizing them or prioritizing the kind of access to them. For example, you could say something like "at least ___ # of the key recreation areas will have reliable access during the breeding season;" or "at least one access route will be maintained to all key sites to the extent possible", or whatever you want to say. You could prioritize locations for maintaining access (are some areas more important than others?). You could prioritize kinds of access (e.g., during incubation, is ORV access preferred to pedestrian access? When there are chicks on the ground, is pedestrian access or some kind of alternative access better than no access? etc.). Are there any principles or criteria in S/B/D's proposal that you could live with, as written or only if modified,? If so, then you could include as written or as modified by you in your proposal. For example, if you could live with some pedestrian areas, but only if it is a smaller number and/or smaller sized pedestrian areas than they have proposed, you should state your version of principles and criteria for determining pedestrian areas (how many? how big? seasonal? year-round?), then apply the criteria and select the sites you think should be for pedestrians. Even if you agree to some of the same principles, you can still apply them differently (i.e., in determining which areas are non-ORV) and come up with an entirely different result than they did. Whatever you come up with needs to be realistic and practical to implement.

Frank, I appreciate how difficult this issue is for you and everyone else (me too!) to work through; but it is nonproductive for you to say you cannot change your position. When you do that, you are basically taking yourself out of the conversation and making absolutely no progress in finding out what compromises the other side is willing to make. **Remember, the purpose of a negotiating committee is to negotiate! Sidney said that both their criteria and their application of the criteria (i.e., the results) are all negotiable.** Their proposal is simply their initial thoughts on how they would do it. The only way to find out how much they are willing to compromise is to actually negotiate with them (i.e., exchange proposals and counter-proposals beyond just the initial ones, discuss what you don't like about their specific criteria or application, offer something different that would satisfy your interests and possibly theirs, etc.). If you cannot negotiate, then it may be better for the negotiation process if the ORV/access caucus would pick someone else to represent them on the Routes and Areas subcommittee. (Please don't take that personally. I am just trying to give honest feedback. It is up to the caucus to decide who represents them in negotiating key issues such as Routes and Areas; and I will accept whoever they choose to represent them.) My point is that it is okay for someone to say they don't like pedestrian only areas or don't want them to be "permanent" (or conversely to say they don't like ORV use), as long as they are still willing to try to find compromises; however, it is a big red flag when someone says they cannot negotiate. Otherwise, I fear there is no chance of success because there is no bargaining going on, and none of us are learning much about what

compromises the respective parties are willing to accept.

I hope this helps explain what needs to be done to bring your proposal more in line with the requirements of the executive orders and the planning process. I do appreciate your passionate involvement in this issue!

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cc

Subject Routes and Areas Subcommittee

All,
After to long days of Neg Reg I wonder where we are. Mike at the meeting stated that he liked Sidney's proposals and the way it was set up better than the pro access `document produced by Jim, Dave and myself. We do appreciate Mikes comments that both comments were good, but stated that our document would not pass legal muster by NPS/DOI in this process.

I have reviewed our proposal again since yesterday's meeting conclusion and cannot see any reason that the document does not meet the criteria of mandates of the executive order.

Furthermore I stand by my statement that as long as there are plans of any year round resource surf zone closures in the areas and routes portion of the negotiation that I will not give from my initial proposal before you now. I and I think most on the access side of the negotiating team agree with this stand.

Unless NPS/DOI come up with some type of document stating where they see the future of areas and routes are going to be can I make further comment on any reduction of the proposal we have on the table at this time. Mike, I believe that you are not the reason this has not been done I believe that everyone that is in this process on the pro-access side has little to no faith in the solicitor or Sandy and NPS/DOI in Washington. The rollover of DOI in front of Judge Boles and the stand taken in the Senate hearing have only caused further distrust in DOI/NPS and this process.

I will stand the course of the Negotiated Rule Making procees, but to say

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that I will change my present stand is questionable.

In order for my comments to be transparent I state that you may forward these comments to anyone you desire.

Frank Folb