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Cape Hatteras National Seashore ORV Planning UPDATE

Environmental Mediation Services/Consensus Building Institute to Conduct Feasibility Assessment of Seashore ORV Negotiated Rulemaking Process

The U.S. Institute for Environmental Conflict Resolution (the Institute) has selected a team from Environmental Mediation Services and the Consensus Building Institute to independently and impartially assess the feasibility of convening a multi-stakeholder negotiated rulemaking process to seek agreement on the content of a proposed regulation for off-road vehicle (ORV) use at Cape Hatteras National Seashore (CAHA). Executive Order 11644 requires the National Park Service (NPS) to develop regulations for parks that allow ORV use.

The Institute made its selection with input from numerous stakeholders and representatives of CAHA ORV interests and the NPS. The NPS hired the Institute earlier this year to assist in the convening of a possible negotiated rulemaking process.

Environmental Mediation Services/Consensus Building Institute will interview representatives of various stakeholder interests in CAHA ORV issues. These interviews will help identify for everyone the most important concerns that will need to be addressed and help determine if there is broad support for the idea of using a negotiated rulemaking process to develop consensus on recommendations for an ORV management plan and an associated proposed regulation.

Environmental Mediation Services/Consensus Building Institute, both located in Massachusetts, have worked together on numerous projects including the Superfund cleanup of Massachusetts Military Reservation, assessment and mediated the drafting of regulations under Delaware's Coastal Zone Act, as well as the assessment and mediation of the Fire Island National Seashore off-road driving regulation negotiated rulemaking. The team has extensive experience facilitating multi-stakeholder dialogues on environmental policy and management issues. Environmental Mediation Services is a privately owned company. The Consensus Building Institute is a Cambridge-based non-profit organization.

Based on the results of the feasibility assessment, the NPS will determine whether to proceed with the negotiated rulemaking process. If the NPS decides to proceed, the next step would be to publish a notice of intent to establish a negotiated rulemaking committee, including a list of proposed members of the committee, in the Federal Register for a 30-day public comment period. After analyzing and considering public comment, the NPS would decide whether to proceed with the negotiated rulemaking process. If the decision is to go forward with a negotiated rulemaking, the Institute would then design the actual negotiated rulemaking process in close consultation with the NPS and

stakeholders. If the NPS decides not to proceed with a negotiated rulemaking, it would then use the traditional agency rulemaking process.

Public meetings will be held in June 2005 to present the results of the feasibility assessment.

Rulemaking is the process used by federal agencies to formulate, amend, or repeal a regulation. The regulation to be developed for CAHA must implement the provisions of Executive Order 11644 and will have the force of law.

In a traditional *agency rulemaking* process, the agency produces a proposed regulation in-house, which is then published in the Federal Register for public comment. *Negotiated rulemaking* allows the agency and interest groups involved in the issue to collaborate in the rulemaking process and to seek agreement on a proposed solution before publication of the proposed rule in the Federal Register for public comment. At its best, negotiated rulemaking increases citizen participation, results in more creative solutions, eases implementation, increases compliance by the citizens affected by the regulation, and reduces the prospect of future conflict and litigation.

The framework for the negotiated rulemaking process, established by Congress, can be found in the U.S. Code (5 U.S.C. §561-570a). To maintain the impartiality of the process, the NPS has contracted with the Institute. The Institute is a federal agency established by Congress to assist parties in resolving environmental, natural resource and public lands conflicts. It helps agencies determine whether collaborative problem solving is appropriate for specific environmental conflicts, how and when to bring all parties to the table, and whether a third-party facilitator or mediator might be helpful in assisting the parties in their efforts to reach consensus or solve conflicts.

The negotiated rulemaking process consists of three consecutive steps:

Assessment Phase: This initial step will recommend whether the establishment of a negotiated rulemaking committee is feasible and appropriate. A facilitator/mediator, hired by the Institute, will identify and interview affected stakeholders to assess their willingness to constructively participate on a committee, and whether constructive negotiations would or would not be possible. If the facilitator/mediator believes that a proposed rule could be reached collaboratively, they would recommend individuals representing a balance of perspectives for participation and the parameters for moving forward.

Establishment of the Negotiated Rulemaking Committee: If the assessment is favorable and the NPS decides to proceed, it would publish a notice of intent in the Federal Register to establish a negotiated rulemaking committee for public comment on the proposed establishment and makeup of the Committee. The notice will also solicit any additional suggested nominations for the Committee if

any affected stakeholders feel that their interests are inadequately represented on the Committee. Following review of public comments, if the NPS decides to establish a Committee, the Secretary of the Interior would appoint the Committee members. In most cases not more than 25 members are on a committee. If after reviewing public comments, the NPS decides not to establish a negotiated rulemaking committee it would publish a notice of this decision in the Federal Register.

Committee Meetings: Before meetings of the negotiated rulemaking committee would begin, the NPS would contract with the Institute to hire an impartial facilitator with input from the committee members. The facilitated committee meetings would be open to the public. The committee would attempt to reach consensus on ORV management issues, which would be the basis for the proposed regulation at CAHA. The outcome of the negotiated rulemaking process cannot be predicted at this time. If the committee reaches consensus, a proposed regulation based on that consensus would be drafted by the NPS and published in the Federal Register for public review and comment.

It is difficult to determine a timeline for the negotiated rulemaking process because each successive step depends on the one before it. The timeline for the work will be better defined after the assessment takes place. The process will be expedited wherever possible.

The NPS will identify and analyze, as required by NEPA, the environmental impacts of reasonable alternatives identified by the negotiated rulemaking committee, as well as any other reasonable alternatives identified through required NEPA public and internal scoping. Reasonable alternatives are defined as those that are technically and economically feasible and that show evidence of common sense. They also meet project objectives, resolve needs and alleviate potentially significant impacts to important resources. Reasonable alternatives for NPS plans strive to be consistent with statutes and with long-standing policies.

The results of this environmental impact analysis will be made available to the negotiated rulemaking committee, as it will provide needed information to support committee deliberations. If the negotiated rulemaking committee reaches consensus on a proposed regulation, it is expected that the NPS would identify the proposed regulation as its preferred alternative in the draft Environmental Impact Statement (EIS) required by NEPA.

NPS expects public scoping for NEPA to occur in the summer of 2005.

There will be several opportunities for public input during the planning process. The National Park Service views development of the Cape Hatteras National Seashore ORV Management Plan/Environmental Impact Statement and

Rulemaking as a major and important project for the park. Public input will be a key component in the development and success of the plan.

The 1972 Executive Order 11644, amended by 1977 Executive Order 11989, required certain federal agencies permitting Off-Road Vehicle (ORV) use on agency lands to publish regulations designating specific trails and areas for this use. Title 36, section 4.10 of the *Code of Federal Regulations* implements the executive orders by requiring units of the national park system allowing ORV use to designate use areas by special regulation.

A recent NPS Director's Order (DO #75A) strongly supports the use of alternative dispute resolution including negotiated rulemaking, emphasizing the importance of collaborative, consensus-building processes.