

**Negotiated Rulemaking Advisory Committee for  
Off-Road Vehicle Management at  
Cape Hatteras National Seashore**

**Final Groundrules**

**I. Purpose and Enabling Statement**

The Committee's function is to assist directly in the development of special regulations for management of off-road vehicles (ORVs) at Cape Hatteras National Seashore (which is the name used by the National Park Service, and for purposes of these Groundrules is referred to as the Seashore).

The Cape Hatteras National Seashore also is referred to as Cape Hatteras National Seashore Recreational Area in the United States Code. The enabling act establishing Cape Hatteras National Seashore was amended in 1940 to substitute the name Cape Hatteras National Seashore Recreational Area for Cape Hatteras National Seashore and added the proviso permitting hunting. 16 U.S.C. §459a-1 reads in part as follows: "...*And provided further*, That the legal residents of villages...shall have the right to earn a livelihood by fishing within the boundaries designated by the Secretary of the Interior, subject to such rules and regulations as the said Secretary may deem necessary in order to protect the area for recreational use... *And provided further*, That hunting shall be permitted, under rules and regulations as may be prescribed by the Secretary of the Interior in conformity with the Migratory Bird Treaty Act..." 16 U.S.C. § 459a-2 provides that "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..." The Committee acknowledges that the designation Cape Hatteras National Seashore or Cape Hatteras National Seashore Recreational Area has no legal or practical consequence related to the Negotiated Rulemaking.

Executive Order 11644, as amended by Executive Order 11989, requires certain Federal agencies to publish regulations that provide for administrative designation of the specific areas and trails on which ORV use may be permitted. In response, the National Park Service (NPS) published a general regulation at 36 CFR § 4.10, which provides that each park that designates routes and areas for ORV use must do so by promulgating a special regulation specific to that park. It also provides that the designation of routes and areas shall comply with Executive Order 11644, and 36 CFR § 1.5 regarding closures. The Committee will negotiate to reach consensus on

concepts and language to be used as the basis for a proposed rule, to be published by the NPS in the *Federal Register*, governing ORV use at the Seashore. The duties of the Committee are solely advisory.

## II. Objectives and Scope of Committee Activities

The Committee will serve as an integral part in the NPS development of a proposed special regulation for ORV management at the Seashore. With the participation of knowledgeable affected parties, the NPS expects to develop a practical approach to addressing ORV management and visitor experience issues related to: 1) access to beach areas for fishing and other recreational activities; 2) provision of a variety of visitor experiences on the beach including both ORV and non-ORV experiences; 3) public safety; and, 4) protection of beach environments and their associated plant and wildlife communities.<sup>1</sup>

Within the constraints of NPS statutory and policy responsibilities to conserve natural and cultural resources and values and to provide for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Committee will evaluate and address key issues possibly including, but not limited to: 1) the designation of specific ORV routes and areas; 2) the periods of the year and times of day during which ORVs may be operated on those routes and areas; 3) other conditions that govern the operation of ORVs at the Seashore; and, 4) other management options for accessing the beach (e.g., walkovers and shuttles). Special ORV regulations for the Seashore would identify criteria used to designate appropriate ORV use areas and routes and would establish consistent ORV management practices and procedures that include the ability to adjust ORV management in response to changes in the Seashore's dynamic physical and biological environment.

The primary focus of the Committee's work shall be developing a consensus recommendation on the special regulation. The Committee may also provide input, though not necessarily a consensus recommendation, on related matters. The Charter states the Committee may provide input on "aspects of protected species management that may affect or be affected by ORV management and that are within the scope of the draft ORV Management Plan/Environmental Impact Statement being prepared concurrently with the proposed special regulations" or that directly

---

<sup>1</sup> The Committee notes that other recreational activities include, but are not limited to: beach walking, birding, dog walking, horseback riding, kayaking, kite boarding, paddle boarding, photography, picnicking, sailing, shelling, stargazing, sunbathing, surfing, swimming, volleyball, wildlife viewing and wind surfing. The Committee also notes there are numerous active and passive uses of the beach and the beach may be used everyday, day and night. The foregoing list is intended to be illustrative, and not a complete list, of all recreational activities on the beach.

relate to the implementation of the Seashore's Interim Protected Species Management Strategy.

With respect to the parallel NEPA process NPS is conducting, information and input from the Committee may be incorporated; however, the content of NEPA documents and the NEPA process are the sole responsibility of the NPS. In this sense, rule making activities of the Committee and the conduct of the NEPA process are complementary rather than formally collaborative, with information flow between the two processes encouraged at appropriate points.

### III. Negotiation Parameters

- 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, Executive Orders, and NPS-wide policies, (b) provide for a diversity of visitor experience, (c) include enforceable mechanisms to manage ORV use; and (d) be implementable.
- B. To the greatest extent possible, the Committee should build a new management approach to ORV use “from the ground up” that is not necessarily limited to the current Interim Protected Species Management Strategy or any other earlier management approaches. To meet the requirements of the National Environmental Policy Act (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.
- C. Management of ORV use at Pea Island National Wildlife Refuge (PINWR) will not be included in the negotiated rulemaking process, as the Refuge is under exclusive administration of the USFWS rather than NPS and under a different set of laws and regulations [16 USC § 668dd(a)(1)].<sup>2</sup>

---

<sup>2</sup> The Committee acknowledges that for a number of years ORVs were allowed on PINWR, however those miles have been lost to ORV use. While management of that area is outside the scope of the plan/EIS and regulatory negotiation, the Committee takes official notice of this reduction in the original area open for access by ORV. The Committee also notes that the USFWS has prohibited off-road driving within the Refuge since the mid-1970's.

#### **IV. Participation**

- A. The Committee consists of individuals representing interests, organizations or stakeholder groups. Committee members are responsible for expressing the views of their constituency rather than their personal views.
- B. Each organization or stakeholder group shall be represented (“hold a seat”) by a principal and may also be represented, in the absence of the principal, by an alternate. As used in these groundrules, the term “members” includes principals and alternates. The Secretary of the Interior must appoint all members. In the absence of the principal, an alternate will serve as a representative for the member organization or group and assumes all the rights and responsibilities of the member at the table.
- C. The members of the Committee are considered those members (principals or alternates) who are present at the time of deliberation and decision. Consensus is determined by those members (be they the principal or the alternate per “seat”) present for the decision. Consensus reached during the presence of an alternate and in the absence of a principal will be binding upon the principal.
- D. Alternates have an important and valuable role in the process. They should stay abreast of all discussions, issues, and information and be able to represent fully their principal in that principal’s absence. They may “exchange” seats with their principal, as appropriate, when the alternate has a unique knowledge or perspective to share. Alternates may also participate actively on subcommittees created by the Committee.
- E. The principal and alternate shall represent an organization or stakeholder group for the purposes of deliberating, reaching consensus, and obtaining ratification of consensus decisions. As ratification is an important step in completing the Committee’s work, principals must keep the Committee apprised of the method for seeking ratification from their respective organizations or stakeholder group. The facilitators will work with the principals to ensure that ratification can be accomplished within the Committee’s schedule.

#### **V. Decision Making**

- A. The Committee will operate by consensus, which the Committee defines as unanimous concurrence of the principals, or in the absence of the principal, his or her alternate. Members may also “abstain” or “stand aside” and not offer their consent, but refrain from blocking agreement and will thus also

refrain from future negative comment or action on the consensus.  
Abstaining/standing aside members shall not be counted in determining if consensus has been reached.

- B. Members should not block or withhold consensus unless they have serious reservations with the approach or solution that is proposed for consensus. Consent means that members can at least “accept,” however reluctantly, the package agreement that emerges.
- C. If both the principal and the alternate are absent from a meeting in which consensus will be deliberated or decided, the absences will be equivalent to not dissenting.
- D. If representatives disagree with the approach or solution proposed, they should make every effort to offer an alternative satisfactory to all members.
- E. All consensus agreements reached during the negotiations will be assumed to be tentative agreements until members of the Committee reach final agreement. Once final consensus is achieved, Committee members may not thereafter withdraw their consensus.

## **VI. Agreement**

- A. The goal of the Committee is to develop a Consensus Agreement Report that reflects a final consensus by the Committee on the concepts and language to be used as the basis for a proposed special regulation.
- B. If the Committee reaches consensus as defined in V.A. above, at the conclusion of the negotiations, the Committee shall transmit to NPS the Report containing the concepts and language to be used as the basis for a proposed special regulation. NPS will use this Report as the basis for its notice of proposed rulemaking. Prior to submitting a proposed special regulation for federal review approval, and publication in the Federal Register, NPS will circulate a draft to the Committee to check for consistency with the report. The facilitators will be available to work with the Committee to help resolve any differences of opinion about consistency. If informal discussion does not resolve the differences, the Committee may be reconvened to resolve outstanding issues.
- C. If NPS or DOI alter the proposed special regulation in its final issuance after being checked for consistency as in VI.B. above, Committee members may comment positively or negatively on those particular changes.

- D. After the Committee concurs that the language of the proposed rule is consistent with the Consensus Agreement, the National Park Service will submit the proposed rule for review, federal approval, and publication in the Federal Register. If possible, public review for the required NEPA draft Environmental Impact Statement will be concurrent with publication of the proposed rule for public comment. If a final consensus is reached on all issues, NPS will identify the Consensus Agreement as the preferred alternative in the NEPA process.
- E. Committee member organizations and their representatives will refrain from opposing or commenting negatively on the consensus-based language during the rulemaking process and any associated processes and will encourage that their constituents do the same.
- F. If the Committee does not reach consensus on a proposed rule, Committee members will explore the basis of the disagreement(s), and the associated reasons for the differences of opinion, and will discuss what if anything to report to NPS about the Committee's efforts. As envisioned by the Negotiated Rulemaking Act, the Committee, through the facilitators, may transmit to NPS a report specifying any areas in which the Committee reached agreement, as well as the explanation for the disagreements, a description of the interests that must be satisfied to reach an agreement, and if possible, ways to address the differences. If a non-consensus report is submitted to NPS, and as permitted by the Negotiated Rulemaking Act, any Committee member may include as an addendum to the report additional information, recommendations, or materials.
- G. If the Committee reaches final consensus on some but not all of the issues, NPS will, to the extent possible, include those areas of consensus in the proposed rule and duly consider the dialogue and proceedings generated by the negotiated rulemaking process. Committee member organizations and their representatives may oppose or comment negatively on those aspects of the proposed rule that are not based on a final consensus.
- H. If a final consensus is not reached on all issues, NPS will endeavor to incorporate all areas of consensus into the preferred alternative developed by the NPS to the degree they are compatible with other elements of the preferred alternative.
- I. Stakeholders should note that final, formal rulemaking requires review and approval by various federal entities that are beyond the authority of the National Park Service. These other government entities include the Office of Management and Budget, the Fish and Wildlife Service the Secretary of the Interior, and the President.

## VII. Committee Meetings

- A. The negotiations will be conducted in accordance with the Federal Advisory Committee Act (FACA).
- B. All meetings of the full Committee will be announced in the Federal Register prior to the meeting and will be open to the public. Brief opportunities for oral public comment will be provided at each meeting. The Committee is not expected to respond to these comments during the oral public comment period. The time and manner of such comments shall be as determined by the facilitators. Members of the public will be permitted to file written comments to the Committee before or after meetings. Comments provided to the Committee will become part of the public record.
- C. Summaries of Committee meetings will be prepared by the facilitators and, after review and approval by the Committee, will be made available to the public. The summaries will identify points of tentative agreement and final agreement and generally be written without attribution. The summaries are not intended to be transcripts or detailed meeting minutes, but summaries of key points, issues, and ideas.
- D. Members may request of the facilitators caucuses by and among subgroups of Committee members for the purpose of discussion at any time. The facilitators also may request caucuses. No decisions, however, can be reached outside of full and public Committee deliberations.
- E. The Committee, in consultation with the DFO, may form subcommittees or work groups to advance discussion, generate options, and develop preliminary proposals. Subcommittees or work groups must be created by the full Committee, have a clear charge, and ensure participation of a diversity of interests. Any subcommittee or work group is not a decision body. Alternates may participate actively in subcommittees and workgroups. Non-Committee members may participate on subcommittees or workgroups as determined by the full Committee.
- F. The facilitators will be responsible for developing an agenda for all meetings of the Committee and the agenda will be distributed ahead of time. This agenda will be developed in consultation with the Committee and under FACA must be approved by the DFO.
- G. The Committee, in consultation with the DFO, may accept technical assistance from representatives of other organizations. The Committee by

consensus may also seek technical assistance from its members' own organizations. Areas in which technical assistance may be requested could include beach driving etiquette and outreach, pedestrian access, handicapped access, and safety. Technical advisors have no authority to make decisions on behalf of the Committee, nor can they report directly to the NPS.

### **VIII. Safeguards for Members and Representatives on the Committee**

- A. Any member of the Committee may withdraw from the negotiations at any time by notifying the DFO in writing.
- B. All members must act in good faith in all aspects of these negotiations. Members 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. Members and alternates understand that a decision to take legal, political or media action may seriously compromise negotiations.
- C. Participating organizations and their representatives commit to making the negotiated rulemaking process the primary and central focus of their efforts to address issues related to ORV use on the Seashore and to voluntarily 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. Principals and alternates understand that a decision to take legal, political or media action may seriously compromise good faith negotiations.
- D. Members commit to the principles of decency, civility, and tolerance. Parties must be willing to envision and shape a future for all users and people interested in the Seashore, including descendants of families living on the Outer Banks when the Seashore was established, current property owners and visitors, and those that care about the accessibility, 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 legitimate interest and 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.

- E. Committee members will not attribute statements to others involved in this negotiated rulemaking, seek to present or represent the views or position of other members or alternates, nor attempt to speak on behalf of the Committee as a whole in or to the media. "Media" for these purposes includes the press, television and radio, websites, and any other public information distribution mechanism. Committee members will abide by these groundrules in all communications during the negotiated rulemaking process in and out of Committee meetings. The Committee, in consultation with the DFO, may appoint a media point of contact, if it so desires.
- F. NPS or the Committee, with the facilitators, will periodically review and assess the Committee's progress to determine if the process is meeting their needs and the interests of the participants.
- G. The Committee, NPS and the facilitators will enforce these groundrules.
- i. Personal attacks, name calling, and other such negative behaviors will be addressed immediately, either privately or publicly, by Committee members and the facilitators.
  - ii. The Committee may recommend to the DFO sanctions for violations of these groundrules.
  - iii. Poor attendance, lack of participation, not participating in good faith, or other significant violations of these ground rules are grounds for a decision by the DFO to recommend to the Secretary of the Interior that a member be removed from the Committee. If the principal is removed, that seat will be filled by the alternate. In the case that no alternate exists or that both the principal and alternate have been removed, the NPS will make every effort to fill the seat to represent that interest within the FACA approval process for membership.
  - iv. If a member does not abide by the provisions of
    - (a) Section VI.E. (not commenting negatively on areas of final consensus),
    - (b) Section VIII.D. (not attributing statements to others, etc.),
    - (c) Section IX.B, third bullet (personal attacks), or
    - (d) Section IX.B, last bullet (not sharing relevant information)

NPS, after consultation with the facilitators, will record this "breach" of these groundrules in writing, post it on the project website, include it in the administrative record, distribute it to all Committee members

and alternates for their use as they see fit, including use in any formal submittals to a court

## **IX. Additional Roles and Responsibilities of Representatives consistent with the Committee Charter**

A. Members on the Committee agree to the following.

- Keep their constituencies informed about the Committee's deliberations and to actively seek their input.
- Represent the interests and concerns of their organizations, and constituents as accurately and thoroughly as possible, and work to ensure that any agreement developed by the Committee is acceptable to their organization.
- Arrive at the meetings prepared to discuss the issues on the agenda, having reviewed the documents distributed in advance.
- Strive throughout the process to bridge gaps in understanding, to seek resolution of differences, and to pursue the goal of achieving consensus on the content of the regulations under discussion.
- Make a good faith effort to participate in all scheduled meetings or activities. If a member is not able to attend a given meeting, his or her designated alternate shall participate in the member's absence. Poor attendance may lead to a recommendation by the NPS to the Secretary of the Interior that a member be dismissed from the Committee.

B. In order to facilitate an open and collaborative discussion, the participants in this negotiated rulemaking also agree to abide by the following rules (these expectations also apply to attendees of Committee meetings, subcommittees, and workgroups).

- Only one person will speak at a time and no one will interrupt when another person is speaking.
- Each person will express his or her own views his or her organization's and constituents' views, rather than speaking for other Committee participants.
- Each person will refrain from making personal attacks, name calling, distributing personal or inaccurate information about other participants, and other such negative behaviors.

- Each person will make every effort to stay on track with the agenda, and avoid grandstanding and digressions in order to move the negotiations forward.
- Committee members will share all relevant information with other Committee members in a timely manner. Members and alternates understand that a decision to withhold or not share key information in a timely manner may seriously compromise negotiations.

## **X. Role of the Facilitators**

- A. The facilitators will serve at the discretion of the full Committee. The facilitators will be responsible for helping to ensure that the process runs smoothly, developing meeting agendas, preparing and distributing draft and final summaries, generating draft agreements, and helping the parties resolve their differences and achieve consensus on the issues to be addressed by the Committee.
- B. The facilitators will be available, to the extent schedule and budget allow, to facilitate Committee sessions, caucuses, subcommittees and work groups.
- C. The facilitators will be available to consult confidentially with Committee participants during or between meetings. Facilitators, if asked, are required to hold confidences even if that means withholding information that the facilitators prefer would be made available to the full group. Confidentiality protections do not extend to threats or reports of criminal action.
- D. The facilitators may engage in shuttle diplomacy among various parties during the negotiation. Within the bounds of the Negotiated Rulemaking Act and the FACA, these deliberations may be conducted in confidence.
- E. The facilitators have no decisionmaking authority and cannot impose any solution, settlement, or agreement among any or all of the parties.
- F. The facilitators will abide by the Ethical Standards of the Association of Conflict Resolution. In part, these standards require that: “The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action and a commitment to serve all parties as opposed to a single party.”
- G. Parties will express any concerns about the facilitator’ role or action: first, to the facilitators directly; or, as needed to: 1) the U.S. Institute for Environmental Conflict Resolution; and/or, 2) the NPS.

## **XI. Consistency**

These groundrules are intended to be consistent with the Committee Charter and all applicable laws and regulations. In the event of any inconsistency or conflict, the statute, regulation, or Charter shall govern.