

February 22, 2005

Cape Hatteras National Seashore ORV Planning UPDATE

Cape Hatteras National Seashore Explores Negotiated Rulemaking Process for ORV Regulation

The National Park Service (NPS) has hired the U.S. Institute for Environmental Conflict Resolution (the Institute) to assess the feasibility of using negotiated rulemaking to establish an off-road vehicle (ORV) regulation at Cape Hatteras National Seashore (CAHA).

Executive Order 11644 requires the NPS to develop regulations for parks that allow ORV use. These regulations must implement the provisions of that Order and will have the force of law themselves. Rulemaking is the process used by federal agencies to formulate, amend, or repeal a regulation.

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 to seek agreement on a proposed solution prior to 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 NPS is exploring the use of negotiated rulemaking to establish an ORV regulation for CAHA.

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 impartiality in the process, the NPS has contracted with the Institute. The Institute is a federal program 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 neutral convener, 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 neutral convener believes that a proposed rule could be reached collaboratively, the

convener would recommend individuals representing a balance of perspectives for participation and would recommend the parameters for moving forward.

Establishment of the Negotiated Rulemaking Committee: If the assessment is favorable, then the process to establish a negotiated rulemaking committee would proceed. The NPS would publish a notice of intent in the Federal Register to establish a negotiated rulemaking committee, at which time the public can comment on the proposed establishment and makeup of 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 Assessment Phase of the negotiated rulemaking process for the CAHA ORV regulation will take place in 2005. A neutral facilitator for the Assessment Phase will be selected in early March with input from interested parties.

Through the required NEPA planning process the NPS will identify and analyze 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 need and alleviate potentially significant impact 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 for committee consensus negotiations. 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 spring or 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.