

August 8, 2008
Assessment Survey
Of
Cape Hatteras National Seashore
Off Road Vehicle Negotiated Rulemaking Committee
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I. Introduction

In 2007 the National Park Service (NPS) convened the Cape Hatteras National Seashore Off-Road Vehicle Negotiated Rulemaking Committee to help it formulate a regulation that would govern off-road vehicle use (ORV) at Cape Hatteras National Seashore. The committee's 30 members represent a broad spectrum of interests that would be impacted by the rule, including ORV enthusiasts, environmental organizations, commercial fishermen, local businesses, homeowners, state, local, and federal government agencies, and others. The committee began meeting on a monthly basis in January 2008. The Park Service has asked the committee to develop a consensus alternative for the ORV plan by January, 2009. This would allow the Park Service to meet the deadlines set forth in the Consent Decree that recently settled a lawsuit brought over the Park Service's Interim Management Plan for off-road driving at the National Seashore. The Consent Decree requires the Park Service to issue a Record of Decision for the ORV plan under the National Environmental Policy Act (NEPA) by December 30, 2010, and a final rule by April 1, 2011.

In June 2008 NPS asked the Department of the Interior (DOI) Office of Collaborative Action and Dispute Resolution (CADR) to survey the 30 members of the committee and get their opinions on how they believed the committee was progressing. The Park Service, in consultation with committee facilitators Patrick Field and Robert Fisher, developed the following questions for this survey:

1. How would you characterize the progress of the committee to this point?
2. What would you recommend to make the committee more productive?
3. Should NPS continue to use the committee to develop the ORV plan?
4. If the committee shifted its role to an advisory or consultative role rather than a consensus-seeking role, would that be constructive?, and
5. Is there anything else you would like to tell us about this?

On July 8th 2008, Superintendent Mike Murray notified committee members by email that the survey would soon be under way and that members should expect phone calls from David Emmerson of the CADR Office and Shayla Simmons, Senior Counsel for CADR, who were assigned the task of conducting the survey. Mr. Emmerson and Ms. Simmons spoke to 29 of the 30 committee members, and concluded the survey on July

31st. In the preface to each call, members were assured that the CADR office was completely impartial and that no comments would be attributed to any specific individual or organization in the report on the survey.

II. Summary of Responses:

While there were a wide variety of views expressed by the 30 committee members, a few common themes emerged in the survey.

It was clear from these conversations that committee members by and large take their roles very seriously and care deeply about the issues that are involved in the ORV plan. Many have a long standing and impassioned commitment to the interests they represent. They appear eager to work hard to accomplish the committee's objectives.

Members were unanimous in their belief that the committee is proceeding too slowly in its work. They offered a variety of reasons for the slow pace, including distrust between committee members, the large size of the committee, the methods employed by the facilitators, poor sequencing of agendas, unclear guidance from NPS, and other reasons. Several members did say that more progress had been made in the May and June meetings than in the first few meetings.

Despite the perceived lack of progress, members overwhelmingly support continuing the negotiated rulemaking process. Several members felt it was the only forum through which local interests could be expressed. Other members said they believe the committee process gives NPS better insight into the issues associated with visitor use of the National Seashore. Several members said they had devoted too much of their time to the process for it to be abandoned. However, four committee members did suggest that NPS abandon the committee process. Their reasons are discussed in greater detail below.

The group appeared split on whether it would be a good idea to shift to more of an advisory role. Some thought this would be a good idea because it was unlikely that the group could reach consensus by January 2009. Others thought a shift in role would weaken the committee. Still others stated that the committee should continue to strive for consensus but be willing to issue recommendations if consensus appears out of reach.

Members offered a variety of recommendations to improve committee performance. The recommendations were essentially directed to the NPS, the facilitators, and to other members. At least 10-15 members suggested that NPS take a more directive approach by being clear about its legal, policy, and budgetary parameters. A few members suggested that NPS unveil at the next meeting its ORV and resource management plan to the committee. The committee would then react to the plan.

Several members recommended that the Designated Federal Official (DFO), Park Superintendent Mike Murray, and the committee as a whole take measures to repudiate what they described as actions taken between meetings primarily by constituents of

members that were designed to intimidate members from expressing their views. These members said that these actions involved postings on internet message boards, advertisements and announcements in the media, and other things. A few members said that they wanted to make clear that they believed it was the constituents, and not the members themselves who were responsible for these actions. However, one member did say that another member's direct conduct fell into this category.

Many members recommended that the facilitators take a stronger and more directive approach in facilitating the meetings. Among other things, a number of members felt that agenda items were abandoned before they could be fully discussed, thus thwarting the opportunity to reach agreement on these items. Several members complained that discussions were dominated by the same group of 5 to 6 individuals, and that the facilitators could do more to get other people involved in discussions.

On the whole, committee members expressed a great deal of frustration over the negotiated rulemaking process. There appeared to be an overriding sentiment that it would be extremely difficult for the committee to come to a consensus on all issues by the January 2009 deadline. Yet, the overwhelming majority of committee members appeared to view the committee process as a worthwhile endeavor, even if it does not result in a consensus on all issues that will be tackled by the committee. These and other observations are discussed in greater detail below.

III. Detailed Analysis of Survey Responses

A. Members on Progress of Committee:

Members were unanimous that progress has been slow. Adjectives such as "excruciatingly slow", "dismal", and "laboriously slow" were common. A few members said that the lack of progress was expected, given the dynamics of the committee and the complex subject matter. "Modest at best" was the most positive thing any member said about the committee's progress. However, one member who described progress as "slow and laborious" was also somewhat optimistic about the committee being able to do its work, stating "by the end of the year [the committee] will have hashed out issues to the extent possible." About five members said that there was more progress made in the past two meetings than in previous meetings. These and other members viewed the establishment of sub groups that had been assigned specific tasks, as well as the assignment of seats, as actions that will improve the effectiveness of the group.

B. Why Members Believe Progress is Slow

Members had a variety of opinions as to why they felt progress was slow.

Some comments were related to the structure of meetings. Several members complained that discussion would cease on topics before the committee could reach agreement.

Other members said it was difficult to develop momentum. One member opined that the group is behind schedule because it “sidestepped and postured” early on. Members also expressed frustration at how agenda items were sequenced. For example, several members said the science presentations given at the June meeting should have taken place at the start of the process.

Several members said the meetings moved slowly because there was a great deal of distrust amongst the divergent factions. A number of members said the distrust was created by the lawsuit filed against NPS. Two members said they were unhappy with NPS and DOI because they entered into the Consent Decree without contesting what they thought were contestable points. One member said that NPS had promised that if they entered into the negotiated rulemaking it would not enter into a consent decree.

A few members said committee discussion was often bogged down by what they called minutia--topics such as tire inflation and the use of plywood. Two members noted that the committee has not yet gotten to what they called “the elephant in the room”—the topic of beach closures and beach access.

Other members said the structure of the committee was one of the fundamental reasons for lack of progress. Three suggested that members ostensibly representing a certain group are in reality representing other interests. Other members said a few stakeholders had been brought in who represent individual rather than organizational interests. In their view, this upsets the balance of views the committee was initially intended to represent. Others suggested that thirty members are too many for a group facing such diverse and complex issues. More than five members noted that the group is split between those who are experienced advocating and negotiating in a group setting, and those who are not. The dichotomy in experience level impacts the dynamics of discussion, according to these members. One of these members suggested that the inexperienced stakeholders “are suspicious” of the tactics and motives of the more experienced stakeholders, which makes them reluctant to enter into agreements.

A number of members believe the lack of progress is due to the approach used by the facilitators. Two members suggested that the facilitators “were not the right people for the job.” On the other hand, several members praised the work of the facilitators.

Several members believe that the slow progress is due to a lack of sideboards on the discussion. In the words of one member, “the sides are so polarized that without sideboards, the parties come to the table stating their most extreme position.”

C. Members on Whether Committee Should Continue.

1. Members in favor of continuing:

The overwhelming majority of members were in favor of continuing the committee in some form. Members voiced the following reasons why the committee should continue to meet and work towards their goals:

- It gives NPS the opportunity to learn from the committee.
- It is a voice for local stakeholders.
- There are some areas where consensus can be reached.
- Traditional NEPA public comment processes are merely “exercises in paperwork.”
- The committee started to make more progress in the last two meetings.
- Whatever NPS can glean from the process is better than nothing.
- If the process were abandoned, people would lose faith in the overall plan and NPS in general.
- Members have devoted too much of their time and effort to abandon the process now.
- It is a way for NPS to learn about how the public uses this park. While NPS has a broad understanding of the park, it does not have a nuanced understanding of how the various interests are impacted by its decisions.

Another member said at length that NPS needs to be prepared and to understand that there will be issues in which consensus may not be reached. The member believes that without consensus on every issue NPS should be able to develop an informed rule and will have a thorough understanding of the issues.

One member said the committee can be very useful and can come to consensus in the four areas being discussed. The member believed that the committee might struggle with some natural resources issues, but that NPS should bring its own expertise to bear on these areas. Another member expressed that while he was guardedly optimistic, he was skeptical that the committee could reach an agreement on the resource’s carrying capacity, considering the information that has been presented thus far.

2. Members opposed to continuing:

There were four members who indicated they did not think the committee should continue its work. Two members said they did not believe there was enough time for the committee to accomplish its objectives. Two other members said that with such little progress it is too much to ask members to give up time at their jobs to participate in the process. Another member said he did not think it was appropriate to negotiate without a proper foundation of information.

D. Members on whether the committee should change its role:

There were mixed opinions in response to the question of whether the committee should shift to more of an advisory focus. Slightly more members supported this idea than opposed it. In addition, about 5 to 7 members said they would not express an opinion on this until they understood exactly what an altered role would mean to them.

1. Members Favoring a Changed Role:

Members favoring a changed role for the committee made the following comments:

- If the group cannot reach consensus, they can at least issue majority/minority recommendations.
- A shift in the committee's role would give NPS a freer hand.
- A move made sense because seeking consensus from such a large group might not be possible.
- If NPS writes the plan that might be incentive for some groups to "draw down their swords."

One member said that he believed that a move to an advisory role is what the committee was already doing. The member believes that it is not a failure if the group cannot reach consensus, stating further that disagreements and dissent should be acknowledged in any recommendations that are made as an advisory body.

2. Members Opposing a Changed Role:

Members opposed to a change in the role of the committee made the following observations:

- The shift in roles would lead to majority and minority recommendations, which would isolate minority constituents, and exacerbate the division in the committee.
- Any system that called for voting would favor ORV interests, which comprised the largest share of the committee.
- An advisory role would carry less weight.
- The committee should be disbanded before taking on a lesser role.
- A shift in role would be valuable only to the people who were consulted, and (this member is concerned that not all parties will be consulted equally).
- Not all members would have an equal opportunity to influence committee advice and actions taken by NPS.
- The group could arrive at consensus so long as NPS "painted the table" with data that the committee could react to.
- If the role shifted there would be no incentive for parties to move to the middle to see if consensus could be reached.
- If we were advisory only, then the NPS might as well ask 30 people for their individual opinions.

3. Members Undecided About a Changed Role:

The members who were undecided about this question remarked that their views would depend entirely on how an advisory role was structured—how the advice would be used, and how the group would make decisions on how it would give advice.

E. Recommendations for Improving Process:

Committee members offered a variety of suggestions for how to make the committee process more effective. The suggestions generally focused on actions that could be taken by the facilitators, NPS, or other members.

1. Recommendations for Facilitators:

As noted previously, several committee members said they thought the facilitators were doing a good job. These members said that the decisions to assign seats for the June meeting, and to establish subgroups that would be assigned specific tasks, were positive developments. About 10-15 members were critical in varying degrees of the facilitators. Members made the following recommendations for the facilitators:

- Be stronger and more directive.
- Move discussion to interests and off positions.
- See discussions and issues through to completion.
- Set parameters on discussion—find out what NPS’s sideboards are—legal, policy, and budgetary.
- Bring up the weighty issues for discussion—beach access and closure.
- Ensure discussion is not dominated by a few people.
- When agreement appears close, stick with the topic even if time has expired on the agenda—nudge people toward agreement.
- Cut down on the number of caucuses.
- Address personal attacks in internet and media against members.
- Go to 3 day meetings. Extend the times of meetings—work later into the evenings.
- Move to conclusion even if some parties do not want to participate in discussion.
- Allow members of the public more than 3 minutes to speak.
- Be aggressive in assigning tasks and goals. Impose penalties/consequences on parties that violate ground rules or do not complete assignments on time.
- Force group to provide actual recommendations rather than laundry list of possibilities.

- Between meetings, hold small group teleconferences between committee members with divergent viewpoints.
- Improve sequencing of agendas and meetings—science presentations should have come much sooner in the process.
- Place greater emphasis on subgroup work.

2. Recommendations for NPS:

A number of members urged the Park Service to take a more directive role. They recommended that NPS:

- Be clear about its parameters and tell the committee what its legal, policy, and budgetary restrictions are,
- Lay out its informational base to the committee—the data that it uses to make decisions on a daily basis.
- Be more transparent. Two members were concerned that parties to the Consent Decree had better access to information than the rest of the committee.

Several members suggested that NPS present a draft plan to the committee that it could react to. Comments along these lines include the following:

- NPS should present a Resource Management Plan to the group, and ORV routes could be overlaid on top of that. The member believes this would get discussion started on weightier issues, and give the committee a better understanding of the sideboards under which NPS is operating.
- NPS should “go to the vault” and get all historical information regarding the species and the ecosystem. The information would then be consolidated and mapped. Habitat information should be overlaid on maps by a team of experts. The member said the current process should be tabled while this is going on.
- NPS appears to want the science negotiated. In this member’s view, this would be inappropriate.
- Another member said that it appears that NPS wants to address GMP issues through the ORV plan. This would be inappropriate according to this member, since resource management and endangered species issues should be addressed in a larger management plan, with the ORV plan a subset of that.

A few members asked that sanctions be imposed on members that violate committee ground rules. These members viewed the lawsuit as a violation of these ground rules, and believe NPS should terminate the membership of the organizations that brought the law

suit. One member expressed confidence that these groups could be replaced by members who represented the same interests of the members removed from the committee.

Other recommendations for the Park Service include:

- Any economic/environmental study should have the scope of a full year in order to get an accurate picture of the economic and environmental conditions at Cape Hatteras National Seashore.
- The DFO needs to make clear that personal attacks and intimidation against other members through the media, the internet, and other means will not be tolerated.
- Implementing a GAG Order that would make it a violation of committee rules for members to make personal attacks on other members through the media.
- Allowing members of the public to speak for longer than three minutes. (One member said that for the last meeting some citizens travelled a long way to get to the meeting, and three minutes was insufficient considering the sacrifice and commitment they had made to be heard.)
- Abiding by the promises that Director Mainella made when she visited the National Seashore several years ago. (The member stated that Director Mainella had promised the community that if they participated in the negotiated rulemaking traditional ways would be respected.)
- Supporting the negotiated rulemaking process in future court hearings.
- Extending meetings to 3 days, and increasing the working hours so that that they run into the evening.
- Clarifying what the decision and recommendation rules are pertaining to the various subject matter areas. (The member said that ground rules do not appear to require consensus for natural resource management, but do require consensus for ORV use.)
- Changing the negative messages it sends to park visitors. Instead of a sign reading “driving is prohibited from 10 pm to 6 am, it should read “driving allowed 6 am to 10 pm.”
- Giving more time to science presentations but ensuring the scientists are impartial (The member felt that the scientists giving the presentation in June presented information in a biased manner).
- Getting scientists to present information on the conditions in the park, not on species in general.

In addition, quite a few members complimented the performance of the Superintendent and his staff.

3. Recommendations for other members:

Several members said that certain members need to “rein in” their constituents. These members were concerned that the constituents of some interests were using the internet and other means to intimidate other members from expressing their views. Other members said that the representatives for environmental groups need to participate more fully in discussions.

IV: Conclusion

It was clear from the survey that the committee members feel frustrated by the lack of progress that has been made by the committee, particularly in light of the fact that they have been asked to develop a consensus-based plan by January 2009. Yet, it is also clear from the survey that all of the members view the committee’s work as important, and are committed to working hard in their roles.

All but four members said they want the committee to continue working toward its goals. Many members offered suggestions for how the committee can be more effective. In general, these suggestions urge both NPS and the facilitators to take a more directive approach towards the process. Members by and large would like for NPS to present a draft plan at its next meeting, and to be forthcoming about its legal, budgetary, and policy sideboards. A number of members would also like to see the facilitators manage the meetings in a way that allows the weightier issues such as beach closures and beach access to be discussed, and allows for discussions on particular issues to continue until consensus is reached. In addition, a number of members believe that the committee needs to repudiate actions that are designed to intimidate members from expressing their views.

Committee members appear to believe, on the whole, that if these measures are taken progress could be made on the development of a plan. There also appeared to be an understanding amongst the group as a whole that consensus might not be achievable on every single issue by January 2009, but working towards consensus was worthwhile.