



**United Four Wheel Drive Associations, Inc.**  
... An International Organization [www.ufwda.org](http://www.ufwda.org)

**Carla Boucher - Attorney**  
P.O. Box 15696 Chesapeake, VA 23328 (757) 546-7969

The Consensus Building Institute  
Attn.: One Ferguson  
238 Main Street, Suite 400  
Cambridge, MA 02142  
Via e-mail: [oferguson@cbuilding.org](mailto:oferguson@cbuilding.org)

RE: Cape Hatteras National Seashore ORV Negotiated Rulemaking Process

January 24, 2006

Dear Ms. Ferguson,

Please accept these comments made on behalf of United Four Wheel Drive Associations regarding the Draft Proposed Stakeholder Recommendations for Participation on the Potential Committee issued by The Consensus Building Institute (CBI) in December, 2005 and the Proposed Stakeholders – Stakeholder Information issued by The Consensus Building Institute on January 17, 2005. I am confident that CBI will take the time necessary to come to a proper understanding of the issues presented here. However, for convenience and ease of reference my specific requests and changes appear in bold font.

1) DRAFT PROPOSED STAKEHOLDER RECOMMENDATIONS FOR PARTICIPATION ON THE POTENTIAL COMMITTEE

A) In June, 2005, CBI issued a Draft – Cape Hatteras National Seashore: Negotiated Rulemaking Feasibility Report and recommended a Negotiated Rulemaking Committee comprised of 23 members. On July 21, 2005, CBI issued a revised assessment pertaining to the Negotiated Rulemaking Committee and recommended a committee comprised of 27 members based upon comments received in response to the June Draft. These recommendations were again revised in December of 2005 to a committee comprised of 25 members. The December 2005 document states, “This proposed list is based on a Committee of 25 members. Under the Negotiated Rulemaking Act, there is a limit of 25 members, **unless the agency head determines that a greater number of members are necessary for the functioning of the committee or to achieve balanced membership** (emphasis mine).”<sup>1</sup>

<sup>1</sup> Attachment C – Draft Proposed Stakeholder Recommendations for Participation on the Potential Committee, page 1.

My comments are twofold. First, the final feasibility report, of which the stakeholder committee recommendations are a part of, is a recommendation from CBI to the National Park Service on the feasibility of negotiated rulemaking based on the considerable time and careful evaluation made by CBI. Thus, the recommendation reached by CBI for a committee comprised of 27 members should not be altered merely to satisfy the benchmark of 25 members under the Negotiated Rulemaking Act. The Negotiated Rulemaking Act itself recognizes the need for some limited flexibility in the composition of a rulemaking committee where a need is demonstrated. CBI possesses documentation to demonstrate a need for a committee comprised of more than 25 members. **Therefore, I request that CBI recommend a committee comprised of 27 members along with the justification of need for these seats to balance the committee membership. The National Park Service is the proper authority to make an assessment and adjustments accordingly if they must be made pursuant to the Negotiated Rulemaking Act. Please stay committed to your role of providing recommendations most suitable for the overall success of the negotiated rulemaking process.**

B) As presented above, it appears as if the adjustment to the number of members recommended for the committee is based more on pressure to conform to the base limit recommended in the Negotiated Rulemaking Act and less on the actual need to balance the membership of the committee specifically for Cape Hatteras National Seashore. Notwithstanding the following excerpt from the stakeholder recommendation, a balance will not be reached with a 25 member committee as recommended. Attachment C states, “We are sympathetic to the desire to ‘add up’ your friends and allies as compared to your potential ‘opponents’. However, we want to stress that the consensus decision rule protects the process from being easily ‘gamed’ by majority or even a supermajority vote. Second, we want to encourage people to not think in terms of allies or enemies or ‘us and them’”.

It is extremely difficult to surmise what position many of the recommended sub-stakeholder groups will take on the specific details of a proposed rule. In contrast, it is much easier to understand what positions will be taken by Environmental & Natural Resource Conservation Advocates and Off-Road Vehicle (ORV) Use groups. Accordingly, it is easier to weigh the likelihood of reaching consensus between Environmental & Natural Resource Conservation Advocates and Off-Road Vehicle Use groups.

In June, CBI proposed a 23 seat committee comprised, in part, of 4 seats for Environmental groups and 2 seats for ORV groups. In July, CBI reported changes in the allocation of the committee seats based upon comments received from the June draft. In July, CBI proposed a 27 seat committee comprised, in part, of 6 seats for Environmental groups and 3 seats for ORV groups. Then in December, 2005, CBI once again reported changes in the allocation of the committee seats. In December, CBI proposed a 25 seat committee comprised, in part, of 5 seats for Environmental groups and 2 seats for ORV groups. As proposed, Environmental groups will comprise 5 of the 25 recommended memberships on the committee. ORV use groups will comprise 2 of the 25 recommended memberships on the committee. Such an imbalance achieves precisely what the draft recommendations profess to avoid – a process that is easily “gamed” by a majority vote. Furthermore, a review of the history of changes proposed on the committee indicates a

complete failure to achieve any kind of balance between Environmental groups and ORV groups. The balance went from 4 to 2 in favor of Environmental groups, to 6 to 3 in favor of environmental groups, to 5 to 2 in favor of environmental groups. We recognize that environmental groups lost one seat just like ORV groups did in the December re-allocation. However, the 5 to 2 imbalance is worse than the original 6 to 3 imbalance. In hindsight, ORV groups are more poorly served now than had we advocated for the original allocation presented in June.

To avoid this imbalance please recommend 3 memberships on the committee for ORV use and reduce the number of Environmental memberships to 4. The change suggested will not be difficult as CBI currently possesses a nomination for a third ORV use membership. Furthermore, the National Parks and Conservation Association (NPCA) has at this time indicated their unwillingness to serve on this rulemaking committee by submitting a formal withdrawal from the negotiated rulemaking process, a step presumably taken in light of the organization's lawsuit filed in Federal District Court for the District of Columbia against the National Park Service relating to ORV use in park units, including Cape Hatteras National Seashore. Substituting Coalition of National Park Service Retirees for the vacated NPCA seat is not suitable. See section (2)(A) below for an in-depth discussion on this issue. Suffice it say for the purposes here that the loss of one membership on the committee from the vacated seat of NPCA will not cause a lack of representation on environmental issues, interests, or constituencies. The points of view for which NPCA would have spoken will still be represented through the remaining 4 Environmental memberships on the committee.

**I request that CBI eliminate the national environmental committee membership that has been vacated by the withdrawal of the NPCA nomination, bringing the total number of environmental stakeholders to 4. I request that CBI reinstitute the ORV use sub-group number to 3 and utilize the nomination information currently in its possession to fill the reinstated ORV membership position.**

## 2) PROPOSED STAKEHOLDERS – STAKEHOLDER INFORMATION

A) NPCA has formally withdrawn their interest in negotiated rulemaking at Cape Hatteras National Seashore. The Coalition of National Park Service Retirees (The Coalition) is not a suitable alternate or replacement for the NPCA vacated committee seat.

Certainly the interests of The Coalition are most appropriately represented by the National Park Service itself. The Coalition lists as its primary guiding principle, “Uncompromisingly defend the mission of the National Park Service, recognizing that, at times, no other entity may exist that is willing , or able, to do so”. Another guiding principle is, “Recognizing that the National Park Service is the stewardship guardian of places that embody irreplaceable beauty...”. One can hardly argue that the National Park Service is unwilling to defend itself. Therefore, I request that The Coalition be listed as an alternate for the National Park Service, if at all.

In addition, The Coalition failed to provide contact information, or affiliations for either the representative or alternate. It is safe to assume that either of these positions is

filled by former National Park Service staff since The Coalition membership is comprised of National Park Service Retirees. However, failure to provide information pertaining to “affiliations” and indicate that the proposed alternate William Harris is a former superintendent for Cape Hatteras National Seashore is unfortunate and places a cloud over the legitimacy of The Coalition nomination in general and Mr. Harris’ nomination specifically.

**Therefore, I am requesting that CBI withdraw its recommendation that The Coalition of National Park Service Retirees nomination be considered for any Stakeholder Group or Sub-stakeholder group.**

B) The North Carolina Wildlife Resources Commission is not a suitable nominee for either the State government Stakeholder group organization or alternate organization. The State of North Carolina has several agencies to which wildlife protection and conservation are entrusted, including the Marine Fisheries Commission, Wildlife Resources Commission, and Division of Parks and Recreation (the Division).

However, wildlife protection and conservation is not the sole focus of ORV rulemaking at Cape Hatteras National Seashore (CAHA). Arguably, the primary purpose of ORV rulemaking is to manage motor vehicle use within CAHA, a part of which concerns natural resource protection, meeting motor vehicle access needs, and consideration of economic impacts. The Division of Parks and Recreation mission is “to conserve and protect representative examples of the natural beauty, ecological features and recreational resources of statewide significance; to provide outdoor recreational opportunities in a safe and healthy environment; and to provide environmental education opportunities that promote stewardship of the state’s natural heritage.”<sup>2</sup> Thus, the mission of the Division of Parks and Recreation most closely matches the purposes for which the ORV rulemaking is undertaken.

I recognize that the State of North Carolina, Department of Environment and Natural Resources, Division of Parks and Recreation has not provided a nomination for the State Government Stakeholder Group as of yet. UFWDA will be formally requesting such a nomination from the Division. However, the lack of a nomination from the Division does not provide legitimacy to the nomination from the Wildlife Resources Commission. Filling a vacancy for the sake of filling it is not a good basis for a recommendation. **Therefore, I am requesting that CBI withdraw its recommendation that the North Carolina Wildlife Resources Commission nomination be considered for the State Government Stakeholder Group organization or alternate organization. In the alternative, I request that a statement by CBI be added to Explanatory Note (1) of the CAHA Pre-Convening Chart that indicates it can not recommend the Wildlife Resource Commission application for consideration as key interests are not represented by the Commission nor does it adequately represent the range of identified interests. The statement should also encourage the State to provide an application for the Division of Parks and Recreation when deciding how to best represent its different regulatory perspectives and interests on the Committee.**

---

<sup>2</sup> <http://ils.unc.edu/parkproject/explore/division.html>

C) It is worrisome that nearly 1/3 of the Stakeholders failed to provide any contact information and another 1/3 failed to provide affiliations. Such a lack of attention or participation by the stakeholders calls into the question the feasibility of using a consensus process to develop new regulations to manage motor vehicle use within CAHA. When 1/3 of the stakeholders are unable or unwilling to provide minimal contact information or disclose affiliations it is difficult to fathom that these same stakeholders can summon the energy, time, or talent to face the challenges ahead in reaching consensus on what is sure to be difficult issues at CAHA. I commend CBI for their numerous attempts under varying formats to acquire this information for the benefit of all of us. Gathering this information appears to be more troublesome than herding cats. **I request that CBI review nomination forms and update the Stakeholder Information if additional information is discovered.**

D) Noticeably absent from the list of Stakeholder Information and from the CAHA Pre-Convening Chart in Attachment C is the name of the representative for the National Park Service. As early as June, 2005, CBI reported their findings that many people “would like the Park to be more friendly with and helpful to Park users. They want the Park to make relationship-building a priority”.<sup>3</sup> CBI further reported, “Most people describe the communications between the Park and local communities as strained and inadequate over the years. Many people perceive the Park as acting in secrecy and the local people never know quite what to expect. If [people] are educated and informed about what decisions are being made and why, they will be much less likely to be upset and might be supportive”.<sup>4</sup>

Despite what often times seems the transient nature of staff at CAHA, the NPS could nominate its representative and an alternate. The concerns iterated above are magnified by the seeming lack of participation by the NPS at this point in the process. **I request CBI seek nomination from the NPS for its representative and alternate. If the NPS is not forthcoming with a nomination within a predetermined amount of time I request CBI list the NPS in the Proposed Stakeholder – Stakeholder Information list and simply indicate “not provided” for each of the data items.** This will allow the public to draw its own conclusions as to the NPS commitment to the negotiated rulemaking process, or lack thereof as the case may be. It will also demonstrate the on-going commitment by CBI to remain neutral and to facilitate meaningful consensus.

Thank you for the opportunity to express our thoughts, concerns, and requests. We appreciate the magnitude of work it requires to facilitate a diverse group of interests and organizations such as the ones represented at CAHA.

Very truly yours,



Carla Boucher, Attorney

---

<sup>3</sup> Draft – Cape Hatteras National Seashore: Negotiated Rulemaking Feasibility Report, page 14.

<sup>4</sup> *Id.* at page 15.