



United Four Wheel Drive Associations, Inc.

Protecting, Promoting, and Providing 4x4 Opportunities Worldwide

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May 11, 2010

Mike Murray, Superintendent
Cape Hatteras National Seashore
1401 National Park Drive
Manteo, NC 27954

RE: Comments to Cape Hatteras National Seashore Off-Road Vehicle Management Plan/Environmental Impact Statement

Dear Mr. Murray,

Please accept the following comments to the Cape Hatteras National Seashore Off-Road Vehicle Management Plan/Environmental Impact Statement (“DEIS”). These comments are submitted on behalf of my client United Four Wheel Drive Associations including their various organizational/individual members (collectively, “UFWDA”), who has in the past and hope in the future to visit the project area using motorized means of access. Individual and/or organizational members of the UFWDA may submit additional comments, which should be considered distinct and independent from these comments and the agency should independently analyze and respond to each such comment. Any communications regarding these comments should be directed to Carla Boucher at the contact information listed above or at attorney@ufwda.org.

I. INTRODUCTION

UFWDA urges the National Park Service (NPS) to actively and effectively manage the Cape Hatteras National Seashore. Neither UFWDA nor the NPS should be limited by past management deficiencies. Instead, we should be working toward a collaborative solution that advances the simultaneous goals of sustainable, yet enjoyable use of the unit. The DEIS is premised on an incorrect and unsupportable notion that the existing condition violates applicable law and cannot be improved. To the contrary, designated roads, trails, and areas are being supported, Endangered Species Act, Migratory Bird Treaty Act, and similar standards are being met, and species protection coupled with a greater degree of both pedestrian and motorized vehicle access can be even further improved through a cooperative and logical management solution that will bring common sense to planning and management of the unit. Instead of the “avoid management through exclusion” philosophy advocated by some, we ask you to have the courage and foresight to pursue an active management strategy that will better advance

management goals and the best interests of the public. For the following reasons outlined below we request the agency adopt in its final decision a modified Alternative F, specifically reestablishing open and seasonal ORV use areas pursuant to maps supplied by UFWDA; removing the DEIS prohibition of access by street-legal motorcycles; prohibit nighttime beach driving during sea turtle nesting and hatchling season only during the hours from 10:00 p.m. until 6:00 a.m. during the dates from May 27 and August 25; during turtle hatch season limit closure to surf line from 1 hour before sunset until dawn, monitored by Turtle Night Nest Watch Team, utilizing keyhole pattern fence to the surf line at night and implement daytime closures that are limited to 10 meters square; Seasonal ORV beach closures for the villages of Frisco, Hatteras, and Ocracoke limited only from May 15 to September 15; addition of access ramps pursuant to maps supplied by UFWDA; provide pedestrian and ORV corridors or bypasses through, around, or below high tide line in all Species Management Areas (SMAs) during the entire breeding and nesting season within guidelines to maintain access; move chick buffers for Piping Plover unfledged chicks as the brood moves rather than expand buffer as proposed. The preceding modifications as well as those suggestions and rationale appearing as part of the UFWDA et al. Addendum to Final Report of the Proceedings of the Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management at Cape Hatteras National Seashore are incorporated herein and attached hereto.

II. BACKGROUND

As stated in the DEIS:

In December 2007, the Department of the Interior established a negotiated rulemaking advisory committee (Committee) to assist the NPS in the development of an ORV regulation for the Seashore. The Committee met 11 times from January 2007 through February 2009, and conducted numerous subcommittee and work group meetings and conference calls. The Committee discussed and explored options for the full spectrum of ORV management issues covered in this plan/EIS. Although the Committee did not reach a consensus on a recommended alternative, the NPS has used the Committee's input to create this action alternative. In any case of conflicting advice from Committee members about any particular issue, the NPS has made a management judgment as to which approach would make an effective overall ORV management alternative. The NPS has also included under alternative E some ORV management approaches identified by the Committee that would require more intensive management (such as park-and-stay and SCV camping), in keeping with the maximum management theme of that alternative.

The committee's input, as part of the negotiated rulemaking process directed by Cape Hatteras National Seashore, included a final committee report. The final committee report Addendum, entitled UFWDA et al., Addendum to the Final Report of the Proceedings of the Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management at Cape Hatteras National Seashore, submitted timely and in accordance with specific instructions of the unit, dated March 27, 2009, is hereby incorporated by reference and attached hereto. This report

was filed by United Four Wheel Drive Associations on behalf of, with the support of, and ratified by other committee members, including sixteen of the approximately thirty committee seats.

The DEIS presents a scattered and misleading background thereby confusing a reader as to the true nature of the project area and context of the proposed action. An accurate characterization of the project area is essential to a dispassionate and legally-sufficient analysis of the agency's management options. The DEIS eliminated from consideration the mileage and pedestrian access opportunities within Pea Island National Wildlife Refuge. Any rationale which states there were or are conflicts of uses between ORV and pedestrian are overstated since pedestrians have exclusive use of Pea Island, located within the National Park unit, irrespective of whether the NPS manages it or not. DEIS efforts to create a self-inflicted use conflict within the unit contradict available data.

The agency's cries of management poverty partly, if not significantly, reflect the agency's questionable decisions or management strategy. The DEIS states, "...the escort system would be extremely labor intensive to initiate, and providing the staffing levels necessary to adequately implement an escort program would likely not be feasible". DEIS at 85. However, the availability of funding is directly correlated to management effort and outreach to funding sources and the affected user community. Where they have been able to, UFWDA and other recreational groups have contributed volunteer assistance including monetary contributions. Typical volunteer activities have included user education brochures, motorist assistance to beach ORV users, turtle sitting, escort services at ramps and other areas where needed from time to time, and other contributions of volunteer time and money.

III. GENERAL LEGAL STANDARD

For any or all of the following reasons, we respectfully request that NPS undertake a more-rigorous final environmental impact statement ("FEIS") to more fully address the relevant issues considered in, and omitted from, the DEIS. As a preliminary matter, we wish to outline the applicable standard of judicial review, as this standard is effectively the one which agency decisionmakers must consider during the administrative review process. Executive-branch agency decisions are ultimately reviewable by the judiciary, which is empowered to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or found to be "without observance of procedure required by law." 5 U.S.C. §706(2)(A) & (D), see also, *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004) ("we review the full agency record to determine whether substantial evidence supports the agency's decision....").

The arbitrary and capricious standard is deferential and does not allow a reviewing court to substitute its judgment for that of the agency:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice

made....Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added). Arbitrary and capricious review is the mechanism through which the courts can require basic fairness and reasonableness of agency behavior, for “unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on discretion.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (quotation omitted).

Even where an agency can arguably point to substantial evidence supporting its decision, the presence of contradictory evidence might render the decision arbitrary and capricious. Thus, “even though an agency decision may have been supported by substantial evidence, where other evidence in the record detracts from that relied upon by the agency we may properly find that the agency rule was arbitrary and capricious.” *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984) (citing *Bowman Transport, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974) (agency decision supported by substantial evidence may still be arbitrary and capricious)); see *Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (where agency modifies or overrides precedents or policies, it has the “duty to explain its departure from prior norms”).

Even substantial evidence cannot properly support a decision if the information was not considered by the decision-maker at the proper stage of the process. Information cannot be presented as a post-hoc rationalization to justify a decision previously made. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). For the reasons identified below, a decision supported by this DEIS, particularly to close certain segments of access to the beach, will violate these basic principles.

IV. DEIS COMMENTS

The DEIS is seriously flawed and should be revisited through a more thorough analysis. Our comments below will primarily address these flaws in a legal context. We note and incorporate by reference herein the comments of UFWDA members and/or agents.

A. THE DEIS RELIES UPON INADEQUATE SCIENTIFIC DATA.

The following are examples of instances where the DEIS relies upon inadequate scientific data. These examples are indicators of a systemic problem with the scientific data relied upon in

the DEIS and are meant to represent the whole of the deficiencies. The following comments are merely examples and are not an attempt to provide an exhaustive list of each instance where the DEIS relies upon inadequate scientific data. Even a cursory glance at the References and Literature Review section of the document provides insight into the large numbers of literature and studies relied upon which have not undergone peer review. DEIS at 657-685 and Appendix A.

1. **No peer review of scientific evidence relied upon to rationalize decisions.**

Failure to utilize only scientific evidence that has been peer reviewed is a violation of Office of Management and Budget Peer Review Bulletin; violation of NPS Director's Order #11B Information Disseminated by the National Park Service; and a violation of commonly held practice within the scientific community to peer review via journal publications where editors or other scientists in the same field of study review the work and determine its quality and thus suitability for publication.

2. **Failure to provide technical references.**

The DEIS dismisses from further consideration routinely relocating turtle nests based in part, on reference to studies indicating that the "determination of the hatchling sex ratio depends on the temperature at which the eggs incubate". DEIS at 86. This portion of the DEIS fails to offer citation to which study or studies it makes reference to.

When federal agencies evaluate technical issues or apply specialized expertise, NEPA requires them to rely on valid sources and to disclose methodology, present hard data, cite by footnote or other specific method to technical references, and otherwise disclose and document any bases for expert opinion. 40 C.F.R. § 1502.24; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998).

42 U.S.C. § 4332(A); 40 C.F.R. § 1502.6. NEPA does not envision undocumented narrative exposition, instead requiring:

Agencies shall insure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

3. **Citations to literature not peer reviewed and literature not applicable to DEIS location.**

The DEIS states that, "OHVs can churn up and damage delicate soils (Proescholdt 2007; Ouren et al. 2007; Webb 1982)". DEIS at A-2. Of the three pieces of literature cited, only one was presumably peer-reviewed; Webb 1982. However, the Webb study was conducted in the Mojave Desert in California where the annual precipitation is 5 inches. In contrast, soil compaction in North Carolina, particularly in Cape Hatteras National Seashore with annual precipitation of 57.8 inches, would vary significantly from that of the study area. The scientific

data in the Webb study for Off Road Motorcycle use in the Mojave Desert of California is inadequate in making a determination, even by extrapolation, to Off-Road motorcycle effects on desert soils within Cape Hatteras National Seashore, if in fact soils at Cape Hatteras National Seashore can fairly be called “desert” soils.

B. THE DEIS WILL VIOLATE THE ENDANGERED SPECIES ACT AND NPS MANAGEMENT POLICY.

Affording protection to species not listed by state or federal EPA is a violation of law. Red Knot is not listed by North Carolina or by the U.S. Fish and Wildlife Service (USFWS). Nonbreeding closures and “floating closures” of some areas is proposed with Alternative F to reduce impacts to Red Knot. DEIS at 139. The Endangered Species Act (ESA) provides no authority for the protection of species upon a mere “proposal” to list a species. To consider adverse effects on candidate species would be premature since the USFWS has yet to determine whether Red Knot or Red Knot habitat are in fact at risk. Imposing additional closures in the name of Red Knot protection is not warranted through public input and the processes required under the ESA. The Endangered Species Act (ESA) provides no authority for the protection of species upon a mere “proposal” to list a candidate species or a “proposal” to designate critical habitat. It is outside the authority of the NPS, and outside the confines of the ESA to reevaluate designation of public lands for the purpose of limiting or closing areas based on candidate species.

The DEIS states that NPS Management Policies require it to “inventory other **native** species that are of special management concern to parks and will manage them to maintain their natural distribution and abundance (emphasis added). DEIS at 419, citing to NPS 2006, sec. 4.4.2.3. The DEIS fails to demonstrate that Red Knot are native to Cape Hatteras National Seashore, thus protection under NPS 2006, 4.4.2.3 is unwarranted. In contrast, the International Shorebird Survey¹ autumn (July to October) counts, 1974-1978, using maximum recorded counts, does not list any Red Knot in North Carolina.² The counts listed in nearby Virginia between 1974 and 1978 are zero except for a count of 24% in 1977. Even if Red Knot are arguably of special management concern, protection by NPS under internal Management Policies is not warranted as Red Knot are not “native” species. Alternative F purposely seeks to reduce adverse impacts by instituting nonbreeding closures and provides further protection including four miles of “floating” closures. DEIS at 139.

¹ International Shorebird Survey (ISS) scheme, organized jointly by the Canadian Wildlife Service, Ottawa, Canada, and the Manomet Bird Observatory, Massachusetts, U.S.A. New

²Bulletin of the International Wader Study Group, Number 28, April 1980, citing to Morrison, R.I.G. and Gratto, C.L. 1979a. Maritimes Shorebird Survey 1978. Preliminary Report. 37pp. Ottawa: Canadian Wildlife Service..

C. THE DEIS PRESENTS FLAWED AND/OR ABSENT ANALYSIS, EVALUATION, AND RATIONALE.

1. Decisions are arbitrary and capricious based on the parks own statistics.

The DEIS, Alternative F, proposes a night driving ban in effect for sea turtle nesting habitat from May 1 to Nov 15. DEIS at 81 and 82. Yet only twice in the past 11 years have turtle nests been recorded within the unit prior to May 27. Even if a no-impairment standard is implied May 1 is too early.

Similarly, a nighttime driving ban is proposed to be in effect for sea turtle nesting habit through Nov. 15. This limitation is arbitrary as it is not statistically supported. All other protection measures would still be employed while allowing driving. In the past 11 years, only 1% of turtle nests remained after August 28 of each year. Utilizing a reopening date of September 16 is still too late compared to statistics showing only 1% of nests remain as of August 28 of each year. Labor Day is traditionally a very high use visitor weekend and thus provides the North Carolina economy with a disproportional amount of revenue compared to a non-holiday weekend. Proposing a beach closure at night that extends into the Labor Day weekend, occurring the first Monday in September, disproportionately impacts the local economy as compared to the low probability of the actual nest protection that could be achieved.

2. Decisions are proposed without adequate evaluation.

a. User Conflicts

The DEIS addresses user conflicts nearly two dozen times. DEIS at ii, iii, iv, vi, xviii, xxxv, 1, 2, 3, 18, 30, 37, 91, 102, 131, etc. In Chapter 2: Alternatives, Consistency with the Purposes of NEPA section, page 91, the DEIS states,

“Also under the action alternatives, the establishment of ORV and non-ORV areas would reduce the potential for, as well as the perception of, visitor conflict issues. Although actual visitor conflict issues may or may not exist with these two uses in the same area, providing non-ORV areas would eliminate the potential for conflicts in those areas and address the feeling of those who perceive there could be a conflict or other safety issue.”

None of the references offer discussion of user conflicts, rather the statements in the DEIS merely profess to minimize user conflicts. No data about user conflicts exists within the DIES, as data of use levels or as data about conflict. The only reference data given for conflict indicated in 2009, “that in the prior 10 years there were no known case incident reports documenting pedestrians being struck by ORVs on Seashore beaches”. DEIS at 268. One conflict between an ORV and pedestrian in late 2009 occurred. As unfortunate as this encounter was for the young child pedestrian involved, this single isolated incident in over a decade does not raise the “conflict” to the level of resolution contemplated by any statutes relied upon by the NPS for authority to minimize conflict.

The same standard of “minimization” referenced as a requirement in various sections of the DEIS could be achieved by recognizing unfettered pedestrian only, non-motorized access, to Pea Island Wildlife Refuge located within the Cape Hatteras National Seashore. Whether management of Pea Island lies with the National Park Service or with another agency is irrelevant to the fact that the refuge does in fact lie within the boundaries of the park unit and is available to pedestrian use free of ORV use.

Further, characterization of Pea Island Wildlife Refuge is deficient. The DEIS indicates that the NPS dismissed from consideration any evaluation of Pea Island National Wildlife Refuge when considering use areas. DEIS at 83. The DEIS states,

“Although the 5,880-acre Pea Island NWR is located at the northern end of Hatteras Island, **and is within the boundary of the Seashore**, the refuge is administered by the USFWS (emphasis added). Because it is not administered by the NPS, the Seashore cannot direct the visitor use at Pea Island NWR.”

This statement fails to accurately characterize how the NPS could have considered availability of pedestrian access at Pea Island NWR when considering whether it met its legal obligation to minimize user conflicts. Surely, the NPS understands the difference between the consideration and *acknowledgment of availability* of an ORV-free pedestrian area within the seashore boundary and that of being able to “direct” the visitor use of Pea Island NWR. Perhaps it is the unstated concern of the NPS that Pea Island NWR will become unavailable to even pedestrian use and therefore can not consider the availability of the refuge for ORV-free recreation opportunities within its own unit boundary.

b. **Motorcycle Prohibition on Ocean Beachfront.**

An element common to all action alternatives is the prohibition by motorcycles on the ocean beachfront. DEIS at 62. Nowhere within the DEIS does it state the rationale, justification, or evaluation of whether motorcycles should be allowed or prohibited on the ocean beachfront. As such, the DEIS fails to provide a clear basis for choice among the options by the decisionmaker and the public. Not only does the DEIS lack any evaluation of the issue of motorcycle access, it lacks any choice. As stated above, every action alternative proposes a prohibition of motorcycle use on the ocean beachfront. Conversely, none of the action alternatives consider the use of street-legal motorcycle access on the ocean beachfront. Throughout the Negotiated Rulemaking process UFWDA provided information to the NPS regarding the suitability, accessibility, and manageability of street-legal dual-sport motorcycle use on the ocean beachfront as a means of vehicular access in pursuit of recreation. Fatally, the issue of motorcycle access was neither evaluated nor dismissed from consideration in the DEIS.

c. **Recreation Carrying Capacity.**

Alternatives C, E, and F propose the establishment of carrying capacity limits as a “peak use limit” determined for all areas based on the linear feet of beachfront with specified physical space requirements for certain districts within the unit. DEIS at 108.

Peak use periods would trigger carrying capacity limitations for vehicles but not for people. However, the Univ. of Idaho study indicated a percentage of respondents felt crowded, though not specifically by vehicle use. Such crowding was presumably felt in non-ORV areas by pedestrian overcrowding, particularly at high-use pedestrian areas. Though this document purports to be an Off-Road *Vehicle* Management Plan, since the NPS included other types of recreational considerations within the scope of the analysis carrying capacity limits should be analyzed for every area of the sea shore. Furthermore, analysis should be undertaken for the consideration of prohibiting pedestrian use in some ORV areas to minimize conflicts, particularly at ORV access ramps and other travel corridors known to be widely used for traversing from one desirable recreation spot to another.

D. FINAL SPECIAL REGULATION DEADLINE APRIL 22, 2011.

In April 2008 the Federal Defendants entered into a binding and court ratified consent degree to settle a law suit germane to this ORV rulemaking. In doing so, NPS voluntarily, and by implication, has assured the Plaintiff's and Intervenor-Defendants in the case, the court, and the public that an infinite amount of resources would be provided by NPS in meeting the Special Regulation deadline of April 22, 2011, without violating those certain National Environmental Policy Act (NEPA) regulations requiring the agency to rigorously explore and objectively evaluate all reasonable alternatives. Based upon comments made above by UFWDA it is our belief that NPS is in danger of failing to meet the standards of NEPA due to a lack of funding necessary to provide adequate resources to rigorously explore the alternatives. We have reached this conclusion based upon the lack of scientific integrity for the data upon which the DEIS purports to rely upon and a lack of meaningful assessment as evidenced by little to no rationale establishing a clear basis for choice among options by the decisionmaker.

V. CONCLUSION

We respectfully ask the NPS to prepare an FEIS which will respond to the many concerns raised in these comments and elsewhere by UFWDA and to adopt a modified Alternative F. Thank you for considering these comments. We look forward to participating in this process and in ongoing activities affecting management of recreation at the Cape Hatteras National Seashore.

Sincerely,

Carla Boucher

Carla Boucher, Attorney