

Reg-Neg was not a failure

By JASON RYLANDER

I'll answer your two questions simultaneously because I think they are related.

Why did Reg-Neg fail to produce a fourth action alternative for the NPS?

Should anything have been done differently?

I appreciate the opportunity to respond to your questions. At the outset, let me say that I do not view the Reg-Neg as a failure. As a result of the committee's work, the Park Service now has more than enough information to move forward to develop an off-road vehicle regulation that is consistent with the best available science and all applicable legal requirements. I also think the process provided an important opportunity for members of the public to air their concerns and learn more about the unique and sensitive resources of Cape Hatteras National Seashore. I sincerely hope that at the end of this process, the Park Service will develop a plan that we all can support. The community deserves nothing less.

In terms of your specific questions, I think the process might have been improved in a number of respects. Most notably, the negotiations were too open-ended. Cape Cod National Seashore's negotiated rulemaking was limited in scope, lasted just six days, and resulted in a consensus agreement. Our committee spent far too much time on issues that were not really before us or which were beyond the group's ability to debate effectively.

Specifically, expert presentations should have occurred earlier in the process so that the committee might have had a common understanding of species requirements and management options from the beginning. The Park Service and the U.S. Fish and Wildlife Service should have stated from the outset what they considered to be the best available information and explained how they intended to rely on that information. These were issues that were largely beyond the expertise of the committee and should not have been left to consensus. As a result, science was a casualty of this process rather than a catalyst for decision making. Experts who were brought to the committee were routinely, and unfairly, accused of bias because the content of their presentations did not fit the paradigms of the activists at the table.

Committee discussions repeatedly devolved into unproductive debates about what did and did not constitute good science. The fact is abundant peer-reviewed science exists on the importance of barrier beaches to shorebirds and sea turtles and the impacts of ORVs on such species. NPS and FWS might have avoided much wasted time had they attempted to explain in greater detail (and sooner) what research they considered to be relevant and how they intended to employ that information.

Similarly, although the Park Service offered general presentations on its many legal obligations, the agency waited too long to explain how those provisions apply to the seashore. It is one thing to recite that the Organic Act puts the highest priority on resource protection and that activities that "impair" park resources or species must be curtailed, but far more useful would have been an articulation of how that obligation binds our decision making.

Because of the agency's reluctance to weigh in on these issues, many participants argued well into the process, to give just one example, that the entire seashore could be designated as an open ORV route subject to temporary resource needs. Many months of heated debate went by before the superintendent and the Department of Interior solicitors made clear that this position was not consistent with the Organic Act or Executive Orders and that pursuant to those provisions, some areas needed to be closed to ORVs and set aside for resource protection and for pedestrian use.

In my opinion, because the Park Service failed to clearly communicate its expectations, many participants clung to negotiating positions that simply did not meet the seashore's minimum legal requirements. Trying to negotiate when not everyone agrees on the parameters is a bit like playing a game of football without agreeing on the location of the end zone. It was not until very late in the process that all sides offered proposals that could form the basis of serious negotiations, and by then the committee simply ran out of time.

I don't know if agreement could have been reached, but we made a great deal of progress in the last few months. We should all recognize that. The process was clearly not perfect, but I think everyone at the table tried their best to get to a consensus that was consistent with his or her values.

In the end, all parties worked very hard to forge an agreement and came up short. Although the committee did not agree on all aspects of a final rule, there were many apparent points of consensus, even on aspects of such controversial issues as resource protection, routes and areas, vehicle characteristics, and permits.

I believe the broad outlines of a workable, scientifically and legally viable ORV management plan are pretty clear as a result of these discussions. It is certainly my hope that the Park Service will recognize and include these points of agreement in the final regulation.

On a personal note, I greatly appreciated the opportunity to get to know all of the people who participated in this process, including many members of the public who came to address the committee. Reasonable regulations on beach driving should have been put in place 35 years ago. Altering expectations built up over generations is never easy, especially in these uncertain economic times. But I remain confident that, with the benefit of the committee's work, the Park Service will be able to finalize an ORV regulation that protects the natural beauty and species diversity of Cape Hatteras while providing all people meaningful opportunities to enjoy America's first national seashore.

(Jason Rylander is an attorney with Defenders of Wildlife and represented that organization on the negotiated rulemaking committee.)