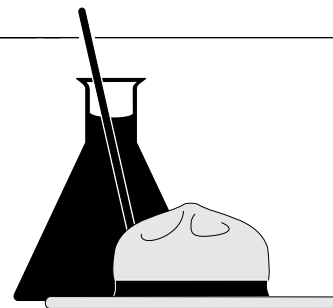




NEGOTIATED RULE MAKING AS A RESOURCE AND VISITOR MANAGEMENT TOOL

A case study in the use of FACA

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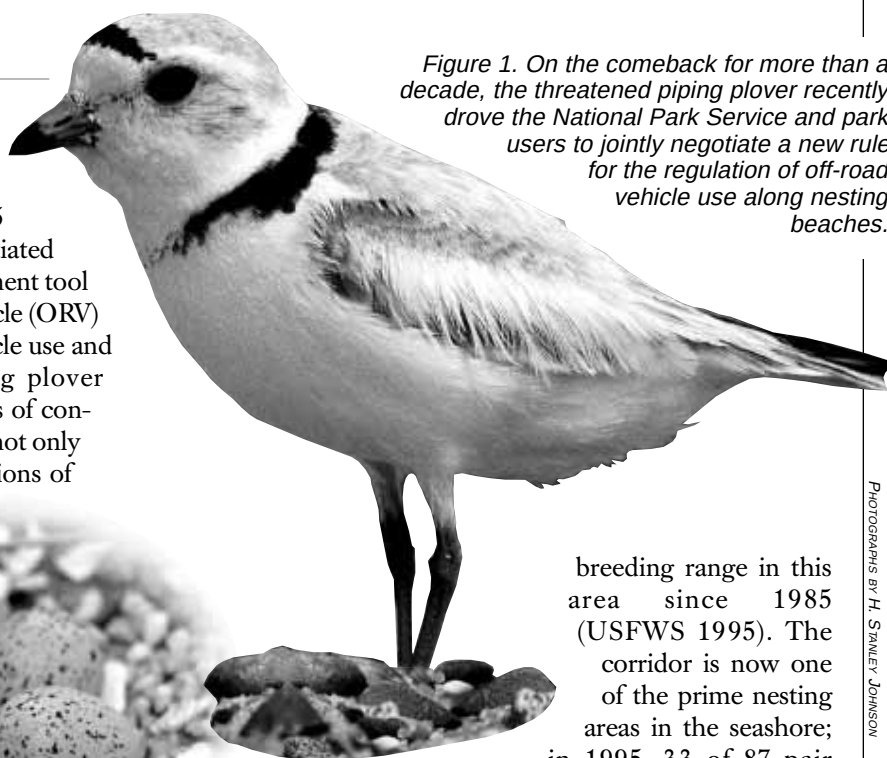
CAPE COD NATIONAL SEASHORE, Massachusetts, recently tried *negotiated rule making* (per FACA, the Federal Advisory Commission Act, P.L. 92-463, 5 U.S.C. App. II Sec. 9(c), and the Negotiated Rulemaking Act, 5 U.S.C. Sec 561-570) as a management tool to resolve an ongoing contentious issue—off-road vehicle (ORV) use on the national seashore beaches. Off-road vehicle use and management of the federally threatened piping plover (*Charadrius melodus* [fig. 1]) has led to over 15 years of controversy, litigation, and different proposed rules that not only attempted to allow ORV access, but also close sections of beach for the plover in compliance with the Endangered Species Act.

BACKGROUND

In 1981, the seashore proposed a new ORV regulation that slightly reduced ORV use. Unsatisfied with the regulation, environmental groups challenged this proposed rule in court. The result was a rewrite of the regulation to what is called the “1985 regulation” (36 CFR 7.67). Environmental groups also challenged this regulation in court, but it was upheld.

The National Park Service would have been content with the 1985 regulation, which established a 13.6-km (8.5-mi) ORV corridor on the 64 km (40 mi) of outer beach within the park (fig. 2, page 16), except that the piping plover has quadrupled its

Figure 1. On the comeback for more than a decade, the threatened piping plover recently drove the National Park Service and park users to jointly negotiate a new rule for the regulation of off-road vehicle use along nesting beaches.



breeding range in this area since 1985 (USFWS 1995). The

corridor is now one of the prime nesting areas in the seashore; in 1995, 33 of 87 pair

nested in the corridor (Hoopes 1996). Primarily because of plovers in the corridor, seashore staff monitor every bird, nest, and egg daily to assess if the corridor should be closed or reopened to ORVs. As soon as a nest is identified, symbolic fencing is erected with true enclosures put up once the four eggs are laid; the ORV corridor is closed from the time the birds hatch until they fledge approximately 28 days later. During the past couple of years, on especially busy weekends such as the Fourth of July, we have only been able to open 0.6-1.0 km (0.4-0.6 mi) of the corridor (Hoopes 1996).

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THE ISSUE

To generalize, ORV user groups feel strongly that they should be able to drive the entire outer beach when the plovers are not present as they did before the seashore was established in 1961 (fig. 2). Conversely, the environmental groups feel that all ORVs should be banned from the beaches altogether. Many groups feel the answer is somewhere in the middle. The National Park Service, using the existing limited science on ORV use and resource impacts, and previous legal actions, feels that controlled, regulated use of ORVs on limited sections of the outer beach is not inappropriate, but that the majority of the outer beach should be vehicle free and that ORVs are not appropriate in sensitive resource areas (inner dunes, wetlands, marsh).

The objective of negotiated rule making is to *front-load* controversy by getting everyone involved in the decision from the beginning, and acknowledging (if not resolving) all issues and concerns. The process brings all interested organizations into the process and charges them with developing a common solution. This process is used by many federal agencies, most notably the Environmental Protection Agency (EPA), but this was the first time the National Park Service used it to make a rule that will be published in the Code of Federal Regulations (CFR). With recent criticism that federal land management agencies are facing for making isolated decisions, for example, we see this process as an important and growing tool.

THE PROCESS

Negotiated rule making is authorized under the Federal Advisory Commission Act, which provides for formal meetings to be open to the public. Meeting notices are published in the *Federal Record*. A public comment period at the end of each day is required as part of the process and those not in attendance can submit letters to be included in the record.

We began by identifying 23 groups (the maximum allowed is 25, although 6-7 is more common) that had a long-term interest and involvement in this issue. The organizations included state agencies, the six towns that the seashore is located within, ORV user groups, environmental



Figure 2. The negotiated rulemaking sessions resulted in a new regulation that closed a significant portion of the plover nesting beaches to off-road vehicle use. Elsewhere, ORVs are still restricted to a nonsensitive corridor, marked with stakes.

groups, federal agencies, and tourism and preservation groups. Each organization selects one person to represent them at the table. These representatives are the only participants in the formal discussions, and all are equal, including the NPS representative.

To avoid unbalanced votes, we managed the negotiated rule making as a consensus process giving each representative a veto. This approach helps get people out of their entrenched positions, pushes them toward the edge of what they can agree to, and gets them thinking creatively. A "threat" can also be used to create a further incentive to participate. In our case, we made the initial statement that the NPS would be developing a new regulation for off-road vehicles if negotiation failed. Either the regulation would be developed by the group, or it would be developed by the National Park Service with the ideas, information, and creativity gathered from the group.

The advantage of this process for the National Park Service, regardless of whether the group reached consensus on a regulation or not, was that every issue, idea, and concern was heard by all sides. Furthermore, the National Park Service was no longer the enemy, but was a participant just like the others. If we were to reach consensus, we made a commitment to publish that regulation in compliance documents and the *Federal Register* as our preferred alternative.

The Federal Advisory Commission Act not only facilitates the process, but also in our case created some challenges in getting it underway. For example, our rulemaking sessions began only after the process had been cleared, some 2-3 years after the idea was first proposed. Another delay was that all organization representatives (as opposed to the organizations party to the process) had to be appointed by the Secretary of the Interior. After the first meeting, one organization removed its original appointee and selected a new one who they felt better represented their views. This created a scramble, for the Washington staff had to get the new appointee approved within a very small window of opportunity. If the National Park Service is going to use negotiated rule making regularly, it would be very beneficial if the process and paperwork associated with it could be streamlined.

Professional negotiators, contracted through an EPA *indefinite quantities* contract, ran both the formal sessions and the advance meetings with each organization. The \$64,000 budget limited the formal sessions to just three, 2-day meetings. These were spaced a month apart to allow the representatives time to make sure that they were committing to things that their organizations could support and, very importantly, to allow time for behind-the-scenes interactions and negotiations. This is where much of the real work happens.

PREPARATION VITAL

The most difficult NPS decisions and thinking had to be done before the process began. We used the time between meetings to refine philosophies, determine our boundaries on issues, and consider new suggestions. It is important that every angle and approach be explored, even undesirable ones, so that the NPS position, at least in public, is unified. The NPS representative must be sure of these boundaries during the sometimes heated and demanding exchange that takes place in the negotiation room. Thus, preparation is key to the process.

Normally, the process would start from ground zero. However, because of the limited number of meetings, the professional facilitator asked us to be prepared to share a *straw dog* or unofficial position to initiate discussion. To develop this, we first assembled a wide variety of park staff. We analyzed every aspect of the existing regulation and brainstormed possible rewrites. This included considering alternatives that would not have been in our plan, if we had been developing it independently. Finally, we threw out all the options we could not live with.

While developing the position document, we needed to keep it to ourselves until we could formally present it in the first session. We did not want the plan to get out, have an attack developed opposing this plan, then find ourselves in the very human position of defending a plan that we had developed specifically to provoke discussion, rather than to identify our idea of the best solution. This was easier said than done. The very need to keep the document private prevented the entire staff from participating in these first discussions. This was a problem and we should have done a better job of getting the staff to understand the process and how they would be involved.

We also needed to collect and organize relevant data, files, decisions, and past research on the issue in advance of the meetings. This information had to be synthesized, analyzed, and distilled so the staff was aware of the history of the issue. The scientific reports and data helped identify what separated the acceptable options from the unacceptable. The representative had to be able to explain to the

committee the important points and ideas contained in these documents so that everyone could understand them.

Despite our preparation, we found that data often got in the way of the negotiation process. It was easy to get into a battle of "my expert" versus "your expert." Mountains of data and reports can overwhelm the group and the process, because some participants do not have access to expert information or may not understand the science behind the information; also, the claims of who has the better information, the correctness of the scientists, or the interpretation of the works can come into question. This creates the danger of raising tempers, because there is no way of resolving these issues among laypeople, and moves the discussion away from the central negotiation points. Our approach was to quickly disseminate scientific information, but only when necessary.

Between the second and third sets of meetings we put forward our first draft proposal, which was developed by a much larger circle of staff. This process was very much a parkwide, and in some respects a servicewide, effort. While just one person spoke for the National Park Service at the table, an enormous support team was behind the proposal. The team participated in numerous discussions between meetings, developed draft rules, reported the institutional knowledge on issues, and served as the reality check on the feasibility of different scenarios. Washington staff moved along the mountains of paperwork and requirements associated with FACA and reviewed draft proposals; the regional solicitor's office reviewed draft proposals and legal issues. Phone calls, e-mail messages, and discussions with other NPS areas around the country looked at their ORV issues and concerns.

SUMMARY

The National Park Service has been accustomed to making decisions, plans, and policy after consulting staff or other federal agencies; however, we must improve our ability to communicate with state and local agencies, critics, and supporters, and learn to listen to their concerns and issues. We need to involve and be involved with our local communities and agencies, and we need to work together on issues of mutual concern rather

than always seek public comment in traditional forums that keep us separate and above our critics. Although it promotes listening to our critics and involving them in the decision making process, negotiated rule making does not suggest that we abdicate our responsibility to protect resources or ignore the NPS mission. It simply requires that we not let resource preservation become a way of eliminating input or ignoring solutions developed by others. It requires us to be up front about our boundaries and to clarify a range of acceptable solutions. We found it to be a useful tool.

EPILOGUE

On the sixth and final day of negotiations, the ORV user groups and the environmental groups had a private 6-hour caucus. In the end, all 23 groups agreed to a new ORV regulation that closes a significant portion of the current ORV corridor, which is a prime plover nesting area from April 1 through July 20. The regulation also opens both a section of outer beach not currently available for ORV use (for night fishing only) and another small section of beach for general ORV use. Some small (two to three car) undeveloped parking lots will be established behind the primary dune for parking to accommodate fishing access. The new regulation also formalizes and recognizes the role that ORV users, serving as volunteers, play in education and resource monitoring and preservation.

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