

Written Remarks of Bradley A. Farrell
Before the House Subcommittee on Fisheries, Conservation, Wildlife and Oceans
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My name is Brad Farrell. I reside at 7423 Salford Court, Alexandria, Virginia. I am a lawyer practicing in the District of Columbia. I represent *Fair Access to Island Refuges*, or "FAIR" and I am an Amateur Radio operator, licensed by the Federal Communications Commission for 26 years. Our concern in the closing of the Desecheo and Navassa national wildlife refuges by the U.S. Fish and Wildlife Service to Americans who propose to lawfully visit these island refuges under stringent regulations while the Fish and Wildlife Service turns a blind eye to illegal and harmful use of these refuges.

We thank the Fisheries Subcommittee for this opportunity to testify on the issue of public access to the nation's wildlife refuges.

1. Desecheo & Navassa Islands

Desecheo Island is a small uninhabited island of about 360 acres which lies approximately 14 miles west of Puerto Rico in the Caribbean Sea. R. 35 at 2. The Fish and Wildlife Service has been trying for years to remove goats and monkeys from the island. The monkeys were released on Desecheo many years ago by the National Institutes of Health for research purposes.

Navassa Island is located in the Caribbean Sea, approximately 40 miles west of Haiti. R. 35 at 2. Navassa was once the site of a guano mining operation, and later served as the platform for a lighthouse built and maintained by the United States government.

2. Why Desecheo and Navassa Are Important to Amateur Radio

Amateur Radio operators operated from Desecheo and Navassa for many years prior to the refuges being closed by the Fish and Wildlife Service. Amateur Radio operators seek to visit these islands to activate them for other Amateur Radio operators in the United States and throughout the world who seek to contact them and to obtain postcards that memorialize the contacts and tell something about the history and geography of each island. The operators who activate these island locations benefit because it allows them to practice operating from remote locations on non-commercial power and with small portable antennas, which is beneficial to this nation in times of emergency.

3. Fish and Wildlife Service Evidence

During an administrative appeal, I obtained from the Fish and Wildlife Service over a thousand pages of the agency's internal documents and reports which, in my opinion, demonstrate that the Fish and Wildlife Service has insufficient grounds for closing the Desecheo and Navassa refuges and that in closing the islands and barring Amateur Radio and other lawful

uses of these refuges, has violated the National Wildlife Refuge System Improvement Act of 1997 (“NWRSA”). These documents constitute most of the administrative record for my appeal (the “Appeal Record”) and I have referenced a number of them in my written remarks submitted to the Fisheries Subcommittee (identified herein by the abbreviation “R.”).

The NWRSA, set forth in the United States Code beginning at Section 668dd, requires that the Fish and Wildlife Service determine whether a particular use of refuge be the product of sound professional judgment and that the Fish and Wildlife Service may bar use of a refuge if it materially interferes with the agency’s mission in the refuge or on the basis of safety factors. The legislative history and an analysis of the statute, analysis of Fish and Wildlife Service internal documents, and how the Fish and Wildlife Service is violating the Act receives extensive treatment in my initial administrative appeal brief, which I have submitted to the Fisheries Subcommittee for the record in this proceeding.

The Fish and Wildlife Service has allowed Amateur Radio use of its island refuges in the Pacific Ocean. In fact, the agency’s Pacific department has embraced Amateur Radio visits to the refuges under its jurisdictions, despite the fact that many of the same issues affecting the Caribbean islands also affect wildlife refuges in the Pacific. Unfortunately, the Fish and Wildlife Service has begun making it considerably more difficult and expensive for the public to visit the island refuges in the Pacific. Bob Allphin will discuss his experiences in visiting Pacific refuges for Amateur Radio operations during his remarks.

In the Caribbean, however, the Fish and Wildlife Service has closed Desecheo and Navassa refuges on the basis of purported safety issues, i.e. unexploded ordnance, illegal aliens and drug smugglers on Desecheo and on the basis of Navassa’s sensitive ecology. However, the agency’s own records and other evidence do not, in our view, support the agency’s decision-making. Fish and Wildlife Service records are devoid of any evidence that Amateur Radio operators were ever threatened or harmed by illegal aliens, drug smugglers or ordnance. In fact, the Refuge Manager has admitted that the agency is aware of no one who has been harmed in the Refuges by the purported threats. R. 35 at 7, R. 44 at 2. The fact that no one has been harmed on these islands is further supported by the verifications of two Amateur Radio operators that are included in the Appeal Record. R. 183, R. 182.

The evidence demonstrates that the Fish and Wildlife’s position is the progeny of unsubstantiated and speculative assertions not grounded in evidence, upon which layer by layer, year after year, the same misapplication of the statute was perpetuated by service personnel who exceeded their authority under the NWRSA by actively discouraging, through deceptions and misrepresentations, lawful use of the Refuges. The unlawful position ultimately endorsed by the agency director mischaracterized and misconstrued the NWRSA, and was incorrectly represented to be the law to applicants for permits for Amateur Radio use of the Refuges and to members of Congress who inquired about Amateur Radio use of Desecheo and Navassa. The result is that the Fish and Wildlife Service has barred lawful, reasonable use of the Refuges pursuant to agency regulations while simultaneously allowing trespassers to enter the Refuges,

unchecked and without repercussions despite the agency's knowledge that trespassers are harming the Refuges.

The Fish and Wildlife Service evidence provides merely speculative support for the Fish and Wildlife Service's conclusion that there is risk of harm on Desecheo Island to Amateur Radio operators by illegal aliens, drug smugglers or ordnance, if any. Indeed, the Fish and Wildlife Service's own records clearly demonstrate that (1) the agency's assertions concerning alleged safety issues in the Desecheo Refuge are speculative or baseless and fall short of the evidentiary standards established by the federal courts (*See e.g. Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001)), and (2) the agency's assertions concerning the purported sensitive ecology in the Navassa Refuge are fabrications, belied, in part, by the Refuge Office's own internal reports, and its discussion of adopting a formal permit program that would formally recognize the presence on Navassa Island of alien transients who are likely responsible for setting fires and harming wildlife on the island.

Neither compatibility determination for Desecheo or Navassa nor any Fish and Wildlife Service records so much as suggest that that Amateur Radio use of these refuges would disturb or harm wildlife.

4. The Desecheo Refuge

a. Compatibility

The Desecheo Compatibility Determination states that the Refuge Office anticipates "No significant biological impacts" and that only "Minor disturbance (e.g., trampling of vegetation) would occur due to the transport of equipment across refuge property and use of the campsite." R. 1. The Compatibility Determination does not conclude that Amateur Radio is incompatible with the Desecheo Refuge, and, in fact, supports the Fish and Wildlife Service's prior view that Amateur Radio is a compatible use of the Desecheo Refuge. Instead, the Compatibility Determination identifies three safety factors as a basis for closing Desecheo.

b. Purported Safety Factors

- "unexploded ordnance" from Desecheo's bombing range days ;
- Desecheo served "as a drop-off point for illegal aliens"; and
- drug trafficking "is common in the area."

R. 1.

i. Unexploded Ordnance

Desecheo's bombing range days ended in the early 1950s. Ordnance on Desecheo, if any exists, does not present a threat to visitors who abide by the conditions of use the Fish and Wildlife Service imposed upon visitors for many years. The Fish and Wildlife Service required Amateur Radio operators to stay within an area the agency concluded was free of ordnance, primarily near the helipad, which is a large concrete slab. This is demonstrated by the many special use permits issued by the agency prior to 1993 which included maps of Desecheo, clearly outlining a perimeter to which Amateur Radio operators were to confine their activities.

The agency's own records demonstrate that the Fish and Wildlife Service has never considered ordnance on Desecheo Island other than a marginal risk. Fish and Wildlife Service personnel have been visiting Desecheo Island for at least 30 years and have hiked the island extensively. R. 151, 158-160, 162-167, 170-171, 174-175. Nevertheless, the U.S. Army Corps of Engineers inspected Desecheo Island for ordnance in March 2002. R. 140, R. 170. During the inspection, Corps personnel examined old bombs and fragments on Desecheo Island, concluded that most of the objects they found were "innocuous scrap", and assessed the risk of harm from the six rusting and damaged bombs found as "low" or "marginal." R. 140 at 6-1-6-3, 7-1, R. 140 App. D-1 at 11. This information is contained in a report issued by the Corps in 2002 about its inspection and extensive review of historical data concerning Desecheo Island. The report was issued in June 2002. R. 140.

Ordnance identified on the island was destroyed by a United States Navy demolitions team as verified by a report dated December 19, 2002 verifies. R. 200. Thus, the "innocuous scrap" identified by the Army Corps of Engineers was, apparently out of an abundance of caution, destroyed. According to the report, three bombs were detonated. The demolitions team reported that it was unable to detonate three shells the Fish and Wildlife Service had identified in hilly terrain which is not near the area Amateur Radio operators have operated from in the past.

b. Illegal Aliens & Drug Traffickers on Desecheo Island

The Fish and Wildlife Service has taken into account reported activity up to fifteen miles outside the Desecheo Refuge. The Fish and Wildlife Service has produced no evidence that any illegal aliens have ever threatened or harmed anyone on Desecheo. A letter authored by the Desecheo refuge manager on September 25, 2003 letter is telling: "The Service does not have direct evidence that such intercepts have or would put visitors at risk[.]" R. 35 at 3 ¶ 7.

Furthermore, there is no evidence to support the Fish and Wildlife Service's assertion "that almost all migrant and drug smuggling ventures" use Desecheo Island "as a referential landmark, a rest area, a temporary hideout pending cover of darkness or for emergencies". Fish and Wildlife Service records include no evidence to show that illegal aliens or illegal drug traffickers pose any more of a threat on Desecheo Island than do illegal aliens or

drug traffickers anywhere else in the United States. The only evidence of drug trafficking on Desecheo Island produced by the Fish and Wildlife Service was of a stash of marijuana found in the old cable house in 1990 – and that was fifteen years ago. R. 147.

c. Landing on Desecheo Island Can be Done Safely

The Fish and Wildlife Service asserts that there is “no landing site but rather a small boat has to be brought to the shore at Desecheo[.]” R. 40 at 2. Desecheo has a cove and beach area adjacent to the proposed operating site on the Helipad that is ideal for landing on the island and has been used in the past by Amateur Radio operators authorized to land on the island. R. 196 at 12 (original document page 14). There is no evidence in the Fish and Wildlife Service records to show that Fish and Wildlife Service personnel or other government personnel who enter the Desecheo Refuge frequently to hunt goats or trap monkeys have been injured landing on or departing from the island. There is no evidence that anyone who has ever visited Desecheo has been injured landing on or departing from the island by sea or otherwise.

An unsolicited e-mail message in which a Michigan man who was denied a special use permit for Amateur Radio, details his telephone conversation with the Desecheo refuge manager who informed him that she has visited Desecheo Island with her family. If this is true, it supports the other evidence which demonstrates that Desecheo is safe for access by other than non-government employees. A copy of the e-mail message is submitted to the Fisheries Subcommittee for the record.

5. The Navassa Refuge

The Navassa refuge is being used by fishermen from Haiti as a campground and the fishermen have harmed the refuge and its wildlife. The Fish and Wildlife Service has been aware of this since at least 2000 and has chosen to do nothing about it, all the while barring from the refuge Americans who seek to visit the island for lawful reasons consistent with the NWRSIA.

a. Compatibility

The Navassa Compatibility Determination does not address Amateur Radio use of the refuge. It concludes that “it is unclear at present what negative impacts might result” from various “recreational activities.” R. 2 at 2. The Compatibility Determination addresses proposed “wildlife-dependent recreation”, R. 2, stating, in part: “Use of the island for recreational purposes could substantially impact a number of terrestrial species, most notably nesting birds such as the Red-footed Booby” and “Traditional uses of the area (e.g., subsistence fishing) should not have a significant impact on trust resources if the level of activity remains constant.” R. 2.

The Fish and Wildlife Service typically tells applicants seeking Amateur Radio

use permits for Navassa that the island's ecology is in such a sensitive state that visitors are not allowed on the island. However, a May 2000 Fish and Wildlife Service internal report prepared by the Refuge Office states that the marine habitat surrounding Navassa Island is in "excellent condition", and is "very healthy". R. 161 at 1, 3. Scientists who have surveyed Navassa support the Fish and Wildlife Service's conclusions, stating that Navassa is a "pristine and entirely unexploited marine habitat" and is a habitat "that may remain in a relatively unexploited state." R. 25 at 46 (original document page numbers). No evidence supports the agency's assertion that the "flora and fauna" of Navassa are in a sensitive state. Furthermore, information obtained from the U.S. Geological Survey internet site shows considerable photographic evidenced that USGS personnel roamed extensively over Navassa Island on foot. R. 23 at 3. Presumably, there was no impact from their exploration on the ecology or flora and fauna of Navassa Island nor any material interference with the Fish and Wildlife Service's purpose and mission in the Refuge. It stands to reason that Amateur Radio operators confined to a tiny perimeter on the edge of the Navassa Refuge for a brief period would have even less impact on the Refuge's ecology.

b. Navassa is a Campground for Haitian Fishermen

The Fish and Wildlife Service's records reveal that Navassa is a camp-ground for Haitian fishermen who fish the surrounding waters and that the agency is content to do nothing about the harm caused by these trespassers – even considering encouraging the fishermen to visit the island through a permit program. The agency's report for field work in the Navassa refuge for the year 2000 states that fires had been started on the island, that fishermen reported seeing other Haitians harm wildlife, and that Fish and Wildlife Service personnel, learning about the harm the fishermen caused the refuge, didn't bother to tell the Haitians to leave the island. When Fish and Wildlife Service personnel returned to their office in Puerto Rico and prepared their report, they recommended that permits be issued for Haitians to go to Navassa. R. 161 at 5.

The Navassa Compatibility Determination concludes that "Traditional uses of the area (e.g., subsistence fishing) should not have a significant impact" on Navassa. R. 161 at 4. The evidence shows that traditional uses are camping by subsistence fishermen who roam Navassa Island at will, start fires and harm wildlife. The Fish and Wildlife Service has made no attempt to prevent fishermen from entering or camping on Navassa Island. If such traditional use of the Refuge should not have a significant impact on the refuge as the Fish and Wildlife Service has concluded, then it stands to reason that Amateur Radio activity, a temporary, passive presence confined to the very edge of the Refuge, will not have a significant impact, if any, on Navassa Island. United States citizens whose taxes pay to support the national wildlife refuge system, who propose to use the Navassa Refuge for compatible, lawful activity under agency supervision, are denied use of the Navassa Refuge in favor of illegal aliens the Fish and Wildlife Service encourages to continue unauthorized and uncontrolled habitation of the island and its waters.

c. Landing on Navassa Island Can be Done Safely

The Fish and Wildlife Service asserts that there is “no landing site” but rather “cliffs have to be climbed from a small boat at Navassa.” R. 40 at 2. Helicopter landings on Navassa have been used by government personnel in the past and are the easiest and safest way of getting on and off the island. A ladder has been safely used to access Navassa by Fish and Wildlife Service personnel and Amateur Radio operators, R. 182, without known mishap. The Fish and Wildlife Service admits that landing on Navassa Island is difficult but not impossible. R. 161 at 1. Surely landing on Navassa Island cannot be as difficult as the Fish and Wildlife Service suggests, if agency personnel Joseph Schwagerl, Beverly Yoshioka, and Glen Callingford spent nights on a research vessel offshore during field work, R. 30 at 2, only to have to climb on and then off the island six times during three day-trips to the island, using a ladder. *Id.* When the field team returned to base that year, the only recommendation regarding improved access to Navassa was to suggest installing a better ladder. R. 30.

6. Distance & Law Enforcement

Neither Desecheo nor Navassa are remote because both Refuges are easily accessible by existing licensed aviation and marine charter transport services. R. 161 at 1, R. 197. As the Fish and Wildlife Service has previously demonstrated in issuing special use permits for Amateur Radio use of Baker Island in the Pacific, the remoteness of a refuge was not a factor. No law enforcement personnel were dispatched to accompany the visitors into the Baker refuge, which is some sixteen hundred miles from Hawaii. Desecheo is 14 miles from Puerto Rico; Navassa is 40 miles from Haiti.

Congress has not mandated that the Fish and Wildlife Service “maintain a law enforcement presence” in the Refuge, nor does the Fish and Wildlife Service have any legal basis for asserting that it is required to do so, or make the presence of law enforcement personnel in the Refuge a condition precedent to authorizing visitors to the island. The Fish and Wildlife Service did not require a law enforcement presence in the Baker Island Refuge as a prerequisite to issuing a special use permit for the Baker Island Operation. R. 190.

Remarkably, the Fish and Wildlife Service has stated that it is willing to place its personnel at risk on Desecheo and Navassa but not non-government visitors. We know of no law or regulation that would allow the Fish and Wildlife Service to subject its civilian employees to such risks and it is unreasonable to believe that any government agency other than military or law enforcement departments of the government would do so.

7. Costs

The Fish and Wildlife Service has indicated that it does not have sufficient funding to allow access to the Desecheo and Navassa refuges. In my application for special use permits for Amateur Radio on Desecheo and Navassa, and in subsequent conversations with the agency, I offered to pay for the cost of sending up to two Fish and Wildlife Service field

personnel to the refuges to supervise us, and to pay for transportation to and from the island. The Fish and Wildlife Service required a similar obligation by Amateur Radio operators for the Baker Island visit in 2002. Proposals of this kind, if granted by the agency, would entail no additional costs above and beyond the administrative costs of reviewing the applications. I have proposed a means by which the Fish and Wildlife Service could reduce the administrative time and costs necessary to reviewing application in my initial appeal brief (pages 77-79).

8. Conclusion

Amateur Radio is a compatible use of the Desecheo and Navassa refuges. Only speculative evidence, at best, suggests the presence of safety factors, and the Fish and Wildlife Service's prior issuance of permits for Amateur Radio for Desecheo and permits for Navassa issued by other agencies demonstrate that safety is not an issue. Furthermore, the closure of Desecheo and Navassa have barred lawful, compatible uses of these refuges consistent with the NWRSA, leaving the islands to be harmed by trespassers.

The NWRSA and its legislative history require the Fish and Wildlife Service to balance protection of wildlife and responsible public access. The relevant facts support reasonable, responsible public use of the Desecheo and Navassa national wildlife refuges, not just for Amateur Radio, but for all Americans who desire to go there to enjoy and appreciate these island refuges. If the agency is concerned about opening the floodgates of public use, then it can, under existing regulations, or through additional rule-making, adopt guidelines for applications for special use permits that will allow an appropriate degree of access to the refuges, as envisioned by the NWRSA.

H.R. 1183, introduced by Congressman Nick Rahall, the ranking member of the House Resources Committee, addresses these issues and would allow limited public access of these island habitats.