January 25, 2007

National Park Service
Benefits Sharing DEIS Team
P.O. Box 168
Yellowstone National Park, WY 82190

Dear National Park Service (NPS) Benefits-Sharing Team:

Public Employees for Environmental Responsibility (PEER) offers the following comments on the Benefits-Sharing Draft Environmental Impact Statement (DEIS):

A. Points of Agreement

1. The NPS May Enter Into Benefit-Sharing Agreements.

PEER agrees that the National Parks Omnibus Management Act of 1988 (NPOMA) authorizes the Secretary to "…enter into negotiations with the research community and private industry for equitable, efficient benefits-sharing agreements," resulting from scientific study in the national park system. 16 U.S.C. 5395 (112 STAT. 3500).

2. This DEIS Cannot Cover All Prospective Benefits-Sharing Agreements.

The DEIS acknowledges that the National Park Service (NPS) cannot adopt a single EIS that covers all future benefits-sharing agreements. Each proposed specimen collection, or other intrusive research, whether subject to a benefits-sharing agreement, requires NEPA review. It is impossible for a programmatic NEPA document to anticipate, much less assess, the impacts of benefits-sharing agreements throughout the national park system.

B. The DEIS Ignores Relevant Laws.

The DEIS misapplies the Federal Technology Transfer Act (FTTA) and disregards the Wilderness Act. We examine each law separately.

1. Federal Technology Transfer Act of 1986

The DEIS states that each national park is a "laboratory" in the meaning of the FTTA. Thus, the DEIS reasons, benefits-sharing agreements should take the form of a Cooperative Research and Development Agreement (CRADA), as authorized by the FTTA. PEER does not dispute that the NPS may enter into benefits-sharing agreements (BSAs) under NPOMA. PEER asserts that CRADAs are now an improper instrument for several reasons.

The DEIS quotes the FTTA's definition of a laboratory as "a facility…owned by a Federal agency, a substantial purpose of which is the performance of research, development, or engineering by employees of the Federal Government." 15 U.S.C. 3710a(d)(2). While one could stretch the research aspects of the NPS to transform each park into a "laboratory," there is no evidence that the 1986 Act, or its amendments, meant to include each national park system area as a "national laboratory." Nothing in that Act's language or its legislative history refers to a national park system or its areas as "laboratories."

A review of the legislative history reveals that Congress enacted FTTA for the named "national laboratories." Among these are "facilities" operated by the Department of Energy (e.g. Los Alamos National Laboratory, Sandia National Laboratory, Lawrence-Livermore National Laboratory etc.), the Environmental Protection Agency research laboratories, the National Institutes of Health and the Agricultural Research Service in the Department of Agriculture.

If the 1986 FTTA covered the NPS and each park is a "laboratory" in the meaning of the law, then the enactment of benefits-sharing language of NPOMA in 1998 would be unnecessary. Each national "laboratory" park could have entered into CRADAs without the enactment of the NPOMA section that authorizes "benefits-sharing agreements." The DEIS, by relying on the FTTA and CRADAs, implicitly posits that Congress acted superfluously when it enacted NPOMA section 205(d). NPOMA itself makes no reference to CRADAs and the FTTA.

Neither the NPS Director nor the Secretary of the Interior was aware, in the period contemporaneous with the FTTA, that the FTTA governs the national park system as laboratories. If the FTTA governs the national park system as laboratories, the NPS has been in substantial noncompliance with several provisions of that law. In brief the FTTA did the following:

- Made technology transfer a responsibility of all federal laboratory scientists and engineers.
- Mandated that technology transfer responsibility be considered in employee performance evaluations.
- Established principle of royalty sharing for federal inventors (15% minimum) and set up a reward system for other innovators.
- Legislated a charter for Federal Laboratory Consortium for Technology Transfer and provided a funding mechanism for that organization to carry out its work.
- Allowed current and former federal employees to participate in commercial development of the research fostered by the CRADA, to the extent there is no conflict of interest.

The National Park Service, governed by the FTTA since 1986 (if we were to trust the DEIS), has yet to implement a single one of the above actions:

- Where is the "technology transfer responsibility" found in the performance evaluations of employees? The answer, in short, is "NOWHERE."
- Does the NPS Director sit as a member of the Federal Laboratory Consortium for Technology Transfer? NO.
- Has the NPS set up a mechanism to allow current and former federal NPS employees to participate in commercial development of the research fostered by the CRADA? NO

In short, the NPS disregards the CRADA provisions of the FTTA, expect for that portion that may provide a revenue stream or monetary benefits to the negotiating park ("laboratory").

The FTTA language on CRADAs also requires that "an agency shall make separate determinations of the mission or missions of each of its laboratories." 15 U.S.C. 3710a(e). Where is the NPS determination of the mission or missions of the Yellowstone National Park Laboratory, or the Sequoia National Park Laboratory? NOWHERE. The NPS has never made the required FTTA determinations of the mission or missions of each of its nearly 400 separate "laboratories."

The FTTA-CRADA "shoe" does not fit. As the DEIS states, the concept that parks may employ CRADAs arose in Yellowstone in 1998. We suspect it was developed in a burst of creative zeal as the Lab Director (superintendent) of Yellowstone National Laboratory sought a way to reap monetary and other benefits from DIVERSA Corporation's research on thermophiles in hot springs. Yes, a federal Court ruled early in 1999 that parks could enter into CRADAs under the FTTA. But, that stretch of the FTTA occurred without any reference by plaintiffs, defendants or the court to enactment of NPOMA in December 1998. NPOMA now governs "benefits-sharing agreements," (BSAs) not the FTTA. The NPS must leave behind the inappropriate CRADA tool found in the FTTA and use the more relevant, current and park specific law – NPOMA.

2. The Wilderness Act

Over 40 million acres of the national park system are designated wilderness. The Wilderness Act states that in wilderness, "there shall be no commercial enterprise," except for "commercial services" necessary for realizing the recreational or other wilderness purposes of the Act. The exception covers guide services for hikers, horsemen, fishermen and, in non-NPS wilderness, hunters. Commercial bio-prospecting for commercially viable products by a business enterprise, as authorized in the NPS-DIVERSA CRADA, does not qualify for the "commercial services" exemption.

The Wilderness Act prohibition on commercial enterprises precludes commercially motivated bio-prospecting by commercial enterprises. Yet the DEIS makes not a single mention of the Act. The DEIS doesn't care to discuss, let alone apply, the Wilderness Act prohibition.

Let us accept, for arguments' sake, that FTTA and CRADAs were the applicable law, then the FTTA "does not limit or diminish existing authorities of any agency." 15 U.S.C. 3710a(f). Thus, the Wilderness Act mandate imposed upon the NPS is neither limited nor diminished by the FTTA. FTTA does not repeal or overrule the Wilderness Act prohibition on "commercial enterprise."

Should the NPS alternatively decide that NPOMA is the authority for BSAs, rather than the FTTA, NPOMA provides no explicit exception to the commercial enterprise prohibition of the Wilderness Act. As a general rule of statutory interpretation, any notion that NPOMA (or the FTTA) implicitly repeals the commercial enterprise prohibition of the Wilderness Act is highly disfavored.

C. Alternative C Protects the Parks.

PEER endorses Alternative C. Alternative C allows the NPS to enter into benefits-sharing agreements. Alternative C differs from Alternative B in that it disallows agreements with entities whose research is commercial in nature, motive and purpose. There is a significant distinction between independent scientific research that fits under the NPS research mandate to conserve the parks and that could yield a commercial application down the road, and research that is strictly commercial in nature. An example of the former is the development of the multimillion-dollar polymerase chain reaction process. Alternative C recognizes that distinction. Under Alternative C, the NPS would not sign a benefits-sharing agreement that is a purely commercial undertaking.

No one in or outside of the NPS can logically dispute that bio-prospecting, like other forms of prospecting, while a relatively new method of resource exploitation, is exploitation nonetheless. There is a commonsense distinction between commercial exploitation and purely scientific investigation. Commerce is qualitatively different from educational or scientific activity of a similar nature due the very different forces that drive it.

D. Alternatives B Fail to Protect Parks.

The DEIS fails to erect a system for managing BSAs to ensure that agreements serve the protection of national park system resources. For example, Exxon-Mobil researchers could approach a park manager seeking a BSA to conduct seismic surveys in a park to determine oil deposits in and around the park. Alternative C would bar a BSA with Exxon under the described circumstances. But, without a doubt, this type of BSA could occur under Alternatives B. If we are wrong, then the Final DEIS must state so and explain why. Otherwise the DEIS is a vague and unformed document whose results have neither been sufficiently plumbed nor assessed.

The seismic research example given above could occur under both of the B Alternatives because neither B alternatives bar any commercially motivated research. Seismic research is only one of many conceivable scenarios where research by commercial interests could impinge on park values and public enjoyment of those values.

Perhaps the NPS is willing to subject the parks to commercial exploitation in the name of research just to get a few of the monetary crumbs that fall from the table. We oppose that as a legitimate rationale for commercialization of the parks. But, at a minimum, if the NPS adopts either of the B Alternatives, the NPS must make clear that any BSA with a commercial enterprise, for research whose purpose is commercial, may not take place in designated wilderness.

E. Alternative B2 Can Lead to Implications of Corruption.

If the NPS adopts any B Alternative, we urge that the NPS adopt Alternative B1. Under that alternative, there must be full public disclosure of the benefits, monetary or non-monetary, that are exchanged between the parties to the BSA. Keeping such information secret is a despicable betrayal of the public trust.

For the park employees' sake, keeping such information secret will lead to inevitable suspicion of corruption. The long history and time honored reputation of the NPS must not be subjected to any such suspicion. NPS signatories to BSAs may trade away the public interest for their own enrichment, either in their current positions, or after retirement, through the "revolving door." When powerful commercial interests are at stake, such practices have occurred on a large scale in other agencies. Don't fool yourself, NPS employees are not all Boy or Girl Scouts. There is no legitimate justification for keeping secret the benefits, monetary or non-monetary, that are exchanged between the parties to the BSA.

F. Benefits Must Go to NPS Headquarters.

A means to ensure that park managers meet the highest professional standards in negotiating and approving BSAs is to direct all monetary benefits to a central account in the NPS Headquarters in Washington, D.C. Perhaps that account should be under the management of the Chief Scientist, and/or the NPS Leadership Council. The central account should be devoted solely to the research needs of the national park system. In this way, the Service's most pressing research needs are supported first.

Deposit of monies from BSAs in the generating park has some distasteful attributes. Keeping monetary benefits in one park contributes to a "soft" corruption of doing sweetheart BSAs because the monetary benefit accrues to "my account." If the account is not the beneficiary, the manager will be more circumspect ("honest" may be a better word) about whether a given research proposal will impair park resources. For example, one of the methodologies used by bio-prospectors involves "*in situ* enrichment selection." By "*in situ* enrichment selection" PEER means enrichment of hot springs with any substance, or altering the pH of any body of water, for the purpose of finding an organism that thrives and/or outcompetes other organisms in the artificially induced state. Such experiments aim to locate organisms or enzymes whose genetic composition makes them best suited for specific industrial practices. This is a fundamental impairment of the body of water. Yet, if the approving official counts the monetary benefits that could accrue

directly to his/her account, will their judgement not be affected? Saying "NO" becomes that much more difficult.

Scientific study is a two-edged sword. Research, including research that involves the collecting of biotic resources, is important to further the conservation mandate that Congress imposed on the NPS. However research also raises more than a theoretical potential for harm to park resources for purposes that are unrelated to the NPS mission. Another recent example involved proposals to research drill in the wilderness of Katmai National Park in Alaska. All scientific research is not allowable within parks. Research, especially research that disturbs or removes biological fabric or involves activities prohibited by the Wilderness Act (16 U.S.C 1131(b)), must surmount a high hurdle before the NPS may permit it. Some research cannot meet the legally applicable tests.

The national park system is one system. It is not an amalgam of affiliated areas, each one open for business. Sending monetary benefits to a central account reinforces the unity and common purpose of the national park system. Nothing in NPOMA mandates that the benefits from BSAs be deposited in the individual park.

G. NPS Must Establish Principles of Federal Employee Participation.

PEER suspects that at the end of this DEIS comment period, the NPS ignores our remarks and continue to insist that its conduct is authorized by the FTAA. If so, then NPS conduct is also governed by the FTAA. The FTAA mandates two things as discussed earlier in these comments. The FTAA:

- Established principle of royalty sharing for federal inventors (15% minimum) and set up a reward system for other innovators.
- Allowed current and former federal employees to participate in commercial development of the research fostered by the CRADA, to the extent there is no conflict of interest.

Ethics issues relating to the FTTA are complex and numerous. Agencies that are actually governed by the FTTA (not, like the NPS, which imagines that it is) have developed such ethics standards. The NPS has not even thought about it. That is but one indication that the NPS never actually believed the FTTA applied to it until the DIVERSA Agreement led it to grasp this flimsy rationale.

Before entering into a single benefits-sharing agreement, including the DIVERSA-Yellowstone CRADA, the NPS must adopt standards to implement these parts of the FTTA that guard against conflicts of interest or corruption. The ethics standards must be reviewed by the Department of Justice and be placed before the public.

H. Alternative B Is Unworkable.

Researchers who develop commercial applications derived from NPS research permits have no incentive to seek out or enter into CRADA agreements with NPS. The

cumbersome 30-page model CRADA with profit-sharing as well as detailed reporting requirements is something an entrepreneur would seek to avoid at all costs. Why would an industry seek out a government agency as a non-contributing profit-sharing partner?

Under Alternative B, the issuance of research permits would be unchanged. Researchers are not required to enter into any contracts to implement a CRADA. Rather, the obligation to enter into a CRADA only arises when or if useful discoveries are developed. That event may well take place long after the research permit has expired.

The DEIS spells out no means by which NPS tracks or learns that a useful discovery with potential commercial application has occurred. Thus, it is unlikely NPS will be able to enter into a CRADA before the discovery is commercially exploited.

In the event that NPS was able to discover the discovery, it lacks any legal means to force the commercial researcher to negotiate a CRADA with it. This legal impotence will be particularly pronounced if the researcher has entered into contracts with third-parties who have no contractual connection with NPS.

As a consequence, it is unlikely that NPS will ever realize a monetary revenue stream from the CRADA alternative it proposes.

If you have any questions about our comments, please feel free to call me at (202) 265-PEER.

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