

March 9, 2011

To: National Park Service  
Comment Docket at NPS Planning

From: Jeff Ruch  
Executive Director  
Public Employees For Environmental Responsibility (PEER)  
Washington, D.C.

Subject: Draft Directors Order 41 – Wilderness Stewardship

### General Comments

Thank you for the opportunity to comment on a draft revision to Director's Order (DO) Number 41 – Wilderness Stewardship.

By way of overview, the draft purports to simplify and clarify NPS internal guidance and provide “consistency and continuity” to National Park Service (NPS) wilderness management. Yet, in some cases described below, the draft weakens protections afforded by current NPS guidance (e.g. road corridors), and in others, goes beyond what may be legally permissible (e.g. fixed rock climbing anchors).

The Wilderness Act remains unchanged since the NPS adopted the current Reference Manual 41 (RM-41) in July 1999. The NPS has adopted two versions of Management Policies, in 2001 and 2006, that may have incorporated parts of RM-41, and therefore lessen the need for parts of that document. However, PEER assumes that RM-41 remains in effect and will so remain. We also assumes the draft DO will supersede and replace conflicting guidance in RM-41. For sake of clarity, NPS should not force its managers and the public to sift through a succession of policy documents to identify the latest nuances which now control.

In short, this draft requires more thoughtful review before adoption. We are hopeful that the NPS' solicitation of public comment will result in such a review. There is no exigency that demands rapid action. PEER urges NPS to be deliberate rather than precipitous.

Our major concerns are in bold italics.

### Specific Issues

#### A) 5.2 - Wilderness Studies and Proposed Wilderness

The second paragraph of this section seem to repeat, albeit in different words and order, the Management Policies section 6.3.1 regarding lands found eligible for wilderness. As such it adds confusion not clarity.

#### B) 5.3 – Recommended Wilderness

There is a conflict between Management Policies section 6.2.3 - Recommended Wilderness and the draft DO 5.3. “Recommended wilderness” is that area of a park that has been recommended by the Secretary to the President and transmitted to Congress. The draft DO states that the “The NPS Wilderness Stewardship Division and appropriate park superintendent will track the status of the recommendation as it progresses through the offices of the Assistant Secretary and Secretary.” Actually the draft DO seems to be speaking of “proposed wilderness.” “Recommended wilderness,” as defined in Management Policies, is that which has been recommended to Congress. At that point, the recommendation has left the Secretary’s Office. Of course, the NPS may wish to track the status of its recommended wilderness in Congress as well. However the draft DO appears to be confusing the two terms.

C) 5.4 - Designated Wilderness

This paragraph of the DO repeats Management Policies 6.2.4. As such it is largely superfluous.

***D) 5.6 Wilderness Boundaries***

Management Policies are silent on wilderness boundaries. The draft DO adopts a standard that would overrule the current standard found in RM-41, Appendix G (page 71) on road corridor widths. The current NPS standard prescribes, in the absence of specific congressional guidance for a wilderness, a corridor width of 30 feet from centerline of a dirt road, and 100 feet from centerline of a paved road. The draft DO drops the 30 foot guidance and applies the 100’ guidance to all roads – dirt or paved. This is a substantive change and one that weakens the current standard. PEER disagrees with this change.

If the NPS adopts the weaker standard, we urge that first, the DO make clear that parks which have composed written legal descriptions of their wilderness that incorporated the 1999 standard and submitted that to Congress remain unaffected by this change. The already submitted legal descriptions have the full force and effect of law.

Second, allowing for exceptions to the new 100 foot standard at the park level must be made in a public review process. When and if a park decides to alter (almost certainly by enlarging) the standard wilderness road corridor to 100 feet, it is too late for public involvement after the map and legal descriptions have been transmitted to Congress. The public has no knowledge or involvement in that process. Once transmitted, the maps and legal descriptions have the force of law.

If the NPS sincerely cares about public involvement, a park that seeks to deviate from the new proposed DO standard corridor width (other than where prescribed by Congress) must give notice for public participation.

E) 6.3 Wilderness Planning

The draft DO substitutes the term “Wilderness Stewardship Plan” for the term “wilderness management plan” found in Management Policies at 6.3.4.2. The change of jargon or title here serves no useful purpose. Moreover it is a deviation from the

Management Policies. A Director's Order should not be used to alter Management Policies.

F) 6.7 Fire Management

PEER commends the addition of the first paragraph to the draft DO on fire management. The new language does not contradict Management Policies, but makes clearer that fires from natural ignitions are part of the natural process that are the heart and substance of wilderness, and not simply another management tool. This new language actually reiterates existing RM-41 (page 38); a concept that somehow does not appear in Management Policies (2006).

G) Abandoned Mine Lands

PEER supports the inclusion of this short paragraph. Existing RM 41 and the Management Policies do not address the issue.

**H) 6.9 Cultural Resources**

The last paragraph of the draft is vague and subject to widespread misinterpretation and conflict with Management Policies. Areas of the national parks, including wilderness may remain sacred to Indian Tribes, Native Hawaiians and Alaska Natives. Existing RM-41 says "Native Americans will be permitted access within wilderness for sacred or religious purposes consistent with the intent of the American Indian Religious Freedom Act and the Wilderness Act and related laws." (p. 19). Management Policies state the same thing, in nearly identical words, in the last sentence of 6.3.12. AIRFA resolves that Federal agencies will protect American Indian freedom to believe, express, and exercise traditional religions, including but not limited to access to sites, use and possession of sacred objects and conduct of ceremonials and traditional rites. This Federal resolve applies also within wilderness.

However, the DO does not use the Management Policies words but adds that "Native Americans may continue religious ceremonies *and other practices* as provided for in the American Indian Religious Freedom Act." (emphasis added). This added language may be construed to go beyond the Management Policies and the law. What, in particular are the "other practices" that the DO has in mind? Do they include operation of motor vehicles, use of mechanized equipment, landing of aircraft? The proposed DO should explicitly describe what exactly it purports to authorize – if anything.

The Draft DO also adds a sentence about treaty rights. Wilderness in a park may be subject to a treaty right by a formerly-occupying tribe to engage in certain activities, e.g. usufruct rights to hunt or gather. Wilderness designation cannot and does not suspend those rights. However, we are aware of no treaty rights that suspend or modify the Wilderness Act. If there are any, perhaps NPS could enlighten us. Thus, this last sentence of the draft DO is so vague as to be meaningless, except to provide misdirection to the uninformed. It should be deleted and replaced with this:

“Uses of wilderness in a park may be subject to a treaty right by a formerly-occupying tribe to engage in certain activities, e.g. usufruct rights to hunt or gather.”

To avoid confusion, the proposed DO should probably just eliminate the last paragraph of 6.9 OR use the words in the Management Policies. But then there would be no point since the DO should not be repeating what Management Policies already state.

### ***I) 7.2 Climbing***

Neither RM-41 nor Management Policies specifically address rock climbing. The inclusion of the section on rock climbing is a legitimate subject for agency guidance. However the draft DO authorizes the “occasional placement” in wilderness “of a fixed anchor...” This kind of authorization is well beyond the scope of a Director’s Order. Use of fixed anchors in wilderness is a subject of intense and long-standing controversy. It is by no means legally resolved if fixed anchors, permanently installed in wilderness, are consistent with the Wilderness Act.

There are no court cases, no subsequent guidance from Congress that resolve this issue. How can a “mere” Director’s Order make a legal determination of so high an order?

If the DO authorizes fixed anchors in wilderness, that has implications not just for the wilderness in the parks but for all four wilderness-managing agencies. The other agencies have wrestled with this difficult question to no avail. In the late 1990’s the Secretary of Agriculture appointed a negotiated rule-making team to propose language on this precise issue for Forest Service rulemaking. At least the Forest Service realized that this was the stuff of public rulemaking under the Administrative Procedures Act (APA). In contrast, the draft DO would make a momentous interpretation, buried deep in NPS Tier 3 guidance.

This single addition to the DO alone will require that the NPS conduct a full scale Environmental Impact Statement (EIS) as required by the National Environmental Policy act (NEPA). The fixed anchor decision, buried on page 12 of the draft, is an agency action that will have effects throughout the 45 million acres of park wilderness and establishes precedent throughout the national wilderness preservation system. No agency, not even the NPS, is free to behave in so reckless a fashion.

While NPS may contend that DOs are not subject to NEPA, it should be countered that DOs do not adopt Federal rules that go to the heart of a statute’s meaning. Make no mistake, that single sentence is a rulemaking by subterfuge.

Moreover, the nonchalant way in which the DO adopts the legitimacy of fixed anchors under the Wilderness Act is deceptive. The DO does not lay out the rationale for why the NPS concludes that fixed anchors are consistent with the Wilderness Act. The DO does not present any reasoning whatsoever before making a perfunctory statement that proves that the NPS has decided that fixed anchors do not violate the Act.

Even if PEER, for argument's sake, adopted the premise that fixed anchors do not violate the Wilderness Act, the NPS cannot simply adopt such a rule without adhering to processes that gives full review to its import and impact. This single addition to the DO would make the DO subject to challenge under the APA as well as NEPA.

Users groups, such as the Access Fund, may or may not support this provision but regardless of their position, NPS is not relived of the obligation to follow the proper and required procedures BEFORE adopting an interpretation of a statute, especially an interpretation that the NPS (or any other agency) has never formally adopted until this draft DO.

If you have questions about PEER's comments, please fell free to call me at 202 265-PEER.