Comments on NPS Management Policies (ID: 12825)

Submitted by
Public Employees for Environmental Responsibility (PEER)
February 18, 2006

A. GENERAL

1. The NPS Should Not Alter Existing Policies

Public Employees for Environmental Responsibility (PEER) urges the National Park Service to halt any revisions to the existing Management Policies (2001). The current Policies, adopted in late 2000, updated Policies last amended in 1988. There is no need to revise the current Policies. Changing agency fundamental policies needlessly and too frequently is a recipe for confusion.

To placate the public and quell unrest among park employees, the NPS has stretched the truth to allege that the proposed revisions originate from the grassroots. In fact, they do not. The politicized process of revising Management Policies originated with Deputy Assistant Secretary Paul Hoffman and has created consternation and confusion throughout the National Park Service (NPS). The fact is so well known that the NPS leadership was compelled to organize a nationwide teleconference in December 2005 for all NPS employees to foster the Administration's "creation myth" for the Draft. But, the NPS leaders have failed in this clumsy effort at myth-making.

2. NPS Management Policy Revisions are Subject to the APA

The Management Policies Draft is subject to the Administrative Procedures Act (APA). The Draft proposes changes to long-standing NPS policies without any evidence that such changes respond to new acts of Congress or decisions of the Federal courts. The Draft fails to show how legislative or judicial guidance may have altered the NPS mission and statutory obligations since the 2001 Policies and thus justify the proposed changes. The Draft proposes changes from existing policies that are "arbitrary and capricious" because they depart from agency policies without clear or reasoned analysis.

3. NPS Management Policy Revisions Must not Contradict Law and Regulation

The NPS proposes Draft Management Policies that, in some instances, contradict the clear language of Federal statutes and/or regulations at 36 CFR. It is impermissible for Management Policies to undermine, repeal or ignore provisions of law or regulations. The Management Policies must conform to existing law and regulation, though the Policies may expand upon or go beyond, as a matter of policy, the law and/or regulations.

PEER's specific comments on the Draft Management Policies follow:

B. SPECIFIC COMMENTS

Chapter 3 – Land Protection

Section 3.4 Cooperative Conservation

The Draft Policies states that the NPS should "monitor state government programs and activities for managing state-owned submerged lands and resources with NPS units." There appears to be no reason why this duty should be limited to only submerged lands owned by the states within parks. States also own considerable surface lands in many parks and the NPS should exercise the same responsibility regarding such lands.

Section 3.5 Boundary Adjustments

The Draft needs to state that the NPS may not alienate (i.e. "trade away") Federal lands already in a park in exchange for lands that are incorporated into a park through a minor boundary adjustment under the Land and Water Conservation Fund Act of 1965, as amended. See 19 U.S.C. 460l-9(c).

Chapter 4 – Natural Resource Management

Section 4.1 General Management Concepts

The Draft strikes deep at the fundamental principles that govern natural resource management since the 1962 Report to the Secretary (The Leopold Report). The Draft adds an additional basis to the four existing bases under which the NPS can manipulate natural systems, i.e. "where necessary to provide appropriate visitor enjoyment…" The Draft allows such manipulation "so long as the intervention does not lead to unacceptable adverse impact (IS THERE SUCH A THING AS AN "ACCEPTABLE" ADVERSE IMPACT?)

This vague phrase has a pointed purpose. It has been deliberately added by Mr. Hoffman to allow for game farming in those parks where hunting is authorized in law. Hunting is an authorized use in many park areas but the NPS has consistently eschewed providing feed, water and other actions to increase the number of huntable species. For that reason, NPS should delete the newly added fourth condition (lines 29 and 30, page 63) from the Final. It is unclear, subject to varying interpretations, conflicts with long-standing practice and is unneeded.

Section 4.4.3 – Harvest of Plants and Animals

The Draft would now permit the stocking of fish and wildlife for recreational take in ALL areas of the national park system where it has continually occurred. The current Policies allow this only in national recreation areas and preserves. PEER strongly urges that NPS return to the Current Policies.

Chapter 5 – Cultural Resources

5.3.5.3.1 Resource Access and Use

To the sentence "Park superintendents may reasonably control the times when, and places where, specific groups may have exclusive access to particular areas of the park" add "…where authorized by law, and Executive Order." Establishing private preserves or enclaves on park lands for specific park users that exclude all other users is a very grave action. The Policies need to recognize that gravity and cite relevant laws, for example park enabling acts that permit such closures, and the Executive Order on sacred sites.

Chapter 6 – Wilderness Preservation and Management

PEER urges that NPS retain the title of Chapter 6. If any element of the national park system needs strict "Preservation" it is wilderness. The proposed new chapter title "Wilderness Stewardship" is deliberately weak.

6.1 General Statement

The changes in paragraph are at odds with the words of the Wilderness Act. The Draft revisions appear to say that wilderness serves two purposes – wilderness preservation and the accommodation of recreational and other uses that are consistent with wilderness character. This is not what the Wilderness Act prescribes. The purpose of the Act is "to secure for the American people an enduring resource of wilderness" 16 U.S.C. 1131(a). It is the wilderness itself that serves several public purposes of recreation, scenery, science, education, conservation and historical use. The Draft reads as if these "public

purposes" of wilderness may vitiate or conflict with the underlying preservation mandate, and must be weighed against wilderness character.

6.2.1 Assessment of Wilderness Eligibility

PEER does not object to the substitution of "eligibility" for "suitability" in the current policies. The current policies created confusion because the Wilderness Act speaks of "suitability" in terms of the Secretary's recommendation to the President. The Management Policies now use the term "suitability" in connection with the first step in the wilderness review process. The actions are not the same and using different words to describe the two different review processes is an improvement.

PEER does object that the Draft Policies eliminates the current Policy requirements that the Service review all lands in the national park system for suitability (now "eligibility") has been deleted in its entirety. PEER urges that the Policies be revised to make clear the intent of the 2000 version that the Service must conduct such suitability (now "eligibility") reviews for all parks of the system not only parks created or expanded after 2000 (as interpreted by the District Court for the District of Columbia in Wilderness Society v. Norton, January 10, 2005)

6.2.1.1 Primary Criteria for Determining Eligibility

The Draft incorrectly adds the phrase "federally owned, undeveloped" to the review criteria. This phrase would eliminate from review as "ineligible" tracts of land that the Secretary may otherwise find "suitable." The Wilderness Act directs the Secretary to review "every roadless area of five thousand contiguous acres or more…" in the national park system. 16 U.S.C. 1132(c). The words "federally-owned and undeveloped" do not appear in the section of law that prescribes the review process.

Since the inception of the Wilderness Act, and the first NPS recommendations to the Secretary, the NPS and the Secretary have recommended to the President roadless areas containing nonfederal tracts of land. Congress has designated wilderness areas within which lie nonfederal tracts of land. Of course, the nonfederal lands within wilderness are not "wilderness" until acquired. The Wilderness Act defines wilderness to consist of "federally-owned areas designated by Congress." 16 U.S.C. 1131(a). The Wilderness Act then states that "An area of wilderness is further defined to mean…an area of "underdeveloped (sic) Federal land retaining its primeval character and influence." 16 U.S.C. 1131(c).

The person or persons who produced the Draft fail to grasp that the definition of what Congress ultimately designates as wilderness ("undeveloped Federal land") is not the criteria for REVIEW of suitable lands. At the review stage, the NPS must evaluate every roadless area of 5,000 acres or more. Drop the "federally-owned and undeveloped" addition. It does not reflect the Wilderness Act review provisions.

6.2.1.2 Additional Considerations in Determining Eligibility

The Draft drops the fourth and fifth bullets from the Subsection. The first deleted bullets address eligibility for lands with existing rights (e.g. mining claims) or privileges (e.g. grazing). The second bullet addresses lands with utility lines. **PEER strongly urges that NPS keep these two bullets**. The Secretary may continue to recommend such lands to the President and to Congress as wilderness, as the Secretary has done since the early 1970's. In some cases the Secretary recommended that Congress designate the lands containing the rights or privileges or utility lines as "potential" wilderness.

Congress has obliged and designated many areas of "potential wilderness" in the national park system. Although the Wilderness Act does not provide for "potential wilderness" subsequent acts of Congress beginning in 1972 and continuing to today have employed the tool of designated "potential wilderness." This is a useful tool and one that the new Draft Policies ought not remove!

The Draft effectively reverses a Policy on wilderness proposals enunciated by Assistant Secretary Nathaniel Reed to the NPS Director on June 24, 1972. Please read Guidelines for Wilderness Proposals and Secretarial Order 2920. This abrupt reversal of long-held policy presents itself as **one of the most arbitrary and capricious decisions** made by the Draft.

6.2.1.1. Potential Wilderness

RETAIN. See comments above.

6.3.1. General Policy

Retain deleted lines on "potential wilderness." See comment above. The elimination of "potential wilderness" flies in the face of decades of departmental and Congressional practice.

Mr. Hoffman's antipathy toward the concept of "potential wilderness" is well known. It is disappointing that the 100 nameless NPS experts who supposedly prepared this draft so meekly went along with his animus. The NPS response to this single issue will be far more indicative than any other subject in revealing whether this review process for determining new final management policies has any integrity or is merely an appendage of the Hoffman anti-wilderness crusade.

6.3.4. Wilderness-related Planning and Environmental Compliance

Once again, the NPS draft flies in the face of the law by positing that there will be "six public purposes of wilderness." Congress established the Wilderness Preservation System for ONE purpose – "to secure for the American people…the benefits of an enduring resource of wilderness." 16 U.S.C. 1131(a). Within areas designated as wilderness, people may recreate, enjoy scenery, pursue scientific knowledge, advance education, experience wild places that have been conserved and historic artifacts of long ago peoples. But they may do so ONLY insofar as the lands are wilderness! The Draft attempts once again to construct "wilderness" in which wildness is just one purpose among several. Wilderness is the Purpose. The other public purposes are wholly dependent upon wilderness. The Draft then attempts to play the public purposes against themselves and wilderness itself. This is incorrect. Drop the added lines. They are obfuscatory, designed to sow confusion and lessen the mandate to preserve wilderness.

6.3.8 Cultural Resources

It appears that the first paragraph in this subsection is a response to recent court decisions by the Eleventh Circuit and the Federal District Court for Western Washington. The relationship between various enactments, including the Wilderness Act and historic preservation or other laws is an exceptionally complex issue and requires more thought than the glib, inaccurate, misleading sentiments of the newly added paragraph in the Draft.

The Draft adds a new opening paragraph that is so full of misunderstanding of the law that it would require pages to address. Federal Courts have now made clear that the

Wilderness Act, with its specific prohibitions, takes precedence over laws that are more general in nature, including laws that govern historic preservation. As a rule in any statutory conflict – specific laws take precedence over general ones. The National Historic Preservation Act applies to objects and structures within wilderness. We agree. But that law, for example, mandates that the NPS engage in a "determination of effect" and does not mandate an outcome. It is a process law, not a prescriptive law. The NHPA, for example, in no way overrules the Wilderness Act, or provides an exception to it. The Draft appears to say the contrary. If so, that is flatly wrong.

The first paragraph of the Draft misquotes 16 U.S.C. 1133(a)(3). The relevant section of the Wilderness Act states that "…the designation of any area…as a wilderness area shall in no manner lower the standards evolved for the use and preservation of such park…in accordance with sections 1, 2, 3 and 4 of this title, the statutory authority under which the area was created, or any other Act of Congress…" The first paragraph of the Draft cites but fails to analyze the exact meaning of the provision. However, the Draft implies that this section of the Wilderness Act gives cultural resource laws precedence over specific Wilderness Act prohibitions. If so, that is also wrong.

A search of the NPS' understanding of the meaning of this provision is found in the 1970 Administrative Policies for managing natural areas. Page 55 explains that the above provision was enacted to serve two purposes. The first purpose is to ensure that the special provisions of the Wilderness Act that provide for certain multiple uses in national forest wilderness should not be construed as applicable to national park system wilderness. Such multiple uses would be contrary to the statutory authorities that govern the parks. Hence, the Wilderness Act is not to be construed to lower the standards that protect the parks.

Second, the 1970 Policies explain that "the status of those national parklands not included by the Congress in the National Wilderness Preservation System remains unique pursuant to previously existing National Park Service legislation, for the Wilderness Act does not contemplate the lowering of park values of these remaining parklands not designated legislatively as "wilderness…"

If the Draft were to state that the Organic Act mandate at 16 U.S.C. 1 "to conserve… historic objects" is not repealed by the Wilderness Act – that would be a true and correct statement. The Wilderness Act did not repeal that provision of the Organic Act nor does it lower the standards of park administration with regard to historic objects. However, that is not what the new paragraph says. Rather, it casts a net that is too wide to sustain a cogent understanding of the relevant provision.

The Drafters need to read the letter of June 10, 1974 from the Office of the Secretary to Senator Henry Jackson, Chairman of the Committee on Interior and Insular Affairs. In that letter, the Secretary's office makes clear that historic structures need not be "carved out of wilderness" but that such structures should only be a minor feature of the total wilderness proposal and the structure will remain in its historic state, i.e. without development. Once Congress designates an area as wilderness that contains structures that are "historic," the NPS policy is to keep the structure in its historic state, not to develop it, expand it, replace it with an replica, etc. One could read the newly added paragraph in the Draft to reverse that Policy which is now over three decades old.

In short, this added paragraph is very murky as to its intent and meaning, and appears to conflict with Departmental and NPS policy statements dating as far back as 1970. The new paragraph can be read to create a wholesale exception to the Wilderness Act prohibitions for all of the numerous cultural preservation laws. That is wrong, as the Federal Courts have found thus far.

6.4.6 Valid Existing Rights

Stick to the law. The Wilderness Act prohibitions contain an exception for "private existing rights." 16 U.S.C. 1133(c).

6.4.7 Accessibility

Both the current and the Draft Management Policies fail to explain that the exception to the mechanical transport prohibitions of the Wilderness Act for disabled persons is a limited one. The Americans with Disabilities Act of 1990 provided a wheelchair exception to the Wilderness Act's mechanical transport prohibition. Although the current and draft Management Policies refers to section 507 of the ADA, the Policies need to quote it. In particular, the NPS is not required to construct facilities or modify conditions within wilderness to facilitate wheelchair use. Moreover, a wheelchair is limited to "a device designed solely for use by a mobility impaired person for locomotion, that is suitable for use in an indoors pedestrian area." This language would improve the existing policies.

Chapter 8 – Use of The Parks

8.2.2.6 Hunting and Trapping

The Draft fails to grasp that the fundamental purpose of the national parks is, among other things, to "conserve" wildlife. The NPS is responsible for discharging that statutory obligation even in those many park areas where Congress has authorized hunting. Congress generally wishes that the States continue to manage the hunters via issuance of licenses, setting of seasons, etc. but it is the NPS that is the wildlife managing authority. Thus, the NPS is invariably empowered by laws authorizing hunting in a park area to impose restrictions that exceed those imposed by the States. The entire thrust of the Draft revisions is to lessen the NPS authority over park wildlife. The Departmental Policy at 43 CFR Part 24 is not written nor should it be construed to lessen the NPS authority to discharge its conservation duties over wildlife free from interference by individual States. This entire section should remain as it is.

8.6.8.3 Trespass and Feral Livestock

This new paragraph is another confusing addition to the current language. What does the sentence about determining "how a particular animal is classified in that state" mean? The NPS rules on trespass livestock are the sole determinant of what constitutes trespass. The states do not write the trespass rules for Federal lands or lands in the national park system. Though absent from 8.2.2.6, the Draft here uses the term "**shared jurisdiction**" over wildlife for the first time. There are no parks in which there is "**shared jurisdiction** (by the NPS) with state fish and wildlife agencies." Where does that come from? Congress gave the power to "conserve" (and thus manage and conduct research on) "wildlife" in the 1916 Act. It is a power consistently upheld by the Federal courts in multiple decisions. Where Congress authorized hunting under State control, it did not surrender any of the NPS authority or jurisdiction over wildlife, nor is the NPS authority affected in any way by whether the NPS possesses exclusive, concurrent or proprietary jurisdiction. The authors of this language do not understand the issue of jurisdiction or

authority. PEER urges in the strongest possible terms that NPS drop the "shared jurisdiction" language.

Chapter 9 – Park Facilities

9.1.6.1 Waste Management

PEER urges NPS to restore the lines deleted on page 233, lines 32 and 33. In this section it is painfully apparent that the Draft is the product of political ideologues like Mr. Hoffman that in it cannot even bring itself to acknowledge that using park lands as solid waste dumps is, on its face, incompatible with park preservation. In 1984 Congress made that clear when it prohibited all new sites for solid waste disposal in parks. The 2000 Policies reflect that enactment. The Draft pretends it never occurred. There is no excuse for NPS failing to retain the original language.

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