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Phillip Selleck  
Regulations Program Manager  
National Park Service  
1849 C St., NW  
Washington, D.C. 20240

**ATTN: RIN 1024-AD72**  
COMMENTS – NPS BICYCLE RULE

Public Employees for Environmental Responsibility (PEER) supports the strongest protection for the resources and the visitor experience of the national park system. PEER opposes the rule at 36 Code of Federal Regulations (CFR) Title 36, section 4.30. Bicycles (36 CFR 4.30) proposed on December 9, 2008 by the Department of the Interior. The proposed rule weakens the regulatory oversight for authorizing bicycles on trails outside of park developed zones. PEER advocates that the National Park Service (NPS) retain the existing regulation at 36 CFR 4.30(b) that governs bicycles outside of developed areas.

The NPS adopted the existing regulation at 36 CFR 4.30 on April 12, 1987. The existing regulation requires that “[E]xcept for routes designated in developed areas...routes designated for bicycle use shall be promulgated as a special regulation.” 36 CFR 4.30(b). The NPS adopted this requirement because park lands outside of developed areas “...are related more to preservation of natural resources and values...”. 51 *Federal Register* (FR) 21844. According to the NPS, the use of routes outside of developed areas “would have a much greater potential to result in adverse resource impacts or visitor use conflicts.” *Ibid.* This fact remains as true today as it was twenty-two years ago.

The 1987 Rule justified the adoption of “a much more stringent decisionmaking process...by requiring that a bicycle route designated outside of developed areas... be accomplished through a formal rulemaking. Such a process will provide for a thorough review of all environmental and visitor use considerations and assure a full opportunity for public participation in and review of a decision concerning any such proposed designation.” *Ibid.*

This contrasts with park developed areas that are “generally impacted to a certain degree by structures, facilities or other improvements which reflect the fact the primary purpose

or management objective for the use of these (developed) lands is other than preservation of their natural resources.” *Ibid.*

The existing regulation authorizes the park superintendent to designate bicycle routes within developed zones in accordance with the procedures of sections 1.5 and 1.7 of 36 CFR Part 1. An example of such a locale is the South Rim Village of the Grand Canyon National Park. PEER endorses and encourages the use of bicycles on roads, trails and parking areas in developed park zones. This is especially beneficial where such use may reduce motor vehicle traffic. PEER endorses the current application of a less rigorous standard of review to designate such routes or areas as open to bicycles.

Authorizing bicycle use on trails outside of developed area has absolutely nothing to do with reducing motor vehicle traffic in parks. Motor vehicles, except under specific circumstances provided by enabling acts, are not permitted on trails outside of developed park zones. Rather than displacing an existing use with a “greener” use, bicycles on trails outside of developed zone simply create a wholly new use of a trail – a mechanized use. Authorizing such a use must be accomplished with the utmost caution.

It is an exaggeration to assert that that the procedures of 36 CFR 4.30(b) are costly, impractical or impossible. Saguaro National Park in Arizona demonstrated that a trail designation by special rulemaking could occur quickly without sacrificing the integrity and rigor of the decisionmaking process. The NPS began scoping for the route designation in July 2002. The NPS prepared a thorough and professional environmental assessment, consulted with Tribes and the State Historic Preservation Officer and the Fish and Wildlife Service. The NPS proposed a special rule for designation of the Cactus Forest Loop Trail on March 7, 2003. The NPS made the rule final in June 2003. The process, from start to finish, took a little less than one year.

One reason that more parks have failed to designate trails outside of developed zones by special rule is that the Department and the NPS regulatory office has for months now suppressed draft special rules for parks, such as for Delaware Water Gap National Recreation Area, Pennsylvania-New Jersey. The Departmental reluctance to publish the special rules as proposals in the *Federal Register* appears to be a deliberate strategy to create the impression that the current special rulemaking process of 36 CFR 4.30(b) is unworkable. As Saguaro National Park demonstrated – the special rulemaking process works, and it works surprisingly well – to the benefit of both park resources and, as it turned out, a specialized user group – mountain bikers.

The NPS was correct in 1987 to provide the cautionary procedures now embodied in 36 CFR Part 4.30(b). Do not substitute another. The NPS must continue to apply the most rigorous standard of a special rulemaking to route designation outside of developed areas, as now required by 36 CFR 4.30(b).

### **Wilderness**

The existing and, belatedly, the proposed 36 CFR 4.30 assures protection of designated wilderness from the use of bicycles by prohibiting the possession of a bicycle in

designated wilderness. This prohibition goes without saying because "...it reflects a statutory prohibition on forms of mechanical transport in wilderness areas that is contained in the Wilderness Act of 1964 [16 U.S.C. 133(c)] and which has been in effect since that law was passed." 51 FR 21844.

Both the text and preamble of the proposed regulation of December 9, 2008 is silent about the status of bicycle trail designation on lands in the national park system that have been:

- Recommended as wilderness to Congress by the President;
- Proposed by the Director to the Secretary of the Interior, or the Secretary to the President as wilderness; or
- Determined eligible for wilderness in formal NPS planning processes, such as in Wilderness Eligibility Determinations, Wilderness Studies, or General Management Plans and accompanying Environmental Impact Statements.

In truth, the existing regulations also do not mention these millions of acres of land. But, it is NPS understanding that, under the current 36 CFR 4.30, parks are not allowed to designate trails as open to bicycles in recommended or proposed wilderness by special rule, or any other means. In confirmation of this limitation, to date, the NPS has never designated by special rule a trail as open to bicycles in undeveloped park areas recommended or proposed as wilderness.

The NPS Director unequivocally stated NPS policy in a letter as recent as October 4, 2005. In the letter, former NPS Director Fran Mainella wrote to PEER:

“NPS policies direct that lands that have been formally proposed by the NPS Director or Secretary of the Interior, or recommended by the President to Congress for designation as wilderness, will be managed with the expectation of eventual designation as wilderness. Therefore, NPS land that are proposed or recommended for wilderness designation are inappropriate for bicycle use designations until such time as Congress renders their decision.” (The entire Mainella letter is displayed at [http://www.peer.org/docs/nps/08\\_17\\_6\\_nps\\_2005\\_wilderness\\_letter.pdf](http://www.peer.org/docs/nps/08_17_6_nps_2005_wilderness_letter.pdf) )

Director Mainella letter interpreted the language of then-applicable NPS Management Policies – 2001 (section 6.3.1). The NPS revised its Management Policies in 2006 but retained the wording of section 6.3.1 verbatim.

The Department now needs to restate, with a vigor and clarity equal to Director Mainella's, the NPS policy on designation of bike trails on lands recommended or proposed as wilderness. A position less protective of park recommended or proposed wilderness would constitute a new and significantly altered interpretation of NPS Policies. Such an alteration would represent an administrative about face. “For [an] agency to reverse its position in the face of precedent it has not persuasively distinguished

is quintessentially arbitrary and capricious.” La. Pub. Serv. Comm’n v. FERC, 184 F. 3d 892, 897 (D.C. Cir. 1999)”

PEER cautions the Department to avoid adopting a new interpretation of NPS Management Policies at 6.3.1 under which the NPS narrowly focuses on only a few words about “diminishing wilderness eligibility”. Such a narrow focus would have the NPS allow certain activities prohibited by the Wilderness Act in recommended or proposed wilderness as “interim” uses because such acts do not “diminish wilderness eligibility”. This creative interpretation could also allow bicycles (mechanical transport), motor vehicles, or the landing of aircraft in recommended or proposed wilderness until such time as Congress acts to designate the wilderness because the activities could be halted upon designation and therefore not, supposedly, “diminish wilderness eligibility.” The NPS has never interpreted the NPS Management Policies in this way. To do so would be a dangerous precedent for mechanical transport that would also create a rationale through which motorized vehicles could also drive. After all, both could be halted upon congressional designation. Fortunately for wilderness, there are other applicable passages in the Management Policies that control the NPS.

The Management Policies provide at section 6.4.3.3 that “[P]ublic use of motorized equipment or *any form of mechanical transport* will be prohibited in wilderness except as provided for in specific legislation.” (Emphasis added.) Section 6.3.1 states that the use of the term “wilderness” in the Management Policies “will include the categories of eligible, study, proposed, recommended and designated wilderness.” Thus, there is no room for the NPS to allow public use of mechanical transport (or motor vehicles) in any area eligible, proposed, or recommended as wilderness.

PEER calls upon the Department, should it adopt this flawed rule, to make clear that lands eligible, proposed or recommended as wilderness are off limits to designation of bicycle routes.

### **Special Rulemaking**

The proposed rule retains only a thin sliver of the current special rulemaking requirement for designating trails for bicycles outside of developed park areas. The existing rule at 36 CFR 4.30(b) requires a special rule for designating any trail as open to bicycle use, outside of park developed areas. The proposed rule at 4.30(c) would require a special rulemaking ONLY “to build a new trail for bicycle use outside of developed areas.” (73 FR 76987). (Emphasis added.)

The proposed rule applies one standard to designating bicycle use on existing backcountry trails and a more rigorous standard for allowing bicycle use on “new” trails. Why does the proposed rule require that only new (but not existing) backcountry trails require the rigorous review afforded by a special rule to authorize bicycle use? There appears to be no logical reason for this distinction and its dual standard.

If the NPS proposes that a special rulemaking would still be required to allow bicycles on “new” trails, then why not also require a special rule to open “existing” trails in the park

backcountry to bicycles? The preamble for the proposed rule lacks any rationale for its dual standard for “existing” and “new” trails in the park backcountry.

The NPS is staggering under a nine billion-dollar maintenance backlog of physical facilities. The backlog includes trails that the NPS maintains with great difficulty. In practice, the NPS constructs very few “new” trails in undisturbed and undeveloped areas of the parks. We ask again: Why does the proposed rule require that only new (but not existing) backcountry trails require a special rule to authorize bicycle use?

One interpretation is that the proposed rule contemplates the possible construction of special trails in park backcountry that are designed primarily for mountain bicycles. While we assume that the specially designed bicycle trails would also be open to pedestrian and equestrian use, the NPS has never constructed trails designed specifically to accommodate mountain bicycles in park backcountry. Because this conduct would be a radical departure for the NPS, the proposed rule may presume that the inherent level of controversy would automatically require a special rulemaking.

PEER argues that the designation of all trails in undeveloped park areas as open to bicycle must be accomplished by special rulemaking, not just “new” trails. PEER also argues that the NPS should not itself construct, nor authorize “partner” mountain biking groups to construct, in undeveloped park areas specially designed bicycle trails.

Both PEER and the NPS know that mountain bicycle advocates have special trails in mind. In a meeting in February 2006 at Big Bend National Park headquarters at Panther Junction, Texas, people representing recreational and commercial mountain bicycling expressed ideas about mountain bike trails outside of developed park areas. Rachel Lopez, the representative for the International Mountain Biking Association (IMBA), is reported to have stated that IMBA is interested in trails that “don’t have water bars” that compel mountain bikers to dismount. They want trails that “zig zag around for variety”.

PEER does not oppose, *per se*, mountain bike use on existing backcountry trails, outside of park areas eligible for wilderness. PEER supports a process of thorough review to assess resource effects, potential visitor conflicts AND a special rulemaking. But PEER opposes the construction of trails specifically designed for bicycles in undeveloped park areas. The features of such trails may tend to resemble BMX tracks, designed for speed, sharp maneuvers; built for skill and thrill. PEER hopes that the NPS does not have such “new trail(s) for bicycles” in mind when it proposes that only that category of trails requires a special rulemaking. Trails designed specifically to afford sport riding of mountain bicycles have no place in park backcountry, even if they are ostensibly open to all other users.

### **Administrative Roads**

The proposed rule would allow the superintendent to designate administrative roads that are closed to public vehicular use as open to bicycles through the compendium process. The proposed rule clarifies the status of so-called “administrative roads”. This is a positive aspect. However the proposed rule fails to define the term “administrative road”.

The existing definitions at 36 CFR 1.4 define only “park road”. The definition limits park roads to “a roadway open to motor vehicles...” presumably by park visitors. In contrast, throughout the national park system, “administrative roads” exist that are closed to public motor vehicle use. Since “administrative roads” do not meet the current definition of “park road,” the proposed rule should define the term “administrative road”.

On April 21, 2005, Associate NPS Director Karen Taylor-Goodrich wrote to all Regional Directors and superintendents to clarify the status of administrative roads and bicycles. That memo squarely placed “administrative roads” under the category of “park roads”. Thus, a special rulemaking is not automatically required to designate bicycle use on an administrative road that is closed to public motor vehicles. On May 19, 2005, PEER wrote to NPS Director Mainella that “[I]ncluding ‘administrative roads’ within the meaning of ‘park roads’ is a liberal interpretation of the term ‘park road,’ nonetheless it is a reasonable one.”

However, Associate Director Taylor-Goodrich prescribed that “...administrative roads (those closed to public motorized use) outside of developed zones will require an analysis, including public comment, and decision pursuant to NEPA.” (Emphasis added.) The Bush rule proposed on December 18, 2008 significantly weakens the very recent NPS directive that distinguished administrative roads “outside of developed zones” from such roads within developed zones. First, the proposed rule fails to make this distinction; a distinction that the NPS itself made in the 2005 directive. Second, the proposed rule lamely prescribes that for *any* administrative road, only the criteria and procedures of 36 CFR 1.5 and 1.7 must be followed prior to designation.

PEER agrees that a special rulemaking is not required for a superintendent to designate an administrative road (closed to public motorized use), outside of a developed zone, open to bicycles, except as indicated by the standards of 36 CFR 1.5(b). In other words, no special rulemaking is automatically required. However, PEER urges that the NPS adhere to the NPS directive of April 21, 2005 and adopt the standard enunciated for administrative roads, closed to public motorized use, that lie outside of developed zones. To quote Associate Director Taylor-Goodrich, PEER asks only that, for such designations, there always be “...an analysis, including public comment, and decision pursuant to NEPA.” To do otherwise constitutes a significant weakening of existing guidance for administrative roads.

### **Closing Comments**

Our national parks are special and distinct places, set aside as an expression of inestimable value to generations of the American people. They are not like other Federal lands, administered by other agencies. Nor should the national parks be thrown into a blender to homogenize them with other Federal lands. It is impossible to administer them to fulfill their conservation mission without applying the utmost care. Nor can we examine what is appropriate within them without looking deeply at “values”.

It is disconcerting to find in the Preamble to the Proposed Rule “...if opportunities for bicycling will offer potential to increase overall visitation, generate new youth interest in

parks, or expand appreciation for our national parks.” (73 FR 76988). While the latter two of these three are sound objectives, not all routes to the goals are either valid or legal. Each of us can propose any number of new or increased uses of the parks that would serve the above objectives – from opening more parks to hunting, organized athletic events, fitness boot-camps or adventure “ecotourism” like zip-lines. There are advocates who argue that park backcountry routes that lie outside of wilderness should be open to enjoyment for motorized vehicles or by snowmobiles. Although each of these proposed uses offers the “potential to increase overall visitation” or “generate new youth interest in parks,” the NPS would, PEER hopes, reject every one of these suggestions. In short, these are inappropriate considerations upon which to decide what should be allowed in park backcountry (or “frontcountry,” for that matter).

Saturating the debate over more bicycle access on backcountry trails, i.e. trails outside of park developed areas, are specious assertions of “equity”. The Organic Act mandates that the NPS provide for enjoyment of park resources that are unimpaired. But not all “enjoyments” deserve equal treatment or equal access. In the late 1990’s the NPS wisely decided that jet-skis do not merit equal treatment on a park’s natural lake as a motorboat with a fisherman. Pedestrian uses on trails are not “equal”. A hiker or birdwatcher is permitted on park trails in the backcountry but many of those proposing to engage in an organized foot race are generally not allowed on that same backcountry trail as a matter of park policy. How can mountain bicycles on backcountry trails be inherently equal to pedestrians, when uses, even among pedestrians, are not “equal”?

Some forms of enjoyment may materially degrade the enjoyment of a park’s scenery, wildlife and other natural and historic attributes that visitors should reasonably expect. The NPS is obligated to protect resources and provide “the enjoyment thereof”. Fast moving mechanical transport on narrow single-track trails in quiet and remote backcountry areas MAY degrade the enjoyment that the parks exist for, admittedly while providing enjoyment to the mountain-biker. To allow such potential degradation in the name of “equality” is patently bogus. For this reason the Department of the Interior adopted in 1987 the current standard that requires the highest level of scrutiny before designating trails in undeveloped park areas as open to mountain bicycles. PEER supports the existing rule and opposes the rule proposed by the Bush Administration on December 18, 2008.