

Public Employees for Environmental Responsibility

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October 23, 2015

Cameron Sholly, Midwest Regional Director
National Park Service
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Omaha, Nebraska 68102-4226
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Dear Mr. Sholly:

As you know, PEER sent you a letter on September 16, 2015, in which we described the situation at Indiana Dunes State Park related to the provisions of the Land and Water Conservation Fund Act and asked for a response to the issues we raised. As of today, we have yet to receive a response, although we have received emails and telephonic status updates from you which we do appreciate. Based on our conversation on Friday, October 16, we have some additional questions that we would like to have answered and issues we would like you to consider. Your responses to these questions and issues can be included with your response to our first letter.

I. Process Issues

A. In our telephone conversation of Friday, October 16, you mentioned that based on plans for buildings for the Indiana Dunes State Park Pavilion Restoration Project (the Project), a conversion might not have been triggered because those plans stay within the existing foot print of the Park Pavilion buildings. To our knowledge such plans have never been made available to the public or anyone else.

Question 1: Has the NPS received final plans for the pavilion and the proposed banquet facility?

B. If the NPS has received these plans, they are public documents, and should be available to us or anyone who requests them.

Question 2: Can the NPS provide us plans for this entire project, including site plans and construction drawings for the pavilion and the proposed banquet facility?

C. A DNR FAQ website -- "INDIANA DUNES STATE PARK PAVILION RESTORATION" includes a section titled: "Conserving the environment." See: <http://www.in.gov/dnr/parklake/8462.htm>

One questions and answer is:

Will Land and Water Conservation Fund (LWCF) requirements affect completion of this project? In a word, no; however, please read this entire response. . . . We believe a conversion from LWCF use will be caused by the Pavilion project. We



have no documentation of approval yet from NPS because we (both NPS and DNR) have not yet determined exactly what will be converted. . . . [W]e (NPS and DNR) have agreed to wait until all building plans are final before completing the final calculation of how much area will be converted from LWCF use.

Question 3: Is this an accurate statement by the DNR?

Question 4: Will or has there been a mutual agreement between the DNR and the NPS as to “how much area will be converted from LWCF use”?

Question 5: If so, on what basis will/has such a calculation be/been made? (Please explain thoroughly.)

II. Additional LWCF issues

A. In our telephone conversation of Friday, October 16, you said something to the effect that the existing plans do not go outside the existing footprint of development and therefore may not trigger a conversion. First, this may not be true, especially in relationship to the already constructed restrooms (“Comfort Center”). Second, this is irrelevant. Only comparing “footprints” does not comport with LWCF regulations, as explained below.

The LWCF Manual (see: <http://www.nps.gov/ncrc/programs/lwcf/manual/lwcf.pdf>) Chapter 8-3, E. Conversions of Use, says the following:

Property acquired or developed with LWCF assistance shall be retained and used for public outdoor recreation. Any property so acquired and/or developed shall not be wholly or partly converted to other than public outdoor recreation uses without the approval of NPS pursuant to Section 6(f)(3) of the LWCF Act and these regulations. The conversion provisions of Section 6(f)(3), 36 CFR Part 59, and these guidelines apply to each area or facility for which LWCF assistance is obtained, regardless of the extent of participation of the program in the assisted area or facility and consistent with the contractual agreement between NPS and the State.

Special note should be taken of the following two sentences:

1. “Property acquired or developed with LWCF assistance shall be retained and used for public outdoor recreation.” The key word is “developed.” The LWCF not only refers to land but to developments, such as buildings or facilities. The pavilion was developed with LWCF funding.

2. “The conversion provisions of Section 6(f)(3), 36 CFR Part 59, and these guidelines apply to each area or facility for which LWCF assistance is obtained. . . .” The key words are “area or facility.” The extent of the “footprint” is only one issue that must be addressed. The actions already undertaken by the DNR and those further proposed not only affect the “area” of development, but also two facilities (the pavilion and the proposed banquet facility). In other words, any functions that the DNR and its operator, Pavilion Partners, propose for the pavilion and the banquet facility that do not meet the standards of public outdoor recreation trigger a conversion. Even one such use in a facility would trigger a conversion. If “footprints” were the only determining factor, any LWCF-encumbered land or facility could be repurposed at any time to non-public outdoor recreation use without being a conversion and without NPS approval. This is obviously not what the LWCF Act intended.

B. As stated in our first letter, there are numerous proposed uses that could trigger a conversion.

1. In the pavilion: A first-floor “casual” restaurant (with alcohol service), a “gallery” for wedding rehearsal dinners, a craft brew pub, a yoga/dance studio, an exercise area, a photography studio, and an art studio; a second-floor “fine dining restaurant” (with alcohol service); and, a “rooftop lounge” (with alcohol service), accessible by elevator, including outdoor fireplaces for birthdays, wedding rehearsal dinners, and corporate events.

An online statement by the DNR says that some of the “activities within the Pavilion qualify as outdoor recreation uses.” This implies that the DNR believes that some of the proposed activities will *not* qualify as outdoor recreation uses.

Question 6: Which of the uses listed above can be classified as “public outdoor recreation” and which cannot be?

2. In the proposed banquet facility: Two floors (with catered alcohol service possible on both levels) intended primarily to host weddings, wedding receptions, and banquets. These events would obviously not be for beach-goers, but appear to be intended to cater primarily to invited attendees, or are not accessible to the general public.

Question 7: Which of the uses listed above can be classified as “public outdoor recreation” and which cannot be?

C. Section H of the LWCF Manual (H. Proposals to Construct Public Facilities, Chapter 8-12) includes the following:

Public facility requests will only be approved if the public facility clearly results in a net gain in outdoor recreation benefits or enhances the outdoor recreation use of the entire park, and the facility is compatible with and significantly supportive of the outdoor recreation resources and opportunities of the Section 6(f)(3) protected area. The State shall use the PD/ESF to document its public facility proposal using the following criteria and submit it along with a project amendment and a recommendation for federal approval for NPS review and decision.

Section H also includes:

Restaurant-type establishments with indoor dining/seating that cater primarily to the outdoor recreating public must be reviewed under this public facility policy.

A “pizza-style” restaurant on the first floor, will perhaps “cater primarily to the outdoor recreating public.”

Question 8: Is Section H being followed regarding restaurant-type establishments with indoor dining/seating (in the pavilion first floor) that cater primarily to the outdoor recreating public?

Section H also includes:

Examples of uses which would not ordinarily be approved include, but are not limited to, a community recreation center which takes up all or most of a small park site, clinics, police stations, restaurants catering primarily to the general public, fire stations, professional sports facilities or commercial resort or other facilities which: (1) are not accessible to the general public; or, (2) require memberships; or, (3) which, because of high user fees, have the effect of

excluding elements of the public; or, (4) which include office, residential or elaborate lodging facilities.

Dining on the first floor, according to the developers, may be for “wedding rehearsal dinners” and thus would not be “accessible to the general public.” The second floor restaurant in the pavilion, as described by the developers, would be for “fine dining,” and thus would be “catering primarily to the general public.” This would also be true of a proposed “Rooftop Lounge” (which would include a bar, kitchen, etc.) on the currently undeveloped roof of the pavilion. It would also be “catering primarily to the general public.”

Question 9: Is Section H being followed regarding restaurants (in the pavilion first floor, second floor, and roof) which either are not accessible to the general public or would be catering primarily to the general public?

The banquet facility, which, as noted earlier, is primarily intended for hosting weddings, catered wedding receptions, and banquets, would also have to be reviewed by the NPS under this section, since its use would either be “not accessible to the general public” or would be “catering primarily to the general public,” depending upon its use.

Question 10: Is Section H being followed regarding dining services (in the banquet facility) not accessible to the general public or restaurants catering primarily to the general public?

See Section H of the LWCF Manual (H. Proposals to Construct Public Facilities, Chapter 8-12) for the criteria that must be met in order for the NPS to consider a request to construct sponsor-funded public facilities.

III. The Comfort Center

A “Comfort Center” (with outdoor showers, changing rooms, restrooms) was constructed west of the pavilion in 2015.

A. This Comfort Center would presumably be a public facility. However, it may have been constructed partially on land that had not previously been developed.

Question 11. Can the location of this facility be clarified regarding whether it was constructed on land that had or had not been previously developed?

B. Chapter 8-4, E. Conversions of Use, includes the following:

2. Situations that may not trigger a conversion if NPS determines that certain criteria are met including:

b. . . . The State should consult with the NPS early in the formative stages of developing proposals to construct indoor facilities on Section 6(f)(3) protected land (see Section H below).

Question 12: Was there any such consultation on the Comfort Center project?

Question 13: If so, is documentation available of this consultation?

Section H includes the following:

The State shall use the PD/ESF [Proposal Description and Environmental Screening Form] to document its public facility proposal using the following criteria and submit it along with a project amendment and a recommendation for federal approval for NPS review and decision. The NPS will consider requests to construct sponsor-funded public facilities when the following criteria have been met [including]:

2. All design and location alternatives have been adequately considered, documented and rejected on a sound basis.
4. Potential and future benefits to the total park's outdoor recreation utility must be identified in the proposal. Any costs or detriments should be documented and a net recreation benefit must result.
5. The proposed facility must be under the control and tenure of the public agency that sponsors and administers the original park area.
6. The proposal has been analyzed pursuant to NEPA, including providing the public an opportunity to review and comment on the proposal if required as part of the NEPA review.
7. All applicable federal requirements for approval are met.
8. The proposal has been adequately reviewed at the state level and has been recommended by the SLO.

Question 14: Were any of these requirements fulfilled prior to beginning construction of the Comfort Center?

Question 15: If so, is documentation available that all of the applicable criteria were met?

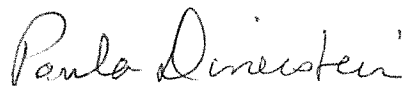
We have seen no evidence that any of this was done. Indeed, the NPS probably did not know of this project at all prior to recent questions about it.

Question 16: If the Comfort Station construction was not approved, what steps will the NPS take to ensure that it is properly approved?

There are more questions that we could ask, but as you can see there are numerous issues that must be addressed by the NPS before the DNR and its operator can proceed with any further action on these projects. We remain concerned that the processes outlined in the LWCF have not been adequately followed and there may be conflicting interpretations of the LWCF regulations that must be addressed.

Our position remains that if these activities have and are taking place without NPS approval, they are in violation of clear statutory requirements, and the NPS must notify the state to take action to preclude the project sponsor from proceeding further with the conversion, use, and occupancy of the area pending NPS independent review and decision of a formal conversion proposal.

Sincerely,



Paula Dinerstein
Senior Counsel

cc:

Jonathan Jarvis, Director, National Park Service <Jon_Jarvis@nps.gov>