PEER Comments on NPS Director's Order # 77-10: NPS Benefits-Sharing

January 22, 2013

Public Employees for Environmental Responsibility (PEER) respectfully requests that the National Park Service (NPS) reexamine the financial, legal, practical, philosophical and ethical implications inherent in its proposed Benefits-Sharing policy.

1. Corporate Incentive to Reach Agreement

The central flaw in the NPS Benefits-Sharing policy is that it assumes a corporate desire to share profits simply because its products were derived in some manner from NPS resources. Adopting a rule that the corporation must reach agreement does not guarantee that negotiations will not drag out endlessly and/or end fruitlessly.

Both the Director's Order (DO) and the *Benefits-Sharing Handbook* (*Handbook*) state that NPS may pursue "remedies" if a corporation spurn's agency overtures. Yet, neither specify what those remedies are, let alone give any idea of their effectiveness.

Given that the DO makes it clear there can be no connection between the granting of research or other permits and a potential benefits-sharing agreement, it is far from clear what leverage NPS could exercise over a recalcitrant corporate would-be partner.

Indeed, the real incentive for corporate partnering with NPS would involve the benefits the corporation could derive from individual parks. Some of those incentives are described as "non-monetary benefits" in the *Handbook* with such terms as "special services" and "research relationships," in which corporations can co-brand with national parks or obtain promotional considerations.

In short, in order for NPS units to induce corporations to "share" profits, NPS will have to give something of value – outside of the underlying research permit – in return.

2. Additional Safeguards Are Needed

One means for ensuring that park managers meet the highest professional standards in negotiating and approving benefits-sharing agreements (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 with 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 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 out-competes 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 judgment 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 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), see below), 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 any law mandates that the benefits from BSAs be deposited with the individual park.

3. Revolving Door Danger

The DO states that research permit decisions are not connected with BSA-related decisions, yet it is unrealistic to presume that research decisions will be unaffected by prospects of new revenue to a park. This supposed "firewall" provides no real guarantees of protection because park superintendents would be key decision-makers in both cases.

Apart from the direct decisions by park superintendents, decision-making officials would have many tools at their disposal to guide the conduct of their supposedly separate staffs.

While we recognize that decisions about research permits and decision about benefit sharing are intended to be separated, however, if, as the *Handbook* emphasizes, benefits sharing can lead to long-term, close, and beholden research relationships, then the hoped-for separation of decision-making may not prove sustainable in fact.

In addition to concern about decision makers, there is concern about those who advise the benefit sharing team. Outside consultants must be strictly without conflicts of interest. The public must be assured that such benefits sharing "advisors" work for organizations that (a) neither receive funds from those who might benefit by the advice they offer the park or (b) engage in advising companies that do product development. Yet, for all its girth, the *Handbook* does not address this topic.

The enduring concern is that NPS signatories or advisors to royalty-sharing deals related to public goods may trade away the public interest for their own enrichment, either in their current positions, or after retirement, through the revolving door.

4. Secrecy Can Mask Abuse

A fundamental assumption seemingly made by the DO is that the financial information from the BSAs, such as royalty rates, will be confidential. It never explicitly states this but instead provides that the agreements shall be –

> "…available to the public in their entirety, except for confidential information that is required by law to be protected. NPS will comply with confidentiality laws and regulations regarding disclosure of royalty rate and other confidential information when one or more parties to an agreement identifies in writing confidential information satisfying one or more of the statutory disclosure exemptions provided under the Freedom of Information Act, Trade Secrets Act, or other laws protecting confidential business information." (§4.3.6)

This provision seems to say that NPS will not disclose the financial terms – the guts – of any BSA. Yet, NPS appears to be engaging in legal sophistry, as nothing in the Freedom of Information Act (FOIA) *requires* that business information remain secret; it instead allows the agency discretion to refuse disclosure otherwise mandated under FOIA for public records.

Moreover, the case law under the trade secrets exemption to FOIA is far more nuanced, conflicting and evolving than suggested by the DO. In any event, it is fairly certain that NPS would not be shielded from FOIA requests and/or litigation (which will consume still more NPS resources). In the unlikely event that NPS is ordered to release royalty data, the already modest Benefit-Sharing monetary yield (see below) will be reduced even further.

It seems clear that NPS would prefer to cloak itself in secrecy for BSA negotiations by hiding behind the ambiguities in the relevant law. By contrast, it has every right to insist that royalty

and other financial BSA information be made public, just as we require royalty information for oil and gas drilling on federal lands to be public.

The philosophical problems with promoting a policy of secrecy affecting public resources and public agencies are discussed below. It should be noted at the outset, however, that this position is contrary to the principles of openness and transparency in government that President Barack Obama declared as national policy in his January 21, 2009 memo to the Executive Branch.

In addition, the afore-mentioned conflicts about resource protection versus royalty revenue will only be aggravated if any part of these deals is kept secret. There must be full public disclosure of the benefits, monetary or non-monetary, exchanged between the parties to a Benefits-Sharing Agreement.

As a consequence, secret corporate revenue-sharing deals would become a continuing source of public curiosity and suspicion. There is no legitimate justification for keeping secret the benefits, monetary or non-monetary, that are exchanged between the parties to a Benefits-Sharing Agreement.

Finally, nowhere is there any explicit provision for public notice regarding BSAs before they are consummated. This omission suggests that there is no intention that the public review or comment upon individual BSAs.

5. National Parks Are Not Federal Laboratories

The DO states that each national park, at the discretion of the Director, could be designated as a "laboratory" in the meaning of the Federal Technology Transfer Act of 1986 (FTTA). Thus, benefits-sharing agreements could 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 other legal authority but we strongly contend that CRADAs are now an improper instrument for several reasons.

The FTTA's definition of a laboratory is "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 the National Parks Omnibus Management Act of 1988 (NPOMA) would be unnecessary. Each national "laboratory" park could have entered into CRADAs without the enactment of the NPOMA section that authorizes "benefits-sharing agreements." Congress did not act 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, if governed by the FTTA since 1986, has yet to implement a single one of the above actions. 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.

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? The NPS has never made the required FTTA determinations of the mission or missions of each of its nearly 400 separate "laboratories."

Two mandates of the FTAA should be of particular concern to NPS. 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 developed such ethics standards. The NPS has not. 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.

In short, the FTTA-CRADA "shoe" does not fit the national park system.

6. Consultants' Profit Center

The maximum monetary returns forecast for NPS are extremely modest. According to Federal Environmental Impact Statement for NPS Benefit-Sharing (FEIS), only negligible financial returns would be expected for the first five years. After 20 years, the most optimistic FEIS Benefits-Sharing revenue forecast would be less than $4 million per year (see "high range…high value" assumption, p. 121).

These figures are gross figures which do not subtract the extensive administrative expenses put forward in the FEIS as "mitigation" for various deleterious effects (p.47). Expenses to NPS would include providing extensive "technical assistance" to the more than 200 individual national park units which host independent research efforts.

Among the required technical assistance, the FEIS states that NPS will need a "strong negotiator" for each CRADA (p. 47). It is unclear whether this refers to a corps of tough negotiators developed from among NPS staff or a group of consultants brought in under contract. If outside negotiators are brought in, it is not stated what such importation would cost or what conflict of interest and insider-dealing protections would be required.

Furthermore, in order to track BSA-related funds, however small, NPS would have to develop and implement an appropriate accounting procedure to ensure that any resulting monetary benefits are used in the manner stipulated in the DO. To the unspecified expense of developing that accounting procedure and implementing it, NPS would also have to add the (further unspecified) expenses which parks would require for financial support administration to monitor agreements and verify royalty payments.

Moreover, given that the DO stipulates that park research staff would be removed from BSA decisions, still other staff would be required to monitor private research activities from permitted research in order to spot sources of potential BSAs. To give some idea of the enormity of this task, the FEIS estimates that there are more than 70,000 research articles published in scientific journals and more than another 100,000 formal and informal scientific reports flowing from NPS research permits.

In contrast to the notion that administrative costs will decline with time, as NPS becomes more skilled in benefit sharing negotiation, that contention cannot be given much credence. It is just as likely that over time other parties will become more skilled in benefit sharing negotiations with NPS and, as a result, NPS costs will stay the same or even rise. The sheer complexity of these issues is underlined by the fact that the NPS *Benefits-Sharing Handbook* runs to 176 pages and still glides over many topics that could have been covered more in depth.

By way of illustration, in the case of the Diversa CRADA at Yellowstone National Park consultant and administrative costs were considerable. Records obtained by PEER under FOIA indicate that Yellowstone National Park paid consultants $359,000 over the course of about two years – an amount that exceeds the FEIS "mid-range" estimate for system-wide revenue from all CRADAs in year 5.

In summary, by its own admission, it will be a long time, if ever, before the Benefits-Sharing plan produces appreciable monetary resources to support NPS scientific endeavors. The administrative costs from this system are likely to more than consume any revenues produced, to the detriment of NPS science and resource programs

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While benefits sharing tasks may provide full employment for the NPS "Benefits-Sharing Team" which has worked on this effort since 2001, nonetheless, it is clear that the preferred Benefits-Sharing plan is likely to cost the NPS far more money than it

7. Wilderness Act Concerns

Roughly one-half of the national park system – more than 40 million acres – is currently designated as Wilderness, as part of the National Wilderness Preservation System and protected by the Wilderness Act. Another 30 percent of the park system has been recommended or proposed for wilderness designation by the NPS. The Wilderness Act prohibits commercial enterprise in these areas.

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 DO makes no provision describing how compliance with the Act will be ensured.

8. Tribal Interest Ignored

Under Title II of the Indian Self-Determination Act Amendments of 1994 (Pub. L. 103–413), the Interior Department has determined that 57 National Parks in 19 states, including parks such as Redwood, Glacier, Voyageurs, Olympic and the Cape Cod National Seashore, have "special geographic, historical, or cultural significance'' to "Self-Governance" Indian tribes. Many of these parks include those which host scientific research from which potential CRADAs might spring.

The FEIS stipulated that: "In the event that research activities involve the use of traditional knowledge or other valuable proprietary input from a Native American community or other source, it would be the responsibility of the park and the researcher to include such individuals or groups in that benefits-sharing arrangement as appropriate." (p.42)

This sweeping grant is much broader than that of the Indian Self-Determination Act Amendments. It is not difficult to imagine many situations in which individual Indian or tribal claims might often arise in response to BSAs. Yet, neither the DO nor the *Handbook* addresses this situation.

Given the vague nature of these entitlements ("as appropriate"), the policy is likely to give rise to disputes and litigation both of which are likely to consume whatever monetary benefits might have been produced.

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