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August 12, 2015

SUPPLEMENTAL COMMENTS ON NPS PROPOSED RULE FOR TRIBAL GATHERING OF PLANTS IN PARKS (AUGUST 12, 2105)

RIN 1024-AD84; National Park Service, Department of the Interior

Mr. Joe Watkins
Office of Tribal Relations and
American Cultures
National Park Service
1201 Eye Street, NW
Washington, DC 20005

Dear Mr. Watkins:

Public Employees For Environmental Responsibility (PEER) opposes the adoption of the rule first proposed on April 20, 2015 (80 FR 21674) to allow managers of national park system units to authorize by agreement the gathering and removal of plants or plant parts by members of federally-recognized Indian tribes. The following comments are in addition to the comments that PEER filed on June 9, 2015 and reflect subsequent discoveries that we have made.

In those earlier comments, we explained several reasons motivating our opposition to the proposed rule, including that it represents a fundamental shift in the National Park Service's interpretation of its statutory mission and history. In addition, the logic advanced by the proposed rule has the likelihood to significantly damage long-standing protections erected by Congress to protect the natural and cultural resources of the parks. Further, the proposed regulation is contrary to law and beyond the authority of the National Park Service (NPS) to undertake. Finally, the proposed rule relies upon factual misstatements, undefined terms, and indefensible assumptions.

Background for Supplemental Comments
On April 20, 2015, the NPS published a Federal Register Notice [Vol. 80, No. 75 / 21674] seeking public comment on a proposed revision of the regulations at 36 CFR 2.1. Preservation of natural, cultural, and archeological resources in order to authorize "Gathering of Certain Plants or Plant Parts by Federally recognized Indian Tribes for Traditional Purposes." In the narrative sections of this Notice, NPS made statements concerning various supporting materials or findings that were not otherwise referenced or provided to the public.

On that same date, PEER filed a request pursuant to the Freedom of Information Act (5 U.S.C. 552) seeking documents supporting conclusory statements in this Federal Register Notice. Specifically, we requested the following:

- All records supporting the following NPS representation: "Research has shown that traditional gathering, when done with traditional methods and in traditionally established quantities, does not impair the ability to conserve plant communities and can help to conserve them…";

- All materials reflecting or assembled pursuant to the provisions of the "National Park Service Management Policies 2006 at Section 4.2.1, which directs the NPS to inventory, monitor and research traditional knowledge and authorizes NPS to support studies designed to 'understand the ceremonial and traditional resource management practices of Native Americans…'"; and

- All documents related to the following statement: "The NPS has also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under [the National Environmental Policy Act] NEPA."

We also explained that PEER sought these documents so that we could include the responses we would receive from the agency in our public comments on the proposed rule. The public comment deadline was July 20, 2015.

In an April 30, 2015 email, Ms. Charis Wilson, the NPS FOIA Officer, informed PEER that it had received our April 20, 2015 Freedom of Information Act (FOIA) request and that the agency would make an initial response to the request on or before May 28, 2015 (the 20 day deadline imposed by 5 U.S.C. § 552(a)(6)(A)(i) and 43 C.F.R. § 2.16), and that final document production would occur on or before July 25, 2015.

The promised production date of May 28th came and went but we had yet to receive a single record responsive to our April 20, 2015 FOIA request. On June 9, 2015, we filed suit in the U.S. District Court for the District of Columbia charging the NPS for failure to meet the statutory deadlines not only for the April 20, 2015 request but also for an earlier request on the same topic we had filed back on November 17, 2014 to which we had also yet to receive any of the requested records.

In an email dated July 27, 2015 (seven days after the public comment period on the proposed rule had closed), Ms. Wilson provided the NPS response to our April 20th FOIA request. From this response, it appears that the NPS *Federal Register* statements in support of the proposed rule were deceptive and misleading. Specifically –

- In response to our request for the research that supposedly shows that traditional gathering "does not impair the ability to conserve plant communities and can help to conserve them," Ms. Wilson wrote, "no single document or documents exist that fully summarize the depth and variety of research on traditional knowledge." (Emphasis

added.) Instead, she provided an abridged bibliography of works "relating to traditional knowledge that are or have been used across the NPS regions." This bibliography merely listed titles and authors but did not contain summaries of the conclusions of these works. Nor did NPS provide or point to any single work which supported its *Federal Register* assertion.

- In response to our request for the required agency studies that were supposed to "inventory [and] monitor" traditional gathering practices, Ms. Wilson stated that while there had been studies touching on this topic "These materials are not catalogued in such a manner to be able to identify each and every one related to this topic." Instead, NPS provided a list of "reports that the American Indian Liaison's office is aware of that relate to" the topic. Again, the agency did not know what, if anything, these studies.

- Finally, in response for the basis for NPS's conclusion that it did not have to do any analysis of the proposed rule under NEPA, Ms. Wilson stated that after a search of the files no documents were found that specifically addressed the determination that the categorical exclusion cited would serve in lieu of a NEPA EIS [Environmental Impact Statement] or EA [Environmental Analysis]." Instead, the agency provided us with earlier drafts of its *Federal Register* notice.

In short, it is now clear that NPS made material misstatements in its April 20, 2015 *Federal Register* notice. When PEER obtained this incriminating information, we informed the Assistant U.S. Attorney representing NPS in our FOIA litigation, communicated that this new information suggested that the NPS had committed a fraud on the public and suggested that the public comment period be reopened so that the matter could be ventilated and the public given another chance to weigh in. As a result, the public comment period was reopened for another 45 days.

Specific Supplemental Comments

1. **Core of Proposed Rule Lacks Empirical Basis**

The central mandate on NPS from its Organic Act of August 25, 1916 is that it conserve the native plants and animals in its custody. Similarly, as we pointed out in our earlier comments, the Organic Act forbids consumptive uses of these resources – and traditional harvest practices by their very nature are consumptive.

The NPS attempts to leap this insurmountable hurdle by asserting that traditional gathering "does not impair the ability to conserve plant communities and can help to conserve them…" When asked for the support behind this central premise of its proposal, the agency admits that it has none. It has none because the notion that harvesting native plants conserves their populations is pure fancy.

A. NPS Ignores Rampant Plant Poaching

Unauthorized removal of plants –whether by traditional practices or not – already constitute a major threat to park resources. Despite this direct loss of resources, the NPS does not keep comprehensive statistics on how much plant poaching occurs but in budgetary requests admits

that poaching of all kinds "has been steadily increasing each year", according to one such budget justification.

The proposed rule would not help control poaching, however. To the contrary, it would increase the harvest level on the plants already most at risk. Consider three examples;

- **Ginseng Root**. The root of a ginseng plant is valued for its health benefits but the harvest of wild American ginseng could lead to the plant's demise. For example, the Great Smokey Mountains National Park used to be host large amounts of ginseng but poaching has become rampant, according to media statements by park law enforcement;

- **Saguaro Cactus**. Saguaro cacti only grow naturally in a portion of the Sonoran Desert, and their distinctive size and shape make them prized as landscape features. Theft of these cacti has been a major problem for decades. Officials from Saguaro National Park indicate that many of the most prominent plants in this namesake park are at constant risk of being poached.

- **Ramps.** Foraging for ramps in the Great Smoky Mountains National Park was ended by NPS in 2004 because consumption rates were threatening park plant communities. This ban, however, has given rise to increased ramp poaching on park, national forest, and surrounding private properties.

Thus, while conceding that harvest of native plants may already be a problem, the NPS has proposed to increase harvest nationally with no available scientific analysis of the state of its native plant populations, let alone the impacts of its proposal.

B. NPS Imperils Plant Communities by Ignoring Its Own Management Policies

Section 4.2.1 of the NPS Management Policies declares that:

"The Service will

- identify, acquire, and interpret needed inventory, monitoring, and research, including applicable traditional knowledge, to obtain information and data that will help park managers accomplish park management objectives provided for in law and planning documents;

- define, assemble, and synthesize comprehensive baseline inventory data describing the natural resources under NPS stewardship, and identify the processes that influence those resources;

- use qualitative and quantitative techniques to monitor key aspects of resources and processes at regular intervals;

- analyze the resulting information to detect or predict changes (including interrelationships with visitor carrying capacities) that may require management

intervention and provide reference points for comparison with other environments and time frames; and

- use the resulting information to maintain—and where necessary restore—the integrity of natural systems."

However, when PEER asked the NPS for documents demonstrating how well it has implemented this mandate with respect to native plants, the agency was unable to give a coherent response.

We are forced to conclude that, despite the dictates of its Management Policies, the NPS does not monitor or inventory its plant resources. Without this baseline data, it would be imprudent for NPS to propose a rule increasing harvest levels – yet it has done so.

C. Superintendents Unable to Responsibly Administer Proposed Rule

As we pointed out in our earlier comments, these proposed rules place park superintendents in the untenable role of having to referee Indian traditional practices. This untenable position is worsened because the superintendents lack the scientific data to make the judgments called for in the proposed rule.

The draft rule authorizes Tribes to request, and each park superintendent to sign, an agreement governing the collection of park natural resources. Before signing an agreement, the park manager must determine that the gathering "will not result in a significant adverse impact on park resources or values." Without a thorough assessment of the current and historic status of the plant communities to be targeted for removal or destruction, the park manager cannot responsibly enter into these agreements.

Further, the proposed rule allows suspension of collection activities but only upon a superintendent finding (and presumably documenting) a threat to "public health and safety" or a need to protect "environmental or scenic values." Given the current state of NPS plant data-collection, it is unclear how a park superintendent can reach and support such a conclusion, regardless of the real plight of the harvested plant communities.

2. NPS Is In Clear Violation of NEPA

In preparing this proposed rule the NPS dispensed with the requirements of the National Environmental Policy Act (NEPA) of 1970. NEPA requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions.

The NPS claims a "categorical exclusion" from NEPA. In its original *Federal Register* notice the agency justified this conclusion by stating that:

> "The NPS has also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA."

This refers to the requirement that in order to find that a proposed agency action falls within a categorical exclusion, it must determine whether there are "extraordinary circumstances" that

nevertheless require the agency to perform an environmental evaluation. 40 C.F.R § 1508.4; 43 C.F.R. §46.215

When we asked under FOIA that NPS produce the analysis supporting the determination that no such extraordinary circumstances exist, the NPS said it had conducted no such analysis – or at least none that had been reduced to writing.

Yet looking at the listed extraordinary circumstances, it seems clear that nearly every one of the listed extraordinary circumstances apply to this rule. So, it is puzzling in the extreme how the NPS could come to the opposite conclusion supported only by a bald assertion.

Any one of the following extraordinary circumstances listed in 43 C.F.R. § 46.215 would, if found to apply to the proposed rule, trigger NEPA review:

> *(b) Have significant impacts on park, recreation, or refuge lands;*

There are more than 500 federally-recognized Indian Tribes throughout the country, not including Regional and village corporations in Alaska. Many of those Tribes have aboriginal association to lands in most of the parks. Many parks have several (some parks have over a dozen) associated Tribes. Tribal requests to harvest plants range from the giant redwoods of Redwood National Park, to ramps in Great Smoky Mountain National Park, to birch and ash trees inside Acadia National Park.

> *(c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources;*

This is undoubtedly the case here, as demonstrated amply by these and our previous comments. Here is one telling example – the rationale employed by the NPS to justify removal of plants by Indian Tribes equally justifies their take of park wildlife, as well.

Only one thin line of the proposed rule protects park animals and fish (although not minerals or cultural resources) from Indian Tribal traditional harvesting and removal. The proposed rule states that it "would not alter the prohibition on taking fish or wildlife for such purposes." The rationale for the distinction that NPS now draws between parks plants and animals is not explained in any fashion.

Thus, the proposed rule lays the intellectual and legal groundwork for a rapid expansion to include park animals, fish, minerals, and cultural resources. Indeed, many of the proposed rule justifications refer to a much the broader class of "park resources."

> *(d) Have highly uncertain and potentially significant environmental effects to involve unique or unknown environmental risks;*

From our FOIA inquiry, we have learned that the NPS has no substantial data about the potential effects of the proposed rule. Nor is the precise number of park units to be affected anywhere

stated. From its absence of monitoring or inventory data, NPS is obviously unsure of the actual effects of its proposed action in any one park, let alone throughout the entire park system.

> *(e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects;*

Our previous comments outlined why the proposed rule represents a fundamental shift in the NPS interpretation of its statutory mission and history. The logic advanced by the proposed rule has the likelihood to significantly damage long-standing protections erected by Congress to protect the natural and cultural resources of the parks.

> *(f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects;*

Each of the more than 400 national park units may be subjected to agreements under the proposed rule. Many parks may be subjected to multiple agreements covering a range of plants and plant parts.

> *(h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species;*

The proposed rule makes no mention of whether NPS managers may enter into agreements that authorize Tribal gathering of plant species (or their parts) listed as endangered or threatened under either Federal or State laws, or are otherwise sensitive.

In addition, the proposed rule makes no provision to safeguard plants that are located in habitat designated as critical to listed animals. The science of ecology is firmly established enough that the NPS should understand that allowing the collecting of plants may cause harm to listed animal species. It is conceivable, for example, that a listed species of animal may depend at critical junctures upon certain plants; plants that may also be the object of collection activities. Thus, authorizing plant collection may "harm" listed animal species. "Harm" is one form of "take." Section 9 of the Endangered Species Act proscribes "take."

Although this draft rule has significant implications both for listed plant species, and for listed animals that may depend upon affected plants, the NPS does not intend to consult with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act about the rule. Nor are park superintendents directed to engage in consultation as part of the Tribal agreement process.

> *(i) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species.*

This proposed rule is designed to authorize removal and destruction of almost exclusively native plant life, i.e. those plants that occurred prior to the arrival of European settlers. It is unknown whether those disturbances facilitate the introduction of non-native species or allow those non-

native species an advantage over the harvested native plant communities. It is, however, one of the myriad effects the NPS should be, but is not, studying.

Thus, it appears inescapable that the NPS cannot justify its invocation of a categorical exclusion. As a result, the agency is proceeding in direct violation of NEPA.

PEER has previously called upon the NPS to prepare an environmental review that examines the effect the proposed rule may have upon the parks, before adopting any final rule. The purpose of NEPA is make agencies "look before leaping" – a simple precaution that is more than warranted in this case.

3. Proposed Rule Is Based in Ideology Contrary to NPS Mission

Since this proposed rule is not rooted in any systematic scientific studies or the product of detailed analysis, it is disconcerting that it has moved to this stage. The reason it has advanced is because of the ideological position of one man – NPS Director Jonathan Jarvis.

At a July 2010 conference with the Eastern Band of the Cherokee Indians, Mr. Jarvis publicly proclaimed that the NPS regulations that preclude Native Americans from gathering plants from parks are "wrong." He vowed to repeal the current rule, stating "It became a mission of mine to fix this. Now, that I'm director, I'm in a position to fix it."

This proposed rule Mr. Jarvis is making good on that promise and he has apparently not let the utter absence of facts or the glaring conflicts with law stop him.

Even further, Mr. Jarvis has encouraged his agency to violate the current rules. Documents obtained by PEER under FOIA evidence widespread violation of the current no-gather rule by park superintendents with the approval and support of the Director. Parks such as Zion, Bryce and Pipe Springs entered into Memoranda of Understanding, without public involvement or required environmental reviews, in open contradiction of the NPS' official rules. Many of these violations are under the table without a paper trail, however. For example in 2009, the acting Superintendent of Yosemite National Park advised a gathering of Indians that they could take any plant they wished and did not need either a permit, or to report what or how much they had taken.

By all evidence, under Director Jarvis, the Park Service has adopted an unofficial "don't ask, don't tell" posture on Indian removal of plants, despite a formal legal opinion by the Interior Office of the Solicitor underlining that NPS is legally required to protect park resources absent an explicit congressional waiver.

Director Jarvis's sentiments may be heartfelt, but our national park system cannot be ruled by one man's sentiment. Nor can the Director unilaterally change a federal regulation.

Moreover, any change in regulation must comport with the law. As detailed earlier, this proposed rule directly violates several laws, including the Organic Act which charts the statutory mission of the Park Service.

Thus, for all these reasons, this proposed rule should be withdrawn.

Sincerely,

Jeff Ruch
Executive Director

Cc. NPS Director Jonathan Jarvis