

September 23, 2002

Ms. Fran Mainella, Director
National Park Service
U.S. Department of Interior
1849 C Street, N.W.
Washington, DC 20240
BY FIRST CLASS MAIL

Re: Illegal Prior Restraint of NPS Employee Speech

Dear Ms. Mainella:

I am writing to you on behalf of Public Employees for Environmental Responsibility (PEER) to protest a recent National Park Service (NPS) directive forbidding its staff from publishing material on any work-related topic without approval from the agency, even if that expression is completely on the staff member's own time and without compensation.

This is a violation of the First Amendment.

In a September 16th memorandum on "Employee Ethical Responsibilities and Conduct" addressed to all employees in the Intermountain Region (excerpt enclosed), the Regional Director warns that any violations "will subject employees to disciplinary action (up to and including removal)." One of the nineteen (19) rules spelled out in the memo concerns "Non-Official Expression":

"Employees who are writing or speaking on a topic which is generally related to their work, are expressing themselves as private citizens and not as representatives of the Department, are communicating under the concept of non-official expression, regardless of whether they are receiving payment for it. A notice of intention to publish non-official expression and certificate of compliance must be submitted through proper channels to the Regional Public Affairs Officer who will forward a recommendation to the Assistant Regional Director, Human Resources for approval."

[Emphasis supplied.]

The memo does not specify what is required to obtain a "certificate of compliance" or what standards will be employed to approve submittals. It is also unclear whether the order covers employee interviews with reporters that are later published.

In addition to a number of practical problems in connection with implementing such a "notice" and "certificate" system, PEER would like to draw your attention to three overarching problems in connection with this directive:

1. It is Unconstitutional

While the First Amendment is not without limits, in a public agency context employee speech is protected so long as it does not impair the efficient functioning of the public agency.

The seminal case in this area is Pickering v. Board of Education of Township High School District (391 U.S. 563 (1968)). In Pickering, a public school teacher wrote a letter to the editor in local paper that opposed a proposed tax increase and was highly critical of the school board's management of funds. The teacher, Pickering, was fired for writing the letter.

Lower courts ruled that Pickering's speech was unprotected by the First Amendment because his voluntary acceptance of the teaching position obliged him to refrain from making critical statements concerning the school's operation. The Supreme Court reversed the lower courts' rulings, finding in favor of the teacher. The Pickering Court his comments were indeed of legitimate great public concern and that this outweighed any disruption in normal operations his comments may have caused.

Courts place a heavier burden upon a government agency to justify a prior restraint on speech, such as a gag order. See also United States v. National Treasury Employees Union, 513 U.S. 454 (1995) and Sanjour v. EPA 56 F. 3d 85 (1995).

In this instance, the Park Service seeks an overbroad prior restraint on all employee off-duty writings on any "topic which is generally related to their work" regardless of whether the writings are without compensation. Under this directive the Park Service would have the discretion to suppress off-duty disclosures on matters of great public import, of political speech or even of reports made by an employee in a private capacity to another government agency? such as law enforcement, the Office of Special Counsel as well as the media.

As employees of a government agency, NPS staff members retain First Amendment rights. This directive unquestionably is a restraint upon those rights unsupported by any articulated rational basis and written in a broad unconstrained manner. This directive would not withstand constitutional scrutiny.

2. It is Illegal.

Every year since the mid-1980's Congress has reenacted a prohibition against the use of federal funds to institute or enforce a non-disclosure policy. This "anti-gag" provision is part of the Treasury, Postal Service, and General Government Appropriations Act of 2001. The language in effect this current (FY 2002) fiscal year is as follows:

Sec. 622. No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, U.S.C. (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or

public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling." Provided, That notwithstanding the preceding paragraph, a nondisclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that they do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law.

The September 16th Intermountain Region memorandum contains none of the required exceptions and provisos. Consequently, the directive and any steps to implement it are an illegal use of appropriated funds. You are not only violating the Constitution, you are violating a Congressional statute passed last year, as it has been passed in the previous thirteen (13) years.

3. It is Bad Policy.

In your outreach to citizen groups following your confirmation you had pledged to bring an atmosphere and policy of openness to NPS. As you may remember, last year, PEER represented a ranger from Yellowstone National Park who was given a similar gag order barring off-duty discussion of work-related issues. In settling that case, Park officials rescinded the gag order and promised to post a free speech policy. I believe that your involvement in this matter helped both parties reach a mutually beneficial resolution that also served the public interest.

Today and nearly a year after that settlement agreement, Yellowstone National Park has yet to issue the promised free speech policy. Instead, the Intermountain Region seems to have issued an anti-free speech policy.

In conclusion let me state my belief that this directive from the Intermountain Region does not represent your policies for NPS. At the same time, the fact that this misstatement of law and policy was issued by the very officials who should know better, NPS regional human resource professionals, raises serious questions about the competence of those specialists as well as the personnel atmosphere within that region.

For the foregoing reasons, I am asking to you to

- Immediately retract the September 16 directive on Non-Official Expression;
and

- Review the role of those officials responsible for promulgating this directive and consider removing the responsible party or parties from further duties relevant to enforcing "Employee Ethical Responsibilities and Conduct."

I look forward to your response.

Sincerely,
Jeff Ruch
Executive Director

Cc. Ms. Karen Wade, Director, Intermountain Region