July 25, 2014

Mary Ziegler
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3510
200 Constitution Avenue NW
Washington, DC 20210

RE: Establishing a Minimum Wage for Contractors; Proposed Rule
RIN 1235-AA10

Dear Director Ziegler:

Thank you for providing America Outdoors Association ("AOA") the opportunity to submit the following comments in response to the proposed rule issued by the Department of Labor ("Department") on June 17, 2014 to implement Executive Order 13658, which would require federal contractors and subcontractors to pay their employees a minimum of $10.10 per hour, effective January 1, 2015, and "an amount determined by the Secretary [of Labor] pursuant to the Order, beginning January 1, 2016, and annually thereafter." *Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 34568, 34571 (June 17, 2014) ("Proposed Rule").

I. Introduction and Summary

AOA represents the interests of more than 1,000 outfitters, guides, and outdoor recreation service providers who are members of our association and our affiliate state organizations. Our members and affiliate members, many of whom are small businesses, provide recreation services to more than two million Americans each year. Most of our members provide services to the public on federal lands managed by the National Park Service ("NPS"), U.S. Forest Service ("USFS"), Bureau of Land Management ("BLM"), and U.S. Fish and Wildlife Service ("USFWS"), under concession contracts, commercial use authorizations, and special use permits.

The Proposed Rule raises important questions and will have significant economic and other implications for AOA's members. Many of AOA's members operate under

contracts and permits that are not subject to the provisions of the Service Contract Act ("SCA") or Davis Bacon Act. Moreover, land use permits through federal agencies like the USFS, BLM, and USFWS do not create a "contractor" relationship with the federal government. Nonetheless, the Proposed Rule appears so broadly drawn that it could bring these permits within the reach of minimum wage requirements for federal contractors. Such a result would be devastating to those companies—almost all of which are small businesses—that rely on these permits for their business model and to provide important services not to the government (like procurement contracts), but to members of the general public who wish to employ outfitters and guides to facilitate their access to and enjoyment of their federal lands.

Importantly, the types of arrangements under which AOA's members operate differ significantly from typical government procurement contracts: rather than being paid by the federal government in return for providing goods and/or services, holders of these contracts and other instruments pay the government for the "privilege" of providing services to the public on federal lands. As a result, holders of these contracts and other instruments cannot simply pass on the additional costs of performance through their bids or contracts. Instead, they must either suffer the costs themselves or, if and to the extent that the market and agency (where agency approval of rates is required) allow, pass those costs on to the members of the public who use the businesses' services to facilitate their enjoyment of our National Parks, Forests, Refuges, and public lands. As a result, the implications of the Proposed Rule for these businesses are significantly different, and arguably more impactful, from those for other federal contractors.

The Proposed Rule raises many important questions that must be answered. Among them:

- The extent of the Proposed Rule's application to new agency authorizations is unclear. For instance, would the Proposed Rule apply to outfitter and guide special use permits issued by the USFS, NPS annual Commercial Use Authorizations (CUA), and outfitter and guide permits issued by the BLM and USFWS?
- Although the Proposed Rule does discuss applicability to amendments, it remains unclear to what extent amendments to existing contracts and permits (if and to the extent covered) on federal lands trigger this wage hike?
- The Proposed Rule explains that automatic renewals or extensions devoid of bilateral negotiations resulting in contractual modifications other than administrative changes fall outside the scope of the Executive Order. It appears then that the Executive Order's minimum wage requirements would not apply to extensions of NPS concession contracts pursuant to the Concessions Management Improvement Act, or to extensions and/or

renewals of USFS priority use permits under Section 53.1m of the Forest Service Recreation Special Uses Handbook, FSH 2709.14. The Department should confirm that this is the case.

- What is the meaning of "verbal agreements" covered by the rule?
- The Proposed Rule does not define "subcontractor." What is the extent of coverage for subcontractors for those companies operating under contracts and contract-like instruments?
- To what extent will entities covered by the rule be expected to enforce the minimum wage requirement on their subcontractors, and how does the Department intend this would work?

Moreover, the Proposed Rule specifically acknowledges that the Department's assessment of impacts on small businesses reflects a lack of data on impacts to our industry. The nine industrial classifications utilized by the Department did not include the recreation, outfitting and guiding industry, which generally operate under very different conditions (*e.g.*, seasonal operations) from the nine industries considered by the Department. Moreover, as the Department recognized, many contractors in our industry are exempt from the SCA. Recognizing the usefulness of data and feedback from small businesses newly affected by the Proposed Rule, the Proposed Rule thus specifically requests information from "small firms with concessions contracts, particularly those that are exempt from the SCA but are covered under Executive Order 13658" to inform the Department's assessment of impacts on small businesses. Therefore, it is our conclusion that the Proposed Rule will have a significant economic impact on a substantial number of small entities represented by our industries. The Department's Regulatory Flexibility Analysis must specifically assess the impacts of the Proposed Rule on our industry in order to meet its obligations under the Regulatory Flexibility Act ("RFA").

These are among the critical issues and questions that the Department must address and answer.

II. Detailed Comments

A. <u>The scope of the Proposed Rule and extent of the Proposed Rule's application to agency authorizations is unclear.</u>

Although the Proposed Rule appears intended to bring as many federal-private agreements within its reach as possible, the scope of the Proposed Rule and the extent of its application to certain agency authorizations are unclear and must be clarified. The Department proposes to define "contract" and "contract-like instruments" collectively to broadly include "all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements,

service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing." This includes "contracts covered by the SCA, contracts covered by the DBA, and concessions contracts not otherwise subject to the SCA."

On this basis, it appears that the Proposed Rule could apply to USFS, BLM, and USFWS permit holders, as well as to NPS contracts and commercial use authorizations ("CUAs"). The applicability of the minimum wage requirements to these specific arrangements, however, must be clarified. So too must the Department clarify the circumstances under which a verbal agreement would cause the minimum wage requirements to apply.

The Proposed Rule would specifically exclude from the new minimum wage requirements employees who are exempt from the minimum wage requirements of the FLSA under sections 13(a) and 14(a) and (b) of the FLSA [29 U.S.C. § 213(a) and 214(a)-(b)], unless they are otherwise covered by the SCA or DBA. As stated in the Proposed Rule, this includes, but is not limited to: certain learners, apprentices, or messengers, or students, whose wages are calculated pursuant to special certificates; or bona fide executive, administrative, or professional employees.

Although not specifically noted in the proposed rule, section 13(a)(3) of the FLSA provides an exemption from the FLSA's minimum wage requirements for employees of "amusement or recreational establishments, organized camps, or religious or non-profit educational conference centers" if either, (1) it does not operate for more than seven months in any calendar year, or (2) during the preceding calendar year, its average receipts for any six months of the year were not more than one-third of its average receipts for the other six months of that year. As amended, however, this provision contains an exception that provides that this exemption from sections 206 and 207 "does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a *contract* with the Secretary of the Interior or the Secretary of Agriculture." 29 U.S.C. § 213(a)(3) (emphasis added).

These USFS, BLM, and USFWS permits and NPS CUAs are not "contracts." For instance, USFS permits state the legal effect of a permit as follows: "This permit, which is revocable and terminable, is not a contract or a lease, but rather a federal license. The benefits and requirements conferred by this authorization are reviewable solely under the procedures set forth in 36 CFR Part 251, Subpart C, and 5 U.S.C. 704. This permit does not constitute a contract for purposes of the Contract Disputes Act, 41 U.S.C. 601. The permit is not real property, does not convey any interest in real property, and may not be

used as collateral for a loan." While the Proposed Rule defines "contract" and "contract-like instruments" collectively as "contracts," the Proposed Rule cannot change the scope of the statutory language of section 213(a)(3) or the fundamental nature of the rights granted by agency permits. Accordingly, the Department should specifically clarify that USFS, BLM, and USFWS permits for commercial recreational uses and NPS CUAs will not be subject to the new minimum wage requirements if they meet either of the two criteria for exemption under section 213(a)(3).

Absent the applicability of this exemption, we estimate that at least 7,000 small businesses providing recreation services on public lands could be impacted by this rule. The USFS issues approximately 6,000 recreation special use permits. The BLM issues approximately 3,000 permits and the NPS issues hundreds of CUAs for a variety of commercial services in National Parks in addition to over 360 concessions permits. Because some entities hold multiple permits or authorizations, we estimate the actual number of businesses impacted to be between 6,000 and 8,000. Extended to subcontractors, this number, of course, would increase exponentially.

For example, NPS CUAs are issued for one-year terms, and therefore the impact on these businesses will be immediate and may impair their ability to operate successfully in 2015. Many new USFS and BLM permits will be renewed in 2015. Prices for the services under these permits will have already been set for many of these operations, which are taking advance reservations, when the final rule is issued in the fourth quarter of this year. The confusion about to whom the rule applies, the difference between these authorizations and procurement contracts, and the lack of clarity on how some of the requirements to comply with the rule will be implemented, such as the inclusion of subcontractors and verbal agreements, provide ample justification for the Department to exclude these types of permits from inclusion in the rule.

B. The Proposed Rule fails to make clear what arrangements are "subcontracts" for purposes of the minimum wage requirements.

Consistent with the Executive Order, the Proposed Rule states that it "sets forth the minimum wage rate requirements for Federal contractors *and subcontractors* . . . ." 79 Fed. Reg. 34579. The Proposed Rule also states that "[t]he term *contractor* refers to both a prime contractor and all of its first or lower-tier subcontractors on a contract with the Federal Government." 79 Fed. Reg. at 34572. Furthermore, the Proposed Rule mandates that the minimum wage contract clause must be inserted in all lower-tier subcontracts as a condition of payment. *See* 79 Fed. Reg. at 34581. It is clear by the varied and numerous references to subcontractors that the Department intends for the Proposed Rule to have broad effect across a wide range of contracts. However, the Proposed Rule does not define the term "subcontractor" or explain what would be a "covered subcontract." As a result, the scope of arrangements that would be considered "subcontracts" subject to the

minimum wage requirements is unclear. For instance, would vendors and suppliers to contractors or permit holders be considered "subcontractors"? What about a transportation service provider utilized by an outfitter and guide company to transport passengers to and/or from a whitewater rafting trip or other outdoor recreation experience? We believe that, in both cases, such entities should not be considered subcontractors for purposes of the minimum wage requirements.

It is equally unclear how the Department intends that the minimum wage requirements would be enforced as applied to subcontractors. Proposed section 10.21(b) would requires "[t]he contractor and any subcontractors [to] include in any covered subcontracts the Executive Order minimum wage contract clause referred to in § 10.11(a) and . . . require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts." 79 Fed. Reg. at 34614. It further states that: "The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract." *Id.* What is entirely unclear, though, is how, other than including the required contract clause in any covered subcontract, the Department intends that a contractor could ensure compliance by a subcontractor. Obviously, contractors lack the enforcement authority of a governmental entity. The Department must make absolutely clear how it intends that a contractor would ensure compliance by any subcontractor with the minimum wage requirements in accordance with applicable law, and what specific burdens it intends to impose on contracts in this regard. The Department should clarify, as stated in its "Executive Order 13658 Frequently Asked Questions (FAQs) that "the responsibilities of contractors in complying with the Executive Order" are as follows, and that contractors have no further obligation with respect to enforcement and compliance by any subcontractor with the minimum wage requirements: "Contractors and subcontractors must include the Executive Order contract clause in lower-tiered subcontracts. They must also pay all covered workers the Executive Order minimum wage for all hours spent performing work on covered contracts."

C. <u>Extension of minimum wage to non-contract work activities.</u>

Some businesses in our industry that have federal permits and contracts also derive a percentage of their income from operations unrelated to any federal agreement or authorization. The Proposed Rule states that the minimum wage requirement applies only to those workers' activities that are under the contract. It explains that, "In situations where contractors are not exclusively engaged in contract work covered by the Executive Order, and there are adequate records segregating the periods in which work was performed on contracts subject to the Order from periods in which other work was performed, the minimum wage requirement of the Executive Order need not be paid for hours spent on work not covered by the Order." 79 Fed. Reg. at 34582. While this may

be true for purposes of strict application of the regulation, as a practical matter, it is unrealistic for the Department to expect that a company could pay an employee engaged in work both on and apart from a federal contract one wage for work associated with a federal contract (or contract-like instrument) and a different wage for work not associated with a federal contract (or contract-like instrument). And, even if it were practically feasible, the record-keeping alone associated with doing so would be cost-prohibitive. Thus, the practical effect of the Proposed Rule would be to apply the minimum wage to work on non-federal activities where an employee is not exclusively engaged in work under federal contracts. The Department should specifically acknowledge this practical impact of its proposal, and must consider this reality in its assessment of the impacts of the minimum wage requirements, particularly on small businesses that may be more likely to have employees splitting time between federal and non-federal work.

D. Annual adjustments create uncertainty about budget and pricing for out years.

As stated in the Executive Order and the Proposed Rule, federal contractors and subcontractors would be required to pay their employees a minimum of $10.10 per hour, effective January 1, 2015, and "*an amount determined by the Secretary [of Labor]* pursuant to the Order, beginning January 1, 2016, and annually thereafter." 79 Fed. Reg. at 34571 (emphasis added). Allowing the Secretary of Labor to set and raise the minimum wage annually for businesses included under the Proposed Rule (presumably raising it consistent with the CPI) will present significant complications for members of our industry.

It will make it impossible for many of AOA's members to forecast and accurately adjust their prices for the following season in time to sell trip packages to tour brokers and to the public. Due to the popularity of some of the trips that our members provide, prices can be set and bookings can be made a year or more in advance. Moreover, rates for the services that our members provide under federal contracts in National Parks generally are subject to federal rate approval processes that require long lead times for approval of rate requests. Thus, in order to comply with agency rate approval requirements and/or for purposes of taking advance reservations, many outfitters must set their prices in July or August of one year for the trips occurring in the next year. The Executive Order, as proposed to be implemented by the Proposed Rule, requires the Department to determine the minimum wage for covered contracts and solicitations on an annual basis beginning January 1, 2016, providing at least 90 days advance notice to the public before the new minimum wage is to take effect. Thus, the new minimum wage rate is unlikely to be available when these outfitters set their prices, making accurate budgeting impossible. Requiring outfitters and guides to increase their wage rates after the prices have been set for those services would impose a substantial burden on many of

our members, and further increase the potential negative economic impacts of the Proposed Rule on our industry.

This requirement also presents particularly serious complications for outfitters and guides entering into longer-term concession contracts or other longer-term and short-term covered contract-like instruments with the federal resource agencies, and for the agencies that manage them. Pursuant to the Concessions Management Improvement Act, for example, contracts for NPS concession contracts are awarded based upon consideration of several factors, including the amount of a "franchise fee" or other monetary consideration to the federal government. That act provides that, "A concessions contract shall provide for payment to the government of a franchise fee or such other monetary consideration as determined by the Secretary, upon consideration of the probable value to the concessioner of the privileges granted by the particular contract involved. Such probable value shall be based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract." 16 U.S.C. § 5956. The uncertainty, and likelihood, of the Department mandating increased costs, on a regular, incremental basis over the term of longer-term contracts makes it impossible for businesses in our industry to anticipate their operational costs and bid appropriately for longer-term contracts, as well as raises significant implications for NPS's ability to develop prospectuses for longer-term contracts that ensure a reasonable opportunity for profit as required by federal concessions law. In this regard, the requirement is likely to put further stress on the agency's already highly stressed budget, by potentially reducing the amount of franchise fees paid to the government in order to ensure the financial viability of concession contracts.

E. <u>The Proposed Rule grossly underestimates additional compliance costs.</u>

The Department grossly underestimates the "additional compliance costs" associated with compliance with the Proposed Rule. After noting that the rule requires executive departments and agencies to include a contract clause in any covered contracts and requires covered contractors and their subcontractors to incorporate the contract clause into lower-tier subcontracts, the Proposed Rule states the Department's belief that the "compliance cost of incorporating the contract clause will be negligible for contractors and subcontractors." 79 Fed. Reg. at 34596. Even if this were true, as noted above, the Department proposes to make contractors responsible for subcontractors' compliance. While we reiterate that it is unclear how the Department intends for this to occur, we submit that the costs of doing so would be significant, and certainly not "negligible."

The Department also downplays the additional compliance costs by suggesting that most contractors subject to the rule will not face any new requirements, other than payment of a higher minimum wage, and does not require contractors to make other

changes to their business practices. On this basis, "the Department posits that the only regulatory familiarization cost related to this proposed rule is the time necessary for contractors to read the contract clause, evaluate and adjust their pay rates to ensure workers on covered contracts receive a rate not less than the Executive Order minimum wage, and modify their contracts to include the required contract clause. For this activity, the Department estimates that contractors will spend one hour." 79 Fed. Reg. at 34596.

The Department's characterization of additional compliance costs is simply wrong. Many outfitters and guides will face significant new requirements, in addition to simply payment of a higher wage. Many will need to become familiar with significant new requirements, adapt human resource management systems, review pay scales not just for workers making less than $10.10 an hour but also those whose pay may need to be raised to ensure an appropriate business-wide wage structure, and consider fundamental changes to their business model (including whether to continue doing business on federal lands). It should go without saying that these businesses will spend considerably more than one hour on these activities. In reality, the Proposed Rule adds enormous costs for our members, and particularly for seasonal small businesses, and in some cases will threaten the ability of those small businesses to survive.

The increase in the minimum wage will also increase FICA taxes and workers compensation insurance premiums, which are based on payrolls, unless the impacted businesses reduce their staff or curtail their operations.

F. <u>The economic impacts of the Proposed Rule on our industry will be enormous and devastating.</u>

The Proposed Rule specifically acknowledges that the Department did not evaluate the economic impacts of the Proposed Rule on the outfitter and guide industry and failed to include the industry in the Proposed Rule's economic analysis and the small business (Regulatory Flexibility Act) sections. The nine industrial classifications utilized by the Department did not include the recreation, outfitting and guiding industry. Our industry generally operates under very different conditions from the nine industries considered by the Department. Our industry is comprised substantially of small businesses that operate on a seasonal basis, often in rural areas with small labor pools, and subject to the significant costs and burdens associated with operating on federal lands. Moreover, as the Department recognized, many contractors in our industry are exempt from the SCA. Recognizing the usefulness of data and feedback from small businesses newly affected by the Proposed Rule, the Proposed Rule thus specifically requests information from "small firms with concessions contracts, particularly those that are exempt from the SCA but are covered under Executive Order 13658" to inform the Department's assessment of impacts on small businesses.

In fact, the Proposed Rule will exact a substantial economic burden on our members and threaten the future viability of many in the industry. It will have a significant economic impact on a substantial number of small entities represented by our industry. The Department's Regulatory Flexibility Analysis must specifically assess the impacts of the Proposed Rule on our industry in order to meet its obligations under the Regulatory Flexibility Act ("RFA").

Unlike traditional federal contractors, federal concessioners are unable to pass on the costs associated with payment of a higher minimum wage and additional compliance costs to the federal government. Those costs, to the extent federal concessioners are permitted to pass them on, will be borne by members of the public seeking to access and enjoy their National Parks, National Forests, Refuges, and public lands—at least by those who don't turn away from these federal lands for less expensive recreational opportunities on non-federal lands. Moreover, many of our members' rates are subject to approval by federal agencies, often based on rates comparable to those of operators on non-federal lands. If operators on non-federal lands are able to base their rates on lower wage costs (which will be the case unless the state in which they operate imposes a similar requirement), then this will result in an "apples to oranges" comparison that will disadvantage operators on federal lands.

Many of our members compete with other recreational or experiential service providers that do not operate on federal lands. Requiring outfitters and guides who operate on federal lands to pay a higher minimum wage will place them at a serious competitive disadvantage to operators on non-federal lands who will not be subject to similar increased costs, unless the state in which they operate adopts a similar requirement.

The results of an AOA member survey on the Proposed Rule confirm that the new minimum wage requirements under the Executive Order, as implemented by the Proposed Rule, would have severe impacts on the outfitter and guide industry. Indeed, a staggering 94% of the businesses responding to the survey within our association's membership said that the rule would put a significant strain on their business and force them to cut staff or services or it could "force them out of business." It is very difficult to see how such a result increases the quality of government services and improves employee morale and productivity, two of the purported benefits of the Executive Order and Proposed Rule. Instead, it will only hurt small businesses, put hard-working people out of work, and reduce the availability of affordable opportunities for the public to enjoy America's treasured federal lands. Applying these requirements to the types of contracts, permits, and other contract-like instruments used in the outfitting and guiding industry and other concessions operations—where affected businesses must either absorb the costs or, if and to the extent possible, pass them on to the public—simply raises far different

issues from applying them to government procurement contracts, where those additional costs can be reflected in contract bids and passed on to the federal government.

III. Conclusion

As reflected in the comments above, AOA contends that the Proposed Rule is vague and overly broad and believes that it will have significant economic impacts on the hardworking small business owners who constitute AOA's membership and who provide a valuable service to the American public by facilitating their use and enjoyment of America's treasured recreation lands. Before promulgating a final rule, the Department must engage in further economic analysis to include the outfitting and guiding and outdoor recreation industry. The Department should also narrow the scope of the rule and provide further clarification as to which contract-like instruments and subcontracts are covered by the requirements.

Thank you for your consideration of these comments.

Sincerely,

David Brown
Executive Director
America Outdoors Association
P.O. Box 10847
Knoxville, TN 37939