



Tribal Environmental Policy Center

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July 29, 2015

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

**Subject: Gathering of Certain Plants or Plant Parts by Federally
Recognized Indian Tribes for Traditional Purposes**

To Whom It May Concern:

The Tribal Environmental Policy Center (TEPC) is pleased to submit these comments regarding the National Park Service's (NPS') proposed rule for Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 80 Fed. Reg. 21674 (April 20, 2015) (Proposed Rule).

Introduction

The TEPC is a non-profit organization formed in 2013 dedicated to the mission of providing Indian Tribes with the requisite policy support to advance their efforts to protect, manage, and regulate environmental, energy, and natural resources based on their own values and priorities. Our staff has a long-term relationship with many Tribal leaders and representatives in Indian Country and Alaska Native Villages with whom we confide and seek recommendations about actions proposed by the NPS and other federal agencies, one being the Proposed Rule for which the TEPC provides its comments. However, the TEPC represents itself only as an organization having the best interest of Tribes in mind, and not as a Tribe that faces daily the impacts of federal agency actions on its people and the environment. As such, for this Proposed Rule and other such rules, we recommend strongly that the NPS engage with Tribes in government-to-government consultation to help insure that any actions proposed by the NPS do not impact such Tribes adversely in any way.

The TEPC has significant concerns about the Proposed Rule and most notably its intended purpose, which is to allow Tribes to gather and remove plants or plant parts from NPS lands for traditional purposes while "ensuring there is no significant adverse impact to park resources and values."¹ However, the NPS fails to state clearly how park resources and values are adversely impacted under current conditions, *i.e.*, what problem exists that requires fixing.

¹ Proposed Rule at 21674.

Agreements between NPS park unit managers and Tribes for gathering and removing plants and plant parts for traditional purposes appear to exist currently absent any adverse impacts to park resources and values, even though the Proposed Rule indicates that current NPS regulations “do not allow tribes or tribal members to gather plants or plant parts on parklands for traditional purposes except where specific statutes or treaties grant rights to do so.”² The TEPC finds itself using the old cliché, “if it ain’t broke, don’t fix it,” by calling for the NPS to keep the status quo regarding the gathering and removal of plants and plant parts for traditional purposes and to provide Tribes with a separate opportunity to consult with the NPS regarding any modifications to the status quo that they might feel necessary.

Alternatively, if the NPS proceeds with adoption and implementation of the Proposed Rule, the TEPC provides its comments and recommendations regarding the rule’s exclusion of coverage for non-federally recognized Tribes, problems with the NPS entering into agreement with Tribes, the rule’s threat to confidential Tribal information, and the lack of Tribal consultation.

Proposed Rule’s Exclusion of Coverage for Non-Federally Recognized Tribes

The Proposed Rule shall “authorize agreements between the National Park Service and *federally recognized Indian tribes* to allow the gathering and removal of plants or plant parts by designated tribal members for traditional purposes.”³ (*emphasis added*). The NPS makes the Proposed Rule specifically applicable to federally recognized Indian Tribes, ignoring the fact that a number of non-federally recognized Tribes currently gather and remove plant and plants parts from NPS lands for traditional purposes. If an NPS park unit manager takes the language of the Proposed Rule literally, he or she may refuse to enter into any further agreements with non-federally recognized Tribes to gather and remove plant and plant parts. The TEPC finds that this would be a travesty of justice for such Tribes that have collected such materials since time immemorial. And, if a non-federally recognized Tribe should gain federal recognition at a later date, it may be too late for the Tribe to preserve its traditional practices of gathering and removing plants or plants parts from NPS park units since the younger generation of Tribal members may be deprived too long from engaging in such practices.

The TEPC also finds that excluding non-federally recognized Indian Tribes from coverage under the Proposed Rule is contrary to NPS policies. First, Section 1.11 of the *National Park Service Management Policies 2006* provides that “American Indian tribe” means any band, nation, or other organized group or community of Indians, including any Alaska Native Village, which is recognized as *eligible for the special programs and services provided by the United States to Indians* because of their status as Indians.⁴ (*emphasis added*). The TEPC finds that non-federally recognized Tribes, like their federally recognized counterparts, are eligible for a number of such programs and services under such federal statutes as the Native

² *Id.*

³ *Id.*

⁴ *National Park Service Management Policies 2006*, Section 1.11.

American Housing Assistance and Self Determination Act. In fact, according to the U.S. General Accountability Office, 24 federal programs awarded more than \$100 million to 26 non-federally recognized Tribes for fiscal years 2007 through 2010.⁵ Hence, using Section 1.11 as a backdrop, it would appear to the TEPC that non-federally recognized Tribes should be covered by the Proposed Rule. Second, the Proposed Rule indicates that Section 4.2.1 of the *National Park Service Management Policies* directs NPS to “inventory, monitor, and research traditional knowledge and authorizes the NPS to support studies designed to understand the ceremonial and traditional resource management practices of Native Americans.”⁶ Instead of distinguishing between federally and non-federally Tribes, the NPS, in this section, has placed the greatest emphasis on inventorying, monitoring, and researching traditional Tribal knowledge, regardless of whether a Tribe is federally recognized or not. This would affirm the Proposed Rule’s claim that the *National Park Service Management Policies 2006* is NPS’s acknowledgment and respect for the special and longstanding connections that Tribes have had with parklands prior to the establishment of NPS park units.⁷

Finally, the Proposed Rule ignores the U.N. Declaration on the Rights of Indigenous Peoples (Declaration) which, in December 2010, the Obama Administration signed,⁸ and which sets out the individual and collective rights of Indigenous Peoples, many rights that the President has consistently supported such as the right of Tribal self-determination. The Declaration makes no distinction between a Tribe’s recognition by its home country, *i.e.*, federally or non-federally recognized, and, instead, focuses on the rights of such Tribes to engage in their traditional practices unimpeded by others. Specifically, the following three Articles of the Declaration would tend to undermine the Proposed Rule’s coverage to be limited to federally recognized Tribes:

Article 24: 1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.⁹

Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.¹⁰

Article 31: 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural

⁵ Federal Funding for Non-Federally Recognized Tribes GAO-12-348: Published: Apr 12, 2012.

⁶ Proposed Rule at 26175.

⁷ *Id* at 21676.

⁸ The United Nations Declaration on the Rights of Indigenous Peoples (*see* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

⁹ *Id.*

¹⁰ *Id.*

expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.¹¹

The TEPC recommends that the NPS expand the coverage of the Proposed Rule to include non-federally recognized Tribes. Alternatively, if the Proposed Rule does not include coverage of non-federally recognized Tribes, the TEPC recommends that such Tribes already engaged in gathering and removal of plants or plant parts from NPS park units for traditional purposes be allowed to continue to do so.

Problems with the NPS entering into agreement with Tribes

The Proposed Rule provides that agreements between the NPS and a Tribe would include “limits on size, quantities, seasons, or locations where the gathering and removal may take place.”¹² Further, the Tribe’s government would be responsible for designating which Tribal members would be allowed to gather and remove plants or plant parts.¹³ The TEPC finds this problematic as it would grant NPS park unit managers the right to make decisions about Tribal cultural practices. Neither a federal agency nor its employees should have such a right which is essentially a regulation of Tribal culture. Such control over traditional practices could significantly compromise such practices based on the interjection of individuals who have no relationship to the practices.

The TEPC recommends that the any decisions contained in an NPS-Tribe agreement about a Tribe’s gathering and removal practices of plants or plant parts for traditional purposes should be vested with the Tribe that has engaged in such practices for an extended period of time.

Threat to Confidential Tribal Information

The Proposed Rule provides that, to enter into an agreement with the NPS regarding the gathering and removal of plants or plant parts for traditional purposes, a Tribe must provide to the NPS a description of the traditional association that the Tribe has to the park area; a brief explanation of the traditional purposes to which the gathering and removal activities will relate; and a description of the gathering and removal activities that the Tribe is interested in conducting.¹⁴ Many Tribes strive to keep their traditional practices hidden from those outside their respective communities to prevent overgathering or damage by others, or for other cultural

¹¹ *Id.*

¹² Proposed Rule at 21677.

¹³ *Id.* at 21676.

¹⁴ *Id.* at 21677.

reasons. The TEPC finds that keeping such information confidential would be made near impossible by the Proposed Rule.

The Proposed Rule provides no safeguards for keeping information confidential regarding a Tribe's gathering and removal of plants or plants parts for traditional purposes even though the NPS believes that existing law can protect sensitive or confidential information submitted to it by Tribes.¹⁵ For example, the TEPC has concerns about what happens to the confidentiality of Tribal information held by NPS employees who leave their service with the federal government. What prevents them from exposing specific information about a Tribe's traditional gathering practices (e.g., location and timing of gathering practices) that could potentially invite members of the public to show up to observe, harass, or even interfere with these practices? But even before that, Tribe's risk having confidential information about their traditional gathering practices exposed based on the Proposed Rule's requirement that environmental reviews and further studies be undertaken, as needed, prior to entering into agreements that would allow gathering and removal in national park units."¹⁶ This means that a Tribe would have to share confidential information with NPS employees absent any guarantee that an agreement would be made between the NPS and the Tribe. Tribes have a right to protect confidential information about their traditional gathering practices, or what the TEPC considers their intellectual property, absent interference from the federal government.

The TEPC recommends that the NPS provide Tribes with definitive safeguards to keep confidential any information shared with the NPS or its employees about Tribal practices regarding the gathering or removal of plants or plant parts for traditional purposes.

Tribal Consultation

The Proposed Rule provides that six Tribal consultation meetings were held by NPS in the lower 48 states in which 50 Indian Tribes participated.¹⁷ The TEPC does not find that these consultation meetings, which were nothing more than listening sessions, equate to consultation in accordance with Executive Order (EO) 13175. Further, having only 50 Tribes out of a possible 338 Tribes¹⁸ participate in the meetings shows a lack of effort on the part of the NPS to consult with Tribes regarding the Proposed Rule, although the TEPC finds that the NPS made a better effort to consult with Alaskan Tribes, having contacted 70 of them traditionally associated with Alaskan parks.¹⁹

¹⁵ *Id.*

¹⁶ *Id.* at 21674.

¹⁷ *Id.* at 21675.

¹⁸ There are 567 federally recognized tribes with 229 of them located in Alaska, meaning that the other 338 Tribes are located in the lower 48 states.

¹⁹ Proposed Rule at 21675.

EO 13175 requires the NPS to develop an accountability process to ensure “meaningful and timely input by development of regulatory policies that have tribal implications.”²⁰ As such, the TEPC recommends that the NPS develop a comprehensive Tribal consultation plan for the Proposed Rule and subsequent regulatory and non-regulatory actions proposed by the NPS that have substantial direct effects on one or more Indian Tribes. Although Tribes consider consultation to be very important, Tribes have limited resources and time to expend on it. The NPS must be sensitive to this fact and make every effort to provide Tribes with any additional resources and assistance that they might require to engage in effective consultation.

The TEPC recommends that the NPS implement the following consultation process with Tribes:

1. Develop guidance on how the NPS intends to assure that consultation meetings with Tribes result in meaningful dialogue rather than simply pro forma consultation.
2. Assign a Tribal liaison to the specific NPS action who has extensively worked with Tribes on similar issues.
3. Provide adequate time to Tribes to review and provide comments concerning proposed NPS actions well beyond the 30- to 60-day periods provided to the public to make its comments.
4. Send a letter to each Tribal chairperson with copies provided to appropriate staff (*e.g.*, Tribal administrator, environmental manager) that asks a Tribe how it would like to be consulted with on the Proposed Rule or other proposed NPS actions. Providing copies to different individuals of authority within the Tribe provides better assurances that the Tribe will clearly be made aware of the NPS action and the opportunity to consult. Further, asking the Tribe about how it would like to be consulted respects the Tribe’s individual preferences and Tribal culture, and helps to insure that true government-to-government consultation occurs.
5. Provide assurances to Tribes that the most senior-level NPS officials will be engaged in consultation with them. This is the proper procedure to follow because Tribes will likely be represented by their highest-level officials, such as Tribal chairpersons and council members, in consultation processes.
6. Keep the channels of communication open throughout the consultation process and throughout development of the proposed NPS action.

²⁰ Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 9, 2000), at http://www.nps.gov/nagpra/AGENCIES/EO_13175.HTM (last visited on July 29, 2015).

According to some Tribes, coming to a final agreement is not as important as building ongoing channels of communication.

7. It is the duty of the NPS to educate Tribes (leaders, representatives, and community members) about the Proposed Rule or other NPS actions and the potential impacts on the Tribe and its members. The NPS should ensure that Tribal members receive information about the NPS action and its impacts because Tribal leaders often rely on input from such members to make decisions that impact the Tribe.
8. Do not rely solely on written communications and telephone conversations. Group meetings, direct mailings, teleconferencing, direct telephone communications, and email may not be sufficient to engage particular Tribes. The NPS must hold in-person face-to-face meetings with Tribal representatives. The NPS must be prepared to accept oral comments from Tribes in the place of or in addition to written comments.

Further, the NPS must engage in government-to-government consultation with individual Tribes and not groups of Tribes, which occurred as part of its alleged consultation process for the Proposed Rule. Such a consultation approach is necessary for a number of reasons. First, it provides for more candid conversations between the individual Tribe and the NPS than would occur otherwise during a group meeting. Second, each Tribe's circumstances are unique and must be treated as such by the NPS. A group meeting of Tribes would only give short shrift to these circumstances. Third, most cultural resources information is protected from release under statutory exemptions to the Freedom of Information Act. Discussion of such information by an individual Tribe as part a group meeting of Tribes risks its release to the general public and potentially endangers Tribal cultural sites and practices. Finally, the subject matter may be so unique that government-to-government consultation between the individual Tribe and the NPS provides the best opportunity for a resolution to the situation versus a group meeting of Tribes where any number of Tribal issues could be discussed in a finite period of time.

Conclusion

In summary, the TEPC is pleased to provide the aforementioned comments regarding the Proposed Rule. If the NPS should have any questions of the TEPC, please feel free to contact the TEPC via phone at (505) 340-6319 or via e-mail at info@tribalepc.org.

Respectfully submitted,

Tribal Environmental Policy Center

