

FROM:

Society of Environmental Journalists
American Society of Newspaper Editors
Radio-Television News Directors Association
National Freedom of Information Coalition
Reporters Committee for Freedom of the Press
Coalition of Journalists for Open Government
National Press Photographers Association
Society of Professional Journalists
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National Association of Science Writers
National Education Writers Association
Journalism Center on Children & Families
National Federation of Press Women
American Society of Journalists and Authors, Inc.
Association of Independents in Radio

TO: Department of Interior/National Park Service
Attn: Lee Dickinson, Special Park Uses Program Manager
National Park Service
1849 C St., NW., ORG CODE 2460
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DATE: October 19, 2007

SUBJECT: Comments on Proposed Commercial Filming Rule (1024-AD30)

Submitted Electronically via federal rulemaking portal, www.regulations.gov.

The Society of Environmental Journalists (SEJ) and other national journalism groups captioned above wish to submit comments on the Department of the Interior's "Proposed Rule: Making Motion Pictures, Television Productions, Soundtracks or Taking Still Photographs on Certain Areas Under the Jurisdiction of the Department of the Interior." This proposal, identified as RIN 1024-AD30, was published in the *Federal Register* on August 20, 2007, pp. 46426-46432.

As organizations of working journalists, we are taking this opportunity to express our strong concern over the possible negative impact of the proposed rule on the First Amendment rights of a free press, and to suggest specific ways of improving the rule to alleviate these concerns.

We recognize the importance of the Interior Department's (DOI's) mandate to protect the nation's natural resources and acknowledge that in many cases a properly designed permit/fee structure can be an effective and appropriate tool in accomplishing this goal.

We have three principle concerns.

First: the proposed rule reverses and turns on its head the clear intent of the authorizing statute -- which specifies presumptively that no permit or fee shall be required for **still photography**, *except* in certain narrowly defined circumstances. We urge that the presumption of the law be followed in the rule.

Second: the proposed rule's definition of **news coverage** is unworkably vague and restrictive. It needs to be clarified and broadened. The rule allows DOI agencies to classify as "commercial filming" activities which are clearly news coverage, such as news documentaries or coverage of resource management issues.

Third: the proposed rule extends the permit/fee structure to restrict **audio recording** as well as photography. This was neither authorized nor intended in the underlying statute, P.L. 106-206, and is therefore illegal. We urge that the rule state blanketly that no fee or permit shall be necessary for any audio recording not incidental to commercial motion photography.

Background

Until quite recently (2000), the National Park Service was prohibited by law from collecting fees for filming of any kind on National Park System lands. There was a strong reason for this: the beauty, grandeur, and cultural or historic uniqueness of park resources is in fact a resource belonging to all the people of the United States. In addition to conserving these resources, the Park Service's mission is to share them with and interpret them to the U.S. population. The same holds generally for other lands under DOI jurisdiction.

The heavy and sometimes resource-damaging impacts of large-scale Hollywood-style movies, advertising shoots, and for-profit promotional events is one of the reasons Congress changed the law in 2000 to allow the Park Service and other agencies to manage impacts with a permit/fee mechanism.

In regulations and directives implementing the 2000 law, DOI acknowledged that Congress never intended it to apply to news-gathering activities, and exempted news coverage from those special-use permits and fees. But the definition of "news" used in various regulations and directives, in practice, has imposed fees and permits that have threatened to make traditional news-gathering activities prohibitively slow, difficult, or expensive.

The news media, broadly defined, are potentially one of the most effective allies of the NPS, FWS, and Interior in achieving their mission of interpreting the parks and refuges --

as well as communicating the importance of resource conservation. Only by enabling effective news coverage can DOI maximize its success in these missions.

It is erroneous to suggest that the law requires Interior or its component agencies to impose permits and fees on *all* visual and sound recording in the parks and refuges. It does not. Interior currently exempts "news coverage" from such requirements, so Interior clearly recognizes that it has discretion on how it applies permits, and that it has discretion to exempt both casual visitors and news media. The issue here is how Interior is choosing to use its discretion.

Main Specific Concerns

1. Still Photography. In direct violation of the letter and spirit of P.L. 106-206, the proposed rule makes a presumption that still photography on DOI lands will be subject to fees and permits. The law, by contrast, presumes and directs that no fees or permits will be required for still photography -- regardless of whether it is commercial or non-commercial -- except in certain narrowly-drawn circumstances. (Sec. 5.3(b))

Rather than using the language: "Still photography requires a permit if: ...," we urge DOI to reword the rule to read: "Still photography shall not require a permit unless: ...".

P.L. 106-206 makes clear that permits and fees are not to be charged for still photography unless it occurs in areas closed to the public, causes administrative costs, requires models and props, damages resources, disrupts public use, or creates hazards.

2. Commercial Filming vs. News Coverage. Foremost among our concerns is that the proposed rule defines "commercial filming" in ways that could be read to include a large portion of the news coverage of DOI-administered lands.

A. The rule appears to encompass news-gathering photography as part of "commercial filming." It defines "commercial filming" as recording for a "market audience." "Market" and "audience" are words commonly and interchangeably used to describe those who watch "commercial" television news or purchase and read newspapers or magazines. Video news that is delivered over paid-subscription cable or satellite channels could be considered filmed for a market audience. Any online newspaper or online news medium for which subscribers pay, could, as another example, be said to have a market or audience. Any online newspaper or online news medium for which subscribers pay or that carries advertising could fall within the breadth of that definition. Yet all of these are a form of filming for the presentation of news and do not represent commercial filming in the sense that Congress intended. The definition, simply, is overly broad. The Department should narrow the definition to make clear that it does not intend to use the permit/fee mechanism in an effort to regulate the news media. (Sec. 5.2)

B. It defines "commercial filming" to include "documentary." In our view, documentary is a form of news coverage, whether video, audio, or print. DOI betrays a fundamental lack of familiarity with the essential nature of news coverage by including documentary here. Is DOI going to be distinguishing between film shot by *Frontline* or *60 Minutes* and film shot by *Discovery Channel* or *National Geographic Daily News*? We think it is all news and we do not believe DOI should be in the business of determining what is news. (Sec. 5.2)

C. By including "documentary," DOI seems to be continuing a distinction it made in the previous rule -- which exempted *only* "spot or breaking news." This distinction is neither clear nor obvious to us. A fairly small portion of the news about National Parks or Wildlife Refuges is "breaking or spot" news in the traditional sense. The big policy issues about public lands about which the public needs to be informed are often ongoing and non-breaking in nature. Is the recovery of Yellowstone from a massive fire breaking news? Hardly. Yet it is information critical to public understanding of Park policy issues. Much of the important "news" about Parks -- from wolf populations to snowmobile impacts -- is not "breaking" news and can *only* be covered by documentary news forms. (Sec. 5.2) (See also Yellowstone NP photo rules at <http://www.nps.gov/yell/parkmgmt/upload/newfilmregs.pdf>).

D. The proposed rule continues unchecked the current policy of treating freelance photojournalists and independent news-film production crews as performing "commercial filming." That is how the current Yellowstone photo rules interpret NPS policy. Yet an increasingly large proportion of the working journalists covering DOI resource issues are freelancers or independents. The effect of the proposed rule could be to impose prohibitive barriers to covering important public policy issues decided by DOI.

Here, for example, is an excerpt from the current Yellowstone NP filming rules:

"Documentaries filmed specifically for sale to a news station or educational channel are considered a commercial venture and require a permit. News media crews not covering newsworthy/news making events, but shooting human interest, staged events, or other topics are required to obtain a permit before proceeding with filming."

"News media crews filming breaking news (an event that cannot be covered at any other time or location) are not required to obtain a permit, but are subject to the same restrictions and conditions necessary to protect park resources and public health and safety, and to prevent derogation of park resources and values. Photographers of breaking news events or documentaries involving breaking news events and sound technicians working with news photographers are also exempt from the permit requirements, if no

advertising, and no set, props, or models are used and there is no derogation of park values or disruption of park visitors. The determination of what is considered to be breaking news is at the discretion of the Chief of Public Affairs or his representative."

The proposed rule falsely certifies that it will not have a significant economic impact on a substantial number of small business entities. To the contrary, most freelance journalists and photographers and independent production companies are small business enterprises. The proposed rule would in many cases result in extreme financial hardship for these small entrepreneurs, and could push them away from covering public lands issues and into other areas.

Interior has put itself in the position of defining journalism paid for by nonprofit public media as "commercial filming" -- which seems absurd.

3. Audio Recording. The proposed rule specifically includes audio recording as an activity potentially subject by itself to permits and fees. Sec. 5.2 defines "commercial filming" to mean "sound recording" with no further qualification. Other passages in the proposed rule, including its title, use the term "soundtracks."

The requirement of permits or fees for audio recording is not authorized by P.L. 106-206, and is contrary to the intent of P.L. 106-206. P.L. 106-206 makes no mention of audio recording (or, for that matter, sound recording or soundtracks). The proposed rule unconstitutionally restricts the First Amendment right of radio journalists to cover public policy issues on DOI lands. It also prohibits the use of a recording device as an alternative to written note-taking for all journalists. Yet there is no conceivable justification for this permitting measure as a protection of natural resources. Audio recording is inherently a low-impact or no-impact activity. It should not be subject to the permit/fee requirements at all.

Despite the silence on P.L. 106-206 on sound recording, previous DOI and NPS rules included mention of "soundtracks." In the context of an authorizing statute that pertains specifically to commercial filming, the only possible interpretation is to understand "soundtracks" as limited to only those audio recordings incidental to, and simultaneous with, motion visual images. The proposed rule unlawfully expands this incidental understanding of soundtracks to include all audio recording. It amounts to an arbitrary and capricious expansion of government power by regulatory fiat. We are aware of a case in the last two weeks, where a reporter working for a news service that feeds public radio stations was told that she needed a permit to interview a Yellowstone wolf biologist.

Since a large portion of radio-news coverage of DOI resource issues is done by various public radio outlets, the proposed rule actually discriminates against non-commercial public broadcasting news. The current rules at Yellowstone NP, for example, which are in no way contravened by the proposed rule, specifically state that "public TV presentations" are required to obtain permits.

Independent audiojournalists and independent audio production companies are responsible for producing a huge portion of the news, including news about Interior lands, that is broadcast on U.S. airwaves. We are aware of at least four independents who reach audiences of well over 1 million via NPR news magazines alone. And that does not include *Living on Earth* (independent via PRI) and numerous others with smaller regional or local audiences.

Recommendations

1. Adopt/Adapt FOIA Definition of News Media.

The Interior Department in this proposed rule is trying to forge its own definition of "news coverage." A tested and refined definition already exists under the statute, regulatory, and case law related to the federal Freedom of Information Act (FOIA). FOIA has evolved from being amended by Congress and litigated in the courts for more than 40 years. Congress is currently in the process of refining that definition. DOI could avoid Congressional intervention and extensive litigation by adopting or adapting the distinctions between news and commercial activity which have evolved under FOIA -- specifically the criteria used under FOIA for exempting news media from fees.

In our understanding, FOIA defines news media as any group that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience. See *Department of Defense v. National Security Archive*, 58 U.S.L.W. 3596 (U.S. March 19, 1990) (No. 89-1204).

2. Recognize Freelancers and Independent Producers as News Media.

A reporter, photographer, or producer is a representative of the news media under FOIA if that person is actively gathering "news" for an organization (commercial or otherwise) that publishes or broadcasts news to the public.

A freelancer or independent producer qualifies under FOIA as a representative of the news media by demonstrating a solid basis for expecting publication. Many independents have a record of such publication that they can point to. While a contract for publication or broadcast would adequately demonstrate this, it may not always be required. Both versions of the FOIA legislation currently before Congress (HR 1309 and S 849) recognize and reaffirm the basic principle that independent journalists and producers are legitimate representatives of the news media. The rule should do likewise.

3. Broaden "News" Definition To Include More Than Just Breaking News.

While the proposed rule itself does not limit "news" only to breaking news, units under DOI's jurisdiction are currently interpreting it this way. The Yellowstone NP filming rules require a permit for any filming except "breaking news," defined as "an event that

cannot be covered at any other time or location" (See <http://www.nps.gov/yell/parkmgmt/upload/newfilmregs.pdf>).

In reality, as experienced both by government agencies and the news media, "news" is much broader. The regulation should preclude narrow definitions like that at Yellowstone National Park by providing a broad definition. News should be understood or defined as information about current events or of about matters of current or continuing interest to the public. In the context of DOI lands, that should include information (visual or otherwise) relevant to publicly owned natural and cultural resources or their management, DOI policies and decisions, and DOI's performance of its job.

4. Explicitly Exempt Audio Recording from Permit and Fee Requirements.

There is no statutory authorization for imposing fees or permits on audio recording. But since some DOI units (e.g., Yellowstone) claim authority for imposing fees or permits on sound recording, the final rule should state explicitly that sound recordings are exempt unless incidental to commercial filming.

5. Explicitly State Presumption That Still Photography Is Permitted.

Most still photography involves little more than a photographer and a camera -- certainly a minimum of personnel, equipment, and impact on public lands. Likewise, most DOI lands consist of areas where the public are allowed. The rule should follow the law and state that still photography is presumptively permitted except in areas off-limits to the public or when it threatens resource damage, disruption of use, or hazard to the public.

6. Eliminate Subjective Restrictions on News-Gathering.

The proposed rule states that news coverage "is subject to time, place, and manner restriction," but does not specify clear criteria for such restrictions. We are concerned that such language could be used arbitrarily or capriciously by DOI officials to deny photojournalists and audiojournalists their First Amendment rights. The restrictions should be clarified or eliminated.

The regulation states that permits shall be denied when filming activity is "inappropriate or incompatible with the purpose of the refuge." Like limits based on the need for special supervision, such limits can be based on subjective judgment. The rule should establish clear and specific criteria or require each particular park, refuge, or management unit to do so.

Conclusion

The Society of Environmental Journalists and undersigned organizations urge the Department of Interior to withhold finalization of the proposed rule until it has done a major rethinking and revision of it.

As proposed, it will seriously impair normal news coverage of public lands and natural resources policy issues under the jurisdiction of the DOI and component agencies.

We urge DOI to abandon its restrictive definition of news and to broaden it instead. Permits and fees should not be required for small-scale and non-disruptive documentary filming, freelance and independent productions, audio recording, and most still photography.

The undersigned organizations thank DOI for the opportunity to comment and submit the above comments for the public record in this rulemaking.

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