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formerly National Coalition to Save Our Mall

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*Advancing the legacy of the
National Mall through effective
public policy and innovative
ideas*

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October 11, 2018

Brian D. Joyner
Chief of Staff
National Mall & Memorial Parks
National Park Service
900 Ohio Drive, SW
Washington, DC 20024

Via the federal eRulemaking portal

<https://www.regulations.gov/comment?D=NPS-2018-0007-0001>

Re: Proposed Rules: Special Regulations, Areas of National Park System,
National Capital Region, Special Events and Demonstrations
Regulation Identifier Number (RIN) 1024-AE45

Dear Mr. Joyner:

The National Mall Coalition appreciates this opportunity to comment on the National Park Service "Proposed Rules" for NPS-managed parkland in the nation's capital. We strongly believe that the new proposals to impose fees for free speech demonstrations, place restrictions on special events, and ban demonstrations in certain areas including around the White House, will continue an unacceptable decline in the Mall's public vitality. As we explain below, we strongly recommend that the Proposed Rules be withdrawn and reconsidered in open, thoughtful consultation with all interested and affected parties, and in compliance with the National Historic Preservation Act (NHPA) and National Environmental Policy Act.

The Coalition is a DC-based nonprofit organization that advocates for the well being and improvement of the National Mall to ensure its long-term vitality as the stage for American democracy. Since our founding in 2000, the Coalition has participated in countless public consultation meetings headed by NPS, and conducted under Section 106 of the NHPA, for undertakings on the Mall including new memorials and the National Mall Plan. These discussions -- involving NPS and members of interested nonprofits, civic groups, and local residents, as well as relevant federal and District of Columbia government entities -- have resulted in improvements to proposed projects and policies that often have minimized adverse effects on the Mall's historic plan. The Coalition has consistently sought to protect and advance the purpose of the National Mall as our country's preeminent open space for civic celebrations, First Amendment demonstrations, and recreation.

With the “Proposed Rules,” NPS seeks to update and clarify policies governing public use and activities of all kinds on parkland in the capital, including the National Mall. We support this intent, especially in light of recent controversies concerning public and private activities on the Mall. However, particularly in recognition of these controversies, any rewrite of NPS rules must be a truly open, consultative process, not one that is conducted behind closed doors by NPS and a limited range of partners. We also believe that some NPS policies need to be thoroughly rethought from the ground up, not merely “tweaked.” Some NPS policies, evolving gradually over the years, have led to restrictions and bans that threaten the very public open space vitality that is essential to maintaining the Mall as a nationally significant historic and cultural resource. The new proposals add to that threat.

Accordingly, we strongly recommend that the Proposed Rules be withdrawn and reconsidered in open, thoughtful consultation with all interested and affected parties, and in compliance with the National Historic Preservation Act (NHPA) and National Environmental Policy Act.

We are concerned about both the proposed changes and the attitude they seem to express toward public use. The National Mall is our country’s preeminent landscape symbol of American democracy, a designed landscape originating in the 1791 L’Enfant Plan for the City of Washington, the setting for our national monuments and museums, and a public open space intended from its creation for use by the American public. It belongs to all Americans – not just as a place we should protect and respect, but also as a place for people to gather, to express themselves, to participate in government. But the Proposed Rules, as written, will discourage First Amendment demonstrations, restrict special events and potentially force an end to the Smithsonian Folklife Festival, and otherwise limit or ban cultural, civic, and recreational activities. The rules will reduce access by the American public and thus fundamentally alter the historic and cultural character of the Mall.¹

Moreover, the NPS has devised its Proposed Rules behind closed doors, without any input from the public and other Mall stakeholders. The public can only react to NPS decisions — posted in the Federal Register, a government publication few people even know exists — and hope they are listened to. The Library of Congress, Smithsonian, and other public institutions located on the Mall are at the same disadvantage.

We remind you that this rule change is an undertaking that requires review under Section 106 of the National Historic Preservation Act (NHPA – See 36 CFR §800.16(y)). Such review requires consultation among affected and interested parties, aimed at achieving agreement on ways to avoid, reduce, or mitigate any

¹ Lisa Benton-Short, *The National Mall: No Ordinary Public Space*, Toronto: University of Toronto Press, 2016, examines the history and significance of public use of the Mall open space and the impact of modern changes.

adverse effects. We strongly recommend that NPS initiate Section 106 consultation immediately. NPS should also attend carefully to the *Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act* (<https://www.nps.gov/fpi/Section110.html>), which provide direction specific to the management of historic landscapes like the National Mall and, like the NHPA Section 106 regulations, promote open, agreement-oriented consultation among agencies, experts, and affected parties.

We must also challenge NPS's statement (Federal Register, p. 40474) that the National Environmental Policy Act of 1969 (NEPA) does not apply to this undertaking. These proposed rules will in fact affect "the quality of the human environment" in real and substantial ways by reducing and eliminating the way the public can use the National Mall as a cultural resource. Public access to and use of the Mall are integral to maintaining its historic and cultural character. We believe that the proposed rules will potentially have effects that will meet at least seven of the ten "intensity" measures set forth in 40 CFR §1508.27(b) of the NEPA regulations. Accordingly, considering any such rule change requires that NPS prepare an environmental impact statement and subject it to full public review.

We are aware of formal and detailed comments submitted by the American Civil Liberties Union and the Secretary of the Smithsonian Institution that include substantive objections to some of the proposed rules. The Coalition shares these concerns.

In considering the effects of rule changes pursuant to the NHPA and NEPA, we request that the NPS address serious concerns that include but are not limited to the following:

- Number 2: The proposed changes to the definitions of "demonstrations" and "special events" should not remove the distinction that First Amendment events are protected by law and do not require permits or fees.
- Number 4: The Coalition believes it's a reasonable idea to increase the number of people, currently 25, who can take part in a demonstration without a permit. Many small demonstrations and spontaneous free speech events probably include 50-200 people or so; some parks can easily accommodate many more. Collecting data from past events on the Mall and on popular parks throughout the city can provide valuable information to arrive at a reasonable set of guidelines.
- Number 5: The Coalition believes that requiring a permit for the erection of any structure larger than a small lectern or speakers' platform is overly restrictive and will adversely impact free speech events. We believe a review of past demonstrations will show little evidence that larger structures and signs associated with public gatherings damage park resources.
- Number 6: The Coalition strongly opposes regulations that would charge fees for First Amendment demonstrations.

- Number 7: The Coalition opposes closure of the White House sidewalk and nearby areas that historically have been meaningful and popular areas for First Amendment demonstrations.
- Number 8: The Coalition appreciates the desire to create certain restricted zones at memorials, particularly those that invite quiet contemplation and reflection in their interior spaces such as the Lincoln and Jefferson Memorials. We believe, however, that these zones should be defined with care, especially for open landscape memorials, where restrictions could in fact inhibit demonstrations, celebrations, and spontaneous acts directly associated with the memorial's subject and symbolic meaning. On-site visits to the various memorials by stakeholders would be useful in establishing guidelines for such zones.
- Number 12: The Coalition is disconcerted by the NPS's over-reliance on its 2018 visual impact analysis for proposing restrictions on areas where structures would not be allowed or subject to height limits. This is the first discussion in the Proposed Rules of the historic L'Enfant and McMillan Plans, which are the blueprints for the Mall. Clearly, NPS has limited knowledge of the design intentions and symbolic meaning of these historic plans. This regulation reduces the significance of these Plans to "scenic views" and vistas from the Capitol and White House and other monuments. It fails to acknowledge the equally significant purpose of the vistas, namely, to provide a majestic and symbolic setting for the public activity within the vistas. **The most symbolic images of the Mall are of the open space teeming with people and activities of all kind.** The viability of the Smithsonian Folklife Festival, a beloved American institution after 50 years of success, as well as other important cultural events the American people celebrate on the open space, would be unacceptably threatened by this rule. In addition, the Commemorative Works Act of 1986, cited here, was intended not only to protect "viewsheds" on the Mall but the integrity of the historic plans and public use of the open space. Moreover, turf management guidelines, while a useful tool for NPS maintenance practices, should not be a key determining factor for restricting public activities.
- Number 14: As stated above, we disagree with NPS's statement that the National Environmental Policy Act of 1969 (NEPA) does not apply and urge the NPS to begin this process immediately.
- It is impossible for the public to provide fully informed comment on the Proposed Rules without adequate access to key missing pieces of information. Although many of the NPS-managed parklands in the capital are integral elements of the historic 1791 L'Enfant Plan, the proposed rules give little attention to or consideration of that Plan's historical significance. On the contrary, the rules would diminish the primary intended purpose and function of the Mall – and open space throughout the District. We urge the NPS to provide additional background information, a "Historic Plans Analysis," drawn from National Register of Historic Places documentation on the history and purpose of the Mall, as well as the L'Enfant and McMillan Plans. Other useful information, such as a "First Amendment

Analysis” of the types and numbers of permits requested and granted in recent decades, would give a better understanding of the history of public activity on various public lands and of NPS’s permitting tasks and needs.

The National Mall Coalition believes that any proposed rules and regulations should aim to support and enhance the Mall’s crucial role in American democracy, not restrict it. For over two hundred years, since its origins in the 1791 L’Enfant Plan, the National Mall has evolved and grown to become the stage for American democracy. Every day, this nationally significant public open space is alive with free speech demonstrations, cultural and civic activities, and recreation.

The truth is that the Mall’s grassy open space is not simply an NPS “park unit.” It is an integral part of the Mall’s unified symbolic landscape that encompasses the Capitol and White House, our national monuments and museums. Congress has entrusted stewardship of the Mall to a host of public institutions including the Smithsonian, Architect of the Capitol, and National Gallery of Art. Their institutional mandates — different from NPS’s interest in protecting green grass and monuments — are education and public engagement. The Mall green space is their “front lawn,” their “stage” for all kinds of public festivals and other activities. Policies governing public use need to acknowledge that larger cultural context -- all the more reason to immediately open the public consultation and invite their participation.

In its 2010 National Mall Plan, NPS correctly recognizes the Mall as America’s “civic stage.” NPS’s “Preferred Alternative” states the goal to achieve “a balance that will permit high standards of living and wide sharing of life’s amenities.” This calls for “additional recreational opportunities” and “equitable use among events, restoration, open recreational use.” These are laudable goals. However, many of the new NPS Proposed Rules will take us in the opposite direction and discourage public activity.

NPS appears to be motivated primarily by maintenance concerns, protecting the new turf grass and minimizing costs of repairing wear and tear from foot traffic from large gatherings. The “Vista Analysis” used to justify limits on structures and signs fails to acknowledge that the vistas were intended in the L’Enfant Plan, and function today, as the meaningful setting for First Amendment and other public events. Maintenance must not dominate policy making. Where are the “Historic Plans Analysis” and “First Amendment Analysis” to provide historical and cultural context for public use policy? If anything, the proposed rules should err in favor of more, enhanced public use of the Mall by local residents and visitors alike for free speech, cultural festivals, and recreation.

A meaningful Section 106 consultation is much needed and long overdue. For decades, the Smithsonian and Library of Congress partnered with NPS to host public festivals on the Mall. But now even these major cultural institutions are

being squeezed out. The purpose of the public consultation would be for all participants to be able to listen to and hear all sides and find common ground. The process will allow the stakeholders to acknowledge their different – and sometimes conflicting -- needs and priorities and come to agreement on thoughtful public use policies that balance those differing needs while also preserving the brilliant legacy of the L’Enfant and McMillan Plans that envisioned the Mall as America’s stage for democracy. In our letters to NPS of November 2017 and January 2018 regarding NPS proposed restrictions on recreational use of the Mall, we stated that those restrictions if implemented “will fundamentally alter the historic and cultural character of the National Mall.” The NPS Proposed Rules would impose even greater limits on public use of the Mall open space. More than ever, we believe this undertaking requires review under Section 106 of the National Historic Preservation Act, and we recommend that NPS initiate that process immediately.

There is real urgency for an open and transparent discussion about how we can improve and strengthen the role of the Mall in American democracy. In recent years, restrictions on tents and signs, and fees associated with permits, have resulted in major cultural activities such as the Solar Decathlon, Black Family Reunion, and National Book Festival being denied permits or giving up and looking for other venues, to the detriment of the American public and DC residents. Tour guides tell of school groups that have been stopped by Park Police for gathering on the steps of the Lincoln Memorial to sing patriotic songs. Limits are increasing each year on when and where recreational sports groups can play on the open space. The Smithsonian’s Folklife Festival has worked diligently in partnership with NPS for years to ensure protection of the Mall grass and trees. But new restrictions would all but banish this longstanding, enormously popular cultural festival from the Mall. Little by little this American stage is losing some of its cherished cultural meaning.

Adding to the need for open consultation process is the growing public controversy over NPS restrictions. On November 14, 2017, seven members of Congress wrote the Acting Director of NPS urging NPS to reconsider proposed closures and fees for recreational sports. On June 18, 2018, Congresswoman Eleanor Holmes Norton convened at Town Hall Meeting on Capitol Hill, inviting NPS and members of the public Mall to discuss NPS’s proposals to restrict or ban recreational sports activities on the Mall. She spoke of the need “to find solutions that are acceptable to all” and urged NPS not to make any policy and rules decisions without first consulting with interested parties. Watch the video at <https://www.nationalmallcoalition.org/2018/06/testimony-feldman-addresses-public-use-and-recreational-sports-national-mall/> NPS apparently decided not to follow up with any invitation to Mall stakeholders before issuing the Proposed Rules on August 15, 2018.

The Washington Post editorialized twice against NPS restrictions, on June 22, 2018: <https://www.washingtonpost.com/opinions/dont-let-the-mall-become-an-untouchable-relic/2018/06/22/8e29b426-74cd-11e8-b4b7->

[308400242c2e_story.html?utm_term=.709c9b76a3b1](https://www.washingtonpost.com/opinions/the-trump-administrations-bad-plan-to-charge-for-free-speech-on-the-mall/2018/09/19/0fa6dc84-bb70-11e8-bdc0-90f81cc58c5d_story.html?utm_term=.6ad7665407af) and again, after release of the Proposed Rules, on September 20th, a resounding “no” to charging fees for free speech events: https://www.washingtonpost.com/opinions/the-trump-administrations-bad-plan-to-charge-for-free-speech-on-the-mall/2018/09/19/0fa6dc84-bb70-11e8-bdc0-90f81cc58c5d_story.html?utm_term=.6ad7665407af See also the Letter to the Editor in the Washington Post: The Trump administration wants to tax protests. What happened to free speech? https://www.washingtonpost.com/opinions/the-trump-administration-wants-to-tax-protests-what-happened-to-free-speech/2018/09/11/70f08bfa-b5e1-11e8-b79f-f6e31e555258_story.html?utm_term=.2be204a35e42

As we have stated, the Coalition strongly believes the proposed rule changes to policies for public use of NPS-managed open space including the National Mall require discussion among stakeholders in which all points of view can be heard. The Smithsonian will provide valuable information and opinion that we cannot otherwise know. Same with the National Gallery of Art, DC residents, and other interested parties and members of the public. We look forward to providing our own perspective in such a collaborative process.

At a time when democracy is seen as taking more than a few hits at home and abroad, we must do all we can to ensure that the National Mall continues to thrive as America’s civic stage and that the American public has a meaningful say in its future – and the future of all public open space in the nation’s capital.

We trust that you will carefully consider these comments and act on them.

On behalf of the Board of Directors of the
National Mall Coalition,



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