House Natural Resources Committee
Subcommittee on Federal Lands
Legislative Hearing -- Guides and Outfitters Act, H.R. 5129
November 30, 2016

Testimony of Paul Sanford
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Chairman McClintock, Ranking Member Tsongas, and Members of the Subcommittee:

The Wilderness Society respectfully submits this testimony on H.R. 5129, the Guides and Outfitters Act or "GO Act," scheduled to be considered at a hearing on November 30, 2016.

The GO Act would make a series of changes to the recreational "outfitter-guide" permitting systems of the federal land management agencies. The bill is well-intentioned and comes at a critical time. The outfitter-guide permitting systems of the federal land management agencies need to be modernized and simplified. We commend the subcommittee for taking up this important issue.

We support several components of the bill. However, we must oppose the bill in its current form because we have concerns about other aspects of the bill. We discuss our concerns in detail below. We believe these concerns can be addressed by making some simple changes to the bill. We would welcome the opportunity to work with the subcommittee to resolve these issues before the bill is reintroduced in the next Congress.

<u>NEPA Provisions in Sections 2, 7, and 9</u>

Several provisions in the bill are directed at National Environmental Policy Act reviews of permitting decisions by the agencies. Section 9 would require the Forest Service and the BLM to revise their regulations to streamline processes for permit issuance and renewal. The revised regulations would be required to shorten application processing times, minimize administrative costs, and provide for the use of NEPA programmatic environmental assessments and categorical exclusions to the maximum extent allowable under applicable law. In addition, both section 9 and section 2 would mandate the creation of a specific categorical exclusion for activities "that have been considered under previous analysis or that are similar to existing uses or are not inconsistent with approved uses." Section 7 would expand the use of temporary permits and make these temporary permits subject to the mandated CE in section 2.

We note that actions taken by the U.S. Forest Service since the introduction of this bill make this provision partially unnecessary. In June 2016, the Forest Service issued new guidance on the application of NEPA to outfitter-guide permits. This new guidance directs field units to maximize the use of existing categorical exclusions when authorizing recreation activities under special use permits. The guidance emphasizes that proposed recreation activities that will take place on lands open to the same uses by the public generally do not have a significant impact on the environment and can be categorically excluded from further analysis. The guidance encourages field staff to look broadly for an existing applicable categorical exclusion to authorize visitor activities on Forest Service land, even if the CE was not written specifically for that purpose. This new guidance provides the agency with the tools necessary to achieve some of the same outcomes as section 9.

To the extent that this section remains necessary, we strongly support efforts to modernize the permitting process. We also support the expansion of programmatic environmental assessments and the development and use of appropriate NEPA categorical exclusions to simplify the process for issuing recreational permits. We think directing the agencies to develop CEs through the agency rulemaking process is the right approach for achieving this outcome. The development of additional CEs through rulemaking would preserve the extraordinary circumstances provisions in existing regulations, and would provide the public with an opportunity to comment on the scope of the new categorical exclusions so that they facilitate more recreational use and enjoyment without creating an unacceptable risk of environmental impact or social conflict.

We prefer to direct the agencies to develop specific NEPA CEs rather than creating them in legislation. Legislated CEs circumvent public input and are sometimes applied without regard to whether extraordinary circumstances exist that suggest the need for additional environmental review. The extraordinary circumstances provisions in agency regulations are a critical safeguard in the review process, because they allow agencies to take a closer look at an activity when certain conditions exist, such as the presence of threatened or endangered species, Congressionally-designated areas, or nearby religious and cultural sites. We believe the extraordinary circumstances safeguard should be preserved.

For that reason, we do not support the mandated CE described in the second half of section 9(a)(2) of the bill, and in parallel language that would be inserted in 16 U.S.C. § 6802(h) by section 2 of the bill. Although the mandated CE provisions attempt to include a limiting principle (“considered under a previous analysis”, “similar to existing uses”, “not inconsistent with approved uses”), this language is vague and open to widely varying interpretations. We think this language will force the agencies to issue permits for activities that could significantly increase the amount of environmental impact without any environmental review.

One example would be a permit request for motorized use of a trail where mountain bike tours have previously been authorized. An agency might feel obligated to consider motorized use "similar to" or "not inconsistent with" mountain bike use, and issue a permit without any additional review, thereby eliminating the opportunity for public input and for evaluation of the impact of motorized use on communities that rely on the affected lands. We think that is the

wrong outcome. While it might be entirely appropriate to issue a permit for the motorized use, some degree of environmental analysis is warranted before making such a decision.

We also believe this mandated CE is unnecessary. We expect the guidance issued by the Forest Service in June 2016 will significantly reduce the amount of duplicative analysis by that agency. The mandate in section 9 to minimize environmental review to the maximum extent allowable under applicable law should also lead to the development of CEs that address these situations, and do it through a notice and comment process that provides for public input. Assigning this task to the agencies will allow them to develop effective CEs that fit in well with existing exclusions and preserve the extraordinary circumstances safeguard. For these reasons, we urge the committee to remove the mandated CE from sections 2 and 9 of the bill and allow the agency to develop CEs to address these situations.

Regarding section 7, we support the expansion of temporary permits and agree that existing CEs may need to be revised to make this viable. However, we see significant problems with categorically excluding those permits from NEPA using the mandated CE in section 2. Read together, these provisions would require the agencies to issue temporary permits using the CE, and then convert those permits into long term permits without additional environmental review. This would exclude the issuance of long term permits from NEPA in a wide range of circumstances, thereby eliminating public input, transparency and environmental review for activities that will take place for ten years.

Instead of a cross reference to section 2, we think it would be more appropriate to cross reference section 9 (with the modifications described in our comments above). Section 9 provides the context in which additional CE authority could be developed to allow for the expansion of temporary permits with a limiting principle to ensure that environmental review is conducted in appropriate circumstances.

Section 5

Section 5 would require that permit fees be used to offset the costs of permit administration and to improve and streamline the permitting process.

The agencies are currently authorized to use permitting fees to offset the costs of permit administration and to improve and streamline the permitting process. This provision would require them to use permit fees for these purposes. Mandating that permit fees be used for these purposes would limit the agencies' ability to use these funds for equally valid purposes that also benefit outfitters and guides. A good example is trail maintenance. If this provision becomes law, permit fee revenue could not be used for trail maintenance. We oppose this limitation and recommending deleting this provision from the bill.

Section 6

Section 6 would make several changes to the Forest Service's methods for reviewing permit utilization by existing permit holders. Some of these changes are positive and others raise concerns.

Section 6(a) establishes more favorable terms for reviews of permit utilization, and mandates increases in permit allocations for existing permit holders when additional capacity is available on the forest. We oppose section 6(a) for two reasons.

1. Section 6(a) mandates increases in allocations to existing permit holders when additional capacity is available without regard to whether there are other outdoor leaders interested in obtaining permits for the same land or water unit. By doing so, it prioritizes expanding the allocations of existing outfitters over providing opportunities to other outdoor leaders. We think this unfairly favors existing permit holders. We urge the subcommittee to revise this provision to limit mandatory increases to situations where there is additional capacity available and no other outdoor leaders are interested in permits for the same land or water unit. If other outdoor leaders are interested in permits for the same locations, the allocations of existing permit holders should not be automatically increased, although they could be increased on a discretionary basis by local permit administrators.
2. Section 6(a) mandates increases in allocation without regard to whether a permit holder has satisfactory performance reviews. Any increase in an outfitter's allocation should be contingent on satisfactory performance reviews. We recommend changing the language of section 6(a) to include this requirement.

Section 6(b) would allow existing permit holders to volunteer capacity for use by others without incurring a penalty for doing so. We generally support section 6(b), with one caveat. This section should be revised to authorize temporary assignments to any other qualified outdoor leader. It should not be limited to "other qualified permit holders." This would allow temporary assignments to qualified outdoor leaders that do not currently hold permits.

Section 7

Section 7 would establish temporary permit authority for new uses for a term not to exceed 2 years, and make the issuance and conversion of these permits subject to the NEPA CE in subsection (h)(3) of Section 2, discussed above. In general, we support the expansion of temporary permits but oppose the application of the CE in section 2 to those permits. We discuss this in more detail in the NEPA section above.

Section 8

Section 8 waives the permit indemnification requirement for entities that are prohibited from providing indemnification under state law, and authorizes the use of liability release forms to the extent permitted by state law. The Wilderness Society strongly supports this provision.

The indemnification waiver is vitally important to recreation programs at state colleges and universities, many of which are prohibited by state constitutional provisions from providing indemnification to the federal government. Some community-based recreation programs operate under the same limitations. Without this waiver, these entities have difficulty meeting the terms and conditions of a permit to operate on federal land. Lifting this requirement will be a giant step forward for these programs, which provide transformative experiences to America’s young people.

Section 8 also recognizes that liability release forms are widely accepted under state law, and that federal policy should allow for their use.

Section 9

Section 9 would require the Forest Service and the BLM to revise their regulations to streamline processes for permit issuance and renewal by expanding the use of NEPA programmatic environmental assessments and categorical exclusions. We discuss the NEPA implications of section 9 above.

Section 9 would also require the agencies to establish an on-line system for permit applications to the extent practicable. We support the development of on-line permit applications, and note that this process is already underway. The U.S. Forest Service is currently testing a system that will allow outdoor leaders to apply for permits on-line. Our understanding is that they will deploy this system in 2017.

Section 10

Section 10 would revise Forest Service and BLM cost recovery regulations to reduce the amount of costs recovered from permit applicants and ensure that the current 50-hour credit for work done on a permit applies to each permit authorization.

We recognize that cost recovery is a significant issue for permit applicants of all stripes. However, we oppose this provision. First, it may score and therefore require an offset. Second, it also reduces the resources available to the agencies for administering permits. The agencies are already operating with reduced resources as the result of budget cuts. Reducing their cost recovery authority will make it more difficult for the agencies to complete the work necessary to issue permits.

Instead of dramatically reducing the agencies' cost recovery authority, we prefer to explore ways to reduce the costs incurred by the agencies so that they have less expenses that they need to pass on to permit applicants. We see several ways to do this. First, increase the use of programmatic NEPA, the costs of which are not subject to cost recovery. Section 9 of the bill does exactly that and makes this provision partially unnecessary. Second, fully implement the guidance issued by the U.S. Forest Service in June 2016. Third, develop additional CEs under section 9 that better calibrate the amount of environmental review required for permitting decisions. This action, combined with full implementation of the June 2016 guidance, should minimize the agency's administrative costs and make it unnecessary to reduce the agency's cost recovery authority.

Conclusion

We thank the subcommittee for the opportunity to share our views on the Guides and Outfitters Act, and look forward to working with the Subcommittee to improve the bill before reintroduction in the next Congress.