



4312-52

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 2

[NPS-WASO-23396; GPO Deposit Account 4311H2]

RIN 1024-AE32

General Regulations; Areas of the National Park System, Free Distribution of Other Message-Bearing Items

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service revises its general rule governing the sale or distribution of printed matter to include the free distribution of message-bearing items that do not meet the regulatory definition of “printed matter.” This change gives visitors an additional channel of communication while protecting the resources and values of the National Park System.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background.

Authority and Jurisdiction to Promulgate Regulations.

In the National Park Service (NPS) Organic Act (54 U.S.C. 100101), Congress granted

the NPS broad authority to regulate the use of areas under its jurisdiction. The Organic Act authorizes the Secretary of the Interior, acting through the NPS, to “prescribe such regulations as the Secretary considers necessary or proper for the use and management of [National Park] System units.” 54 U.S.C. 100751(a).

National Park System.

Consisting of over 400 units in 50 states, the District of Columbia and multiple territories, the National Park System covers more than 84 million acres. These units are located in a wide range of environments as diverse as the United States itself. The size of these units also varies tremendously, ranging from Wrangell-St. Elias National Park and National Preserve, Alaska, at 13.2 million acres, to Thaddeus Kosciuszko National Memorial, Pennsylvania, at 0.02 acres.

About one-third of the units—such as Great Smoky Mountains National Park, Tennessee; Grand Canyon National Park, Arizona; Everglades National Park, Florida; and Hawaii Volcanoes National Parks, Hawaii—preserve nature's many and varied gifts to the nation. The other two-thirds of the units recognize benchmarks of human history in America. These units protect elements of great native cultures, far older than European exploration and settlement; preserve battle sites from the Revolutionary and Civil Wars—including the key surrender fields of both great conflicts; embrace Thomas Edison's New Jersey laboratories where he and his staff led a technological revolution more dramatic even than the coming of the computer age; and more. These historical park units reflect the development of both art and industry in America, along with landmarks of social and political change.

As a broader understanding of history took hold, the National Park System eventually grew to include the historic homes of civil rights, political, and corporate leaders, and the lands of the poor, struggling to build lives for themselves on a Nebraska homestead claim or in an

urban community. The National Park System now embraces the birthplace, church, and grave of Dr. Martin Luther King at Martin Luther King, Jr. National Historical Site, Georgia; the birth of jazz at New Orleans Jazz National Historical Park, Louisiana; the flowering of a literary giant at the Eugene O'Neill National Historical Site, California; and the artistic grace of a great sculptor's studios at Saint-Gaudens National Historical Site, New Hampshire. Because of the lessons they help us remember, the National Park System also includes the Japanese American World War II internment camp in the desert at Manzanar National Historical Site, California, as well as Andersonville National Historical Site, Georgia, one of the very bleakest of the Civil War prison sites.

The National Park System is habitat for 247 threatened or endangered species, has more than 167 million items in museum collections, has 75,000 archaeological sites, and 27,000 historic and prehistoric structures. The National Park System also has an extensive physical infrastructure, which includes thousands of buildings, tens of thousands of miles of trails and roads, and almost 30,000 housing units, campgrounds, and picnic areas as well as 3,000 water and waste water treatment systems.

Over 325 million visitors visited the National Park System in 2016, where visitors find not only visual, educational, and recreational experiences but also inspirational, contemplative, and spiritual experiences. For Native Americans, certain national parks are also considered sacred religious sites, where the NPS asks visitors to respect these long-held beliefs, such as by voluntarily not walking under a natural bridge.

Final Rule.

First Amendment activities in units of the National Park System are governed by longstanding but ever-evolving First Amendment jurisprudence; by the statutes and regulations

governing the National Park System as a whole; and by park-specific statutes and regulations.

Title 36 CFR 2.52 currently allows the sale or distribution only of printed matter and only in areas of a park designated by the superintendent. The regulation defines “printed matter” as “message-bearing textual printed material such as books, pamphlets, magazines, and leaflets, provided that it is not solely commercial advertising.” The NPS recognizes, however, that items other than “printed matter” may also contain or present speech, either literal or symbolic, that is not solely commercial and whose expression may be protected by the First Amendment. Accordingly, the NPS is revising its regulations to allow the free distribution of message-bearing items other than printed matter in areas of a park designated by the superintendent, subject to compliance with the regulations at 36 CFR 2.51 and 2.52. These items include readable electronic media like CDs, DVDs, and flash drives; articles of clothing like hats and accessories like buttons and pins; key chains; and bumper stickers.¹

Under the rule, message-bearing items other than printed matter may not be sold within a park unit; they may only be distributed free of charge. This restriction is necessary to prevent the proliferation of unregulated commercial activity that would be inconsistent with park resources and values, that would impinge upon and degrade park scenery, and that would disrupt the visitor experience in many park units.

The revision to § 2.52 to allow the free distribution of other message-bearing items is consistent with the NPS’s National Capital Region (NCR) regulation at 36 CFR 7.96(k). As discussed in the preambles to the proposed and final rules for the NCR regulation, 59 FR 25855

¹ This rule therefore enshrines in regulation NPS Policy Memorandum 14-01,(January 28, 2014), which requires superintendents to allow the free distribution of message-bearing items to the public other than printed matter, so long as the activity occurs within an area designated as available for First Amendment activities under 36 CFR 2.51(c)(1) and otherwise complies with 36 CFR 2.52.

(1994) and 60 FR 17639 (1995), the NPS promulgated § 7.96 to resolve serious issues created by unregulated sales of merchandise on NPS-administered lands that resulted in conflicting and excessive commercialism; degraded aesthetic values; had negative impacts on visitor circulation and contemplation and historic scenes; and inhibited the conservation of park property. In upholding the constitutionality of the NCR regulation limiting the sales of such items, the U.S. Court of Appeals for the District of Columbia Circuit found that the regulation was “content neutral” and “narrowly tailored to serve significant government interests” and offered “ample alternative channels of communication” insofar as “members may display and give the audio tapes and [religious] beads to members of the public so long as they do not try to exact a payment or request a donation in exchange for them.” *ISKCON of Potomac v. Kennedy*, 61 F.3d 949, 952, 958 (D.C. Cir. 1995).

Summary of and Responses to Public Comments on the Proposed Rule.

The NPS published the proposed rule on October 14, 2016 (81 FR 71026) with request for public comment through the Federal eRulemaking portal at www.regulations.gov, or by mail or hand delivery. The 60-day comment period ended on December 13, 2016. A total of 26 comments were received. The NPS evaluated these comments when developing this final rule. A summary of comments and NPS responses is provided below. Many comments supported the rule and expressed gratitude that it provides an alternative means of communication in national parks. After taking the public comments into consideration and after additional review, the NPS has not made any substantive changes in the final rule. A few conforming edits to 36 CFR 2.51 and 2.52 are included in this final rule. These changes simply add references to the free distribution of other message-bearing items to reflect the substantive revisions to section 2.52 that were included in the proposed rule.

1. Comment: Some commenters were concerned that the rule would lead to the commercialization of national parks and take away from the serenity and beauty of the environment. One commenter suggested that the rule should prohibit the sale of printed matter as well as other message-bearing items in order to prevent rampant consumerism in national parks. Several commenters suggested that the rule prohibit all items that include or function as commercial advertising, or any items that are predominantly or primarily commercial advertising, rather than only prohibiting those items that are “solely commercial advertising.” One commenter stated that t-shirts, even when given away for free, are primarily used as marketing devices and not to communicate information.

NPS Response: The rule only allows the free distribution of other message-bearing items. Asking for or requiring payment or donations in exchange for these items is prohibited without written authorization under 36 CFR 5.3 (Business operations) or 36 CFR 2.37 (Noncommercial soliciting). The NPS will use the permit process to ensure that the free distribution of other message-bearing items will not result in the commercialization of national parks and the degradation of park values and visitor experiences. This activity will only be allowed in areas designated as available for First Amendment activities by the Superintendent.

Items with some amount of commercial advertising may also contain protected speech under the First Amendment. For this reason, the free distribution of these items is properly regulated under 36 CFR 2.52 rather than 36 CFR 5.3, which focuses on business operations. Examples may include t-shirts and water bottles that contain a message unrelated to commercial advertising that are freely distributed by a corporate sponsor at a permitted event. Although these items may also contain a logo or other mark associated with the company, they are not solely commercial advertising and are therefore subject to regulations addressing speech rather than

business operations.

2. *Comment:* One commenter questioned the basis for allowing the sale of printed matter, but not the sale of other message-bearing items, when both may contain speech protected by the First Amendment.

NPS Response: Experiences on the National Mall and in other national parks suggest that other message bearing items such as t-shirts, mugs, hats, and jewelry are more likely than printed matter to be sold primarily as a commercial enterprise rather than as part of a sincere First Amendment activity. In the past, the proliferation of sales of other message bearing items has degraded the purposes and values of the National Park System in manner not experienced with the sale of printed matter that is primarily focused on communicating a message. The distinction in this rule between printed matter and other message bearing items will provide the public with a broader opportunity to engage in protected speech without opening national parks to unchecked commerce. The sale of an unlimited range of message bearing merchandise, including t-shirts, would negatively impact park resources and values as well as the visitor experience. In order to sell other message bearing items in national parks, written authorization must be obtained under 36 CFR 5.3.

3. *Comment:* Several commenters were concerned that allowing the free distribution of other message-bearing items will result in litter and waste that will harm resources, including wildlife, and the ability of visitors to enjoy national parks. These commenters were concerned about items such as CDs and keychains that are made out of plastic and other materials that are not biodegradable and are costly to recycle.

NPS Response: Groups of more than 25 people who wish to freely distribute other message bearing items must obtain a permit that will contain terms and conditions addressing the

proper disposal of litter and waste. These items will not be allowed to be distributed outside of designated First Amendment areas, reducing their impact on more unspoiled and sensitive areas of the Parks. Designated First Amendment areas are generally developed and have more foot traffic and nearby amenities such as trash and recycling cans. National parks have existing programs in place to collect and dispose of litter that will help mitigate any incremental waste associated with the free distribution of these items. The NPS will not regulate substantially more speech than necessary to implement the NPS's substantial government interest in protecting park resources from impairment. This rule allows the exercise of protected speech. The NPS has determined that any additional measures the NPS could take at this time to prevent additional litter associated with this speech, including, for example, prohibiting the free distribution of plastic message bearing items, are unnecessary. If the NPS determines at a later date that additional management actions are needed to address increases in litter attributable to message-bearing items, then the NPS will consider appropriate responses, including new terms and conditions to permits and changes to this rule.

4. Comment: Some commenters felt that the free distribution of other message-bearing items will lead to an influx of visitors and material objects, such as t-shirts and keychains, to national parks, which will degrade the natural beauty, contemplative quality, and integrity of these areas. One commenter suggested that the rule allow the Superintendent to deny a permit application based upon the severity of impacts to park resources and values imposed by these items. One commenter was concerned about audio and visual pollution from the distribution of these items that will harm park resources and values.

NPS Response: There are several protections in place that will mitigate the impacts of this activity on park values and resources. Groups of more than 25 people who wish to freely

distribute other message bearing items must obtain a permit that will contain terms and conditions that will address potential impacts. The Superintendent may deny a permit if the number of persons engaged in the distribution cannot be reasonably accommodated, considering such things as damage to park resources or facilities, impairment of a protected area's atmosphere of peace and tranquility, interference with program activities, or impairment of public use facilities. 36 CFR 2.52(e). The free distribution of other message-bearing items may only occur in locations designated under 36 CFR 2.51(c). These locations may only be designated if the free distribution of other message-bearing items in these locations would not (i) cause injury or damage to park resources; (ii) unreasonably impair the atmosphere of peace and tranquility maintained in wilderness, natural, historic, or commemorative zones; or (iii) be incompatible with the nature and traditional use of the particular park area.

5. Comment: Some commenters were concerned that the content of other message-bearing items could be offensive or contain political messages that are not appropriate in national parks.

NPS Response: Similar to other types of protected speech that occurs in the National Park System, the NPS does not regulate the content of protected speech contained in other message-bearing items.

6. Comment: One commenter suggested that the NPS define other message-bearing items by a closed list of items that meet the definition, rather than an open-ended definition that lists only examples of items that qualify. This commenter felt that an exclusive list would relieve park managers from the burden of having to identify which items are message-bearing on a case-by-case basis.

NPS Response: A non-exhaustive list of things that qualify as other message-bearing

items gives the NPS more flexibility than a closed list to determine which items are message-bearing. This will allow the NPS to adapt to the introduction of new message-bearing technologies such as digital downloads and other means of delivering electronic content.

7. Comment: One commenter suggested that the rule establish standard locations in all national park units that are designated for First Amendment activities, including the free distribution of other message-bearing items, in order to preserve the integrity of the parks. This commenter suggested visitor centers or information kiosks as potential places that could be designated across the National Park System.

NPS Response: NPS regulations at 36 CFR 2.51 require Superintendents to identify on a map the locations that are designated for demonstrations and the sale and distribution of printed matter. As stated above, these locations must meet certain criteria that will help address the commenter's concerns. This rule updates these regulations to state that these locations are also designated for the free distribution of other message-bearing items. The geography, infrastructure, and frequency and size of First Amendment activities are unique for each national park unit. This makes it difficult to identify a standard location that can be designated as appropriate for First Amendment activities in every unit. The NPS believes that the Superintendents are in the best position to determine which areas in the parks they manage are most appropriate for First Amendment activities.

Compliance with Other Laws, Executive Orders, and Department Policy

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771)

This rule is an E.O. 13771 deregulatory action because once finalized, it will have costs less than zero.

Regulatory Flexibility Act.

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will generate positive benefits and no costs. This certification is based upon the cost-benefit and regulatory flexibility analyses found in the report entitled “Cost-Benefit and Regulatory Flexibility Analyses: Proposed Regulation Revisions for Free Distribution of Other Message-Bearing Items” that is available to the public upon request.

Small Business Regulatory Enforcement Fairness Act.

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act.

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. It addresses public use of national park lands, and imposes no requirements on other agencies or governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630).

This rule does not effect a taking of private property or otherwise have takings implications under Executive Order 12630. A takings implication assessment is not required.

Federalism (Executive Order 13132).

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This rule only affects use of federally-administered lands and waters. It has no outside effects on other areas. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988).

This rule complies with the requirements of Executive Order 12988. This rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to

eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation with Indian tribes (Executive Order 13175 and Department Policy).

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the criteria in Executive Order 13175 and under the Department's tribal consultation policy and have determined that tribal consultation is not required because the rule will have no substantial direct effect on federally recognized Indian tribes.

Paperwork Reduction Act.

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. OMB has approved the information collection requirements associated with NPS Special Park Use Permits and has assigned OMB Control Number 1024-0026 (expires 01/31/20). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act of 1969

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by a categorical exclusion. We have determined that the rule is categorically excluded under 516 DM 12.5(A)(10) as it is a modification of existing NPS regulations that does not increase public use to the extent of

compromising the nature and character of the area or causing physical damage to it. Further, the rule will not result in the introduction of incompatible uses which might compromise the nature and characteristics of the area or cause physical damage to it. Finally, the rule will not conflict with adjacent ownerships or lands uses, or cause a nuisance to adjacent owners or occupants.

We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 36 CFR Part 2

Environmental protection, National parks, Reporting and recordkeeping requirements

In consideration of the foregoing, the National Park Service amends 36 CFR part 2 as set forth below:

PART 2—RESOURCE PROTECTION, PUBLIC USE AND RECREATION

1. The authority citation for part 2 continues to read as follows

Authority: 54 U.S.C. 100101, 100751, 320102.

2. Amend § 2.51 by revising the section heading and paragraphs (c)(1) introductory text and (c)(2) to read as follows:

§ 2.51 Demonstrations and designated available park areas.

* * * * *

(c) *Designated available park areas.* (1) Locations may be designated as available for demonstrations under this section, and for the sale or distribution of printed matter and the free distribution of other message-bearing items under §2.52, only if these activities would not:

* * * * *

(2) The superintendent must designate on a map, which must be available in the office of the superintendent and by public notice under §1.7 of this chapter, the locations designated as available for demonstrations, the sale or distribution of printed matter, and the free distribution of other message bearing items.

* * * * *

3. Amend § 2.52 by:

- a. Revising the section heading;
- b. Revising the paragraph (a) subject heading;
- c. Adding two sentences at the end of paragraph (a);
- d. Revising paragraph (b) introductory text; and
- e. Revising paragraph (i) introductory text.

The revisions and additions to read as follows:

§ 2.52 Sale of printed matter and the distribution of printed matter and other message-bearing items.

(a) *Printed matter and other message-bearing items.* * * * The term “other message-bearing items” means a message-bearing item that is not “printed matter” and is not solely commercial advertising. Other message-bearing items include, but are not limited to: readable electronic media such as CDs, DVDs, and flash drives; clothing and accessories such as hats and key chains; buttons; pins; and bumper stickers.

(b) *Permits and the small group permit exception.* The sale or distribution of printed matter, and the free distribution of other message-bearing items without asking for or demanding payment or donation, is allowed within park areas if it occurs in an area designated as available

under § 2.51(c)(2) and when the superintendent has issued a permit for the activity, except that:

* * * * *

(i) *Misrepresentation.* Persons engaged in the sale or distribution of printed matter or the free distribution of other message-bearing items under this section are prohibited from misrepresenting the purposes or affiliations of those engaged in the sale or distribution, and misrepresenting whether the printed matter or other message-bearing items are available without cost or donation.

* * * * *

Jason Larrabee
Principal Deputy Assistant Secretary
for Fish and Wildlife and Parks
Exercising the Authority of the Assistant Secretary for Fish and Wildlife and Parks
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