

**National Park Service****36 CFR Part 7****RIN 1024-AC14****National Capital Region Parks; Special Regulations****AGENCY:** National Park Service, Department of the Interior.**ACTION:** Final rule.

**SUMMARY:** This final rule amends the National Capital Region Parks regulations to limit sales on Federal park land to books, newspapers, leaflets, pamphlets, buttons and bumper stickers, and to set standards for sites, stands and structures used in such sales. By this amendment, the National Park Service (NPS) also rescinds a sales enforcement guideline that allowed the sales of T-shirts that contained a message directly related to a cause or activity. This final rule is adopted because such sales have adversely impacted Federal park land in ways described further below, resulting in discordant commercialism and creating a "flea market" atmosphere in the National Parks of the National Capital Region. Finally, pursuant to Public Law 103-279, the NPS no longer has operating responsibilities for the John F. Kennedy Center for the Performing Arts. Accordingly, this final rule removes reference to the Center from the sales regulation.

**DATES:** The final rule becomes effective May 8, 1995.

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**SUPPLEMENTARY INFORMATION:****Background**

On May 18, 1994, the NPS proposed a rule that would limit sales to books, newspapers, leaflets and pamphlets on park land of the National Capital Region (59 FR 25855). Copies of the proposed rule have been distributed to demonstration and special event applicants, posted and handed out in the National Capital Region's permit office. Copies were also mailed to past and current demonstration and special event applicants and other interested parties. In addition, the proposed regulation has also received media

coverage in stories about the problems caused by sales activities.

Prior to this proposed rulemaking, the majority of applicants who sought to engage in demonstrations or special events on park land within the National Capital Region requested permission to engage in sales activities related to their event. As detailed in the proposed rule dated May 18, 1994, the National Capital Region of the NPS adopted an enforcement guideline reflecting an administrative determination that the term "newspapers, leaflets, and pamphlets" under 36 CFR 7.96(k) may cover certain other designated written material. Specifically, under the guideline (a copy of which routinely has been made available to all applicants), allowable materials have included books, bumper stickers, buttons, posters and T-shirts which display a message directly related to the cause or activity. The sale of patches, jewelry, hats, license plates, coffee mugs, flags, records, tapes, pictures, decals and lapel pins has not been permitted under the enforcement guideline.

Adverse park impacts generated by the sale of T-shirts under the enforcement guideline caused the NPS to propose an amendment to the sales regulation. Since then, the amount of T-shirt sales activities on park land in the National Capital Region has increased significantly, and the adverse impacts associated with such sales decidedly worsened.

For example, during calendar year 1994, 4,771 permits were granted for demonstrations or special events and the majority of these involved requests for associated T-shirt sales. After publication of the proposed regulations in May 1994, the Service received 976 T-shirt applications during the remainder of 1994. In 1992, the Service received 3,232 demonstration and special event applications, and, in 1993, there were 3,323. Through March 8, 1995, the NPS had received 3,092 applications, 90% of which sought T-shirt sales opportunities. For the same period of 1994, the NPS had received 2,884 applications, an increase of more than 200 applications.

Application numbers alone do not tell the whole story because many applications apply for multiple dates and sites. For example, on February 28, 1995, the Region received 50 demonstration/special event applications. All sought T-shirt sales permission. Thirty-one of these applications requested single T-shirt sales locations, and 19 applied for multiple locations. The total number of sites applied for in the 50 applications was 112.

For the past several years, the NPS has routinely issued permits for demonstrations and associated sales near the Vietnam Veterans Memorial. But particularly throughout the past year, applicants have sought and gained permission to sell message-bearing T-shirts for repeated demonstration activities for a number of very general causes such as "conservation of the environment," "to promote and broadcast cultural and environmental messages," "environment protection," "promote the salvation of the environment," "Washington DC statehood," and, ironically, "Preserve National Parks."

The demonstrator/vendors sales, which began near the Vietnam Veterans Memorial, have now spread throughout Washington's Monumental Core. As explained in the preamble to the proposed regulation, the increase in applications for demonstration/sales sites on the limited amount of park land available near the Vietnam Veterans Memorial forced the NPS to designate additional demonstration/sales sites. Facing ever-increasing numbers of applicants for sales activities, the NPS designated additional sites adjacent to the popular memorials, monuments and museums on the National Mall, Washington Monument grounds and at the Jefferson Memorial.

A fundamental consideration in this rulemaking is the impact of sales activities on the park land of the National Capital Region. This park land enjoys a rich diversity of uses. Located at the seat of the Federal Government, it hosts a wide variety of demonstration activities, ranging from the lone protester to hundreds of thousands of participants championing and opposing all manner of causes.

Visitors are also drawn to the great monuments of the Nation's Capital—most notably, the Lincoln Memorial, Jefferson Memorial, the Vietnam Veterans Memorial and the Washington Monument—which together with the Capitol, the National Mall and the White House area, form Washington's Monumental Core. The National Mall is an integral part of the original L'Enfant Plan for the City of Washington. It is the single most significant public park and open space, providing an unencumbered greensward between the U.S. Capitol to the Washington Monument and the Lincoln Memorial, a distance of 21 blocks. Visited by millions of citizens and international travelers, the National Mall provides a formal work of landscape architecture of monumental proportions and provides the unifying element for the carefully placed, diverse architectural symbols,

repositories and shrines of the heritage of our democracy on and along its length. As part of Washington's Monumental Core, it is unquestionably the most significant park area in the Nation's Capital. Visitors to the National Mall are drawn by its proximity to the great monuments of the Nation's Capital as well as by its vistas and natural beauty. Visitors may enjoy the sights and activities of Washington, or they may seek time for quiet reflection in the midst of this great park.

Flanking this core are world-recognized museums such as the National Air and Space Museum, the National Museum of American History, the National Museum of Natural History, the Freer Gallery, the National Museum of African Art, the Arts and Industries Building, the Arthur M. Sackler Gallery, the Hirshhorn Museum and Sculpture Garden, the West and East Wings of the National Gallery of Art, and the United States Botanic Garden.

These monuments, memorials and museums, together with the commanding vistas and natural beauty, draw several million visitors annually. In 1994, for example, visitation at the Vietnam Veterans Memorial was 1,475,044, for the Washington Monument 1,000,270, and for the Jefferson Memorial 522,339. The Smithsonian's National Air and Space Museum had 8,494,193 visitors, while its Museum of National History had 5,756,861.

Many other parks located throughout the National Capital Region draw hundreds of thousands of visitors. They accommodate recreational activities including picnics, softball, and field hockey. Park visitors may enjoy the sights and activities of Washington and its environs and also seek time for quiet reflection in all of these areas.

Generally, applicants for demonstrations or special events who also seek to engage in T-shirt sales submit applications in twenty-one day increments (the maximum number of days authorized by NPS regulation). See 36 CFR 7.96(g)(5)(iv)(B). Many applicants routinely submit successive applications in twenty-one day increments for periods of several months; one group submitted applications to sell T-shirts on park land through the end of 1996.

The sales that first occurred under the enforcement guideline several years ago were made in the context of large scale, one-day demonstrations. The sales activities, like the demonstrations, lasted but a single day and the T-shirts left with the demonstrators. The current T-shirt sales are far different.

Vendors sell their wares day-in and day-out. The sales occur not between organizers and participants at demonstrations, but between commercial vendors seeking customers from among non-demonstrating visitors at adjacent national monuments.

The consequence of this system of administration has been the proliferation of T-shirt sales throughout the park land of the National Capital Region. It is now commonplace to see large quantities of T-shirts displayed and stored on park land at various demonstration/sales sites, not only near the Vietnam Veterans Memorial where the practice first arose, but also on park land the entire length of Washington's Monumental Core. T-shirt stands now confront park visitors as they approach many of the Nation's monuments, memorials and museums. They are located at the base of the Washington Monument, in front of the Jefferson Memorial, near the National Holocaust Memorial Museum, and on the Mall adjacent to the Museum of Natural History, the Smithsonian Castle and the Smithsonian Metro station. Increasing commercialization within the sales sites has been marked by the use of life-size torso mannequins and commercial clothing racks. As the Smithsonian Institution observed in its comments on the proposed regulation:

[T]he number of vendors on the Mall increase[d] dramatically especially within the last two years. Rather than occasionally observing vendors associated with demonstrations or special events, we note that vending near Smithsonian museums is now constant activity, [and the] selling of products is done mostly by the same groups.

#### **Analysis of and Response to Comments and Rationale for Final Regulation**

##### *A. Overview*

The NPS received 4,626 written comments (some accompanied by photographs) regarding the proposed rule. Most were from individuals not indicating a particular affiliation or interest. Of the others, 25 were from veterans organizations, seven from other organizations, 73 were from veterans or relatives of veterans, four from representatives of the legal community, and one from a past Director of the NPS. The Department appreciates the time and effort expended on these comments.

606 comments supported the proposed rule as drafted. Among these were four different preprinted signed letters from 170 individuals as well as one petition signed by 170 individuals. Another 1,438 identical, unsigned letters were received bearing the names and addresses of different persons purporting to support the proposed rule

as drafted. The organization responsible for submitting the letters has requested that the NPS disregard all of these unsigned letters because it failed to obtain the consent of the persons named. Accordingly, the NPS has not given these unsigned letters any weight in its decision making.

2,582 comments opposed the proposed rule as drafted. Among these were 2,415 identical, preprinted, signed post cards. (A sampling of 298 of these revealed that 43, or 14%, were duplicate submissions.) One petition in opposition to the proposed rule was signed by 130 individuals. One comment opposed the proposed regulation as drafted because it was "exceptionally lenient and generous"; another recommended an outright ban on all sales.

There was one request for a public hearing. Given the large number of responses received as well as their breadth and scope, however, the NPS does not believe a public hearing would add to the range of views and solutions considered.

#### *B. Comments in Support of the Proposed Rule Based Upon Degradation of the Park Visitation Experience and Impact on Park Physical Environment*

Many of the 606 comments in support of the proposed rule agreed with the NPS's assessment of the damages to park land caused by sales activities. Comments frequently used words such as "honky-tonk," "open air market," "flea market," "shopping mall," "bazaar," "circus," "carnival," "eye sore," "national embarrassment," and "disgraceful" to describe park land being used for T-shirt and other sales activities. One comment, by a professor of urban design, stated:

Your characterization of the current situation at those sites as having resulted in "discordant commercialization, creating a 'flea market' atmosphere on park land" resonates the feelings of all concerned with the dignity and elegance of memorial statements in the public domain.

The Smithsonian Institution, National Park Foundation, National Capital Planning Commission, Commission of Fine Arts, National Gallery of Art and National Park Hospitality Association wrote in support of the proposed regulation. The President of the National Park Foundation stated:

As a resident of the District of Columbia and someone who cares about the Parks, I find the increased commercialism, especially in the National Capital Region, to be exceedingly offensive \* \* \*. Visits to public land/Park land should be visits to uncluttered, noncommercial areas. The law provides ways for individuals representing

causes to get their messages across and leave open ample opportunities for channels of communication of information. It was not intended to create a supermarket for clothing, hats, banners, pins, and other aggressive sales of similar items which rob and deny a visitor the opportunity to see these places as they were intended to be.

One comment describes the area of Washington's Monumental Core as an unsightly "virtual sea of T-shirt vendors." Another lamented that these vendors have made it difficult to enjoy the beauty of the Mall, forcing park visitors to play "dodge the vendors."

Sales activities on the Mall adjacent to the National Air and Space Museum are particularly pronounced. Pursuant to the court's order in *ISKCON of Potomac, Inc. v. Ridenour*, 830 F. Supp. 1, 4 (D.D.C. 1993) (appeal pending), NPS regulations regarding sales and solicitation may not be enforced at all in "the area of the Mall adjacent to the Air and Space Museum." With no regulatory enforcement mechanism possible under this court order, T-shirt sales tables on park land have multiplied. Displays have stretched to extraordinary lengths; e.g., vendors now occupy all of both sides of a 139 foot north-south walkway just north of the National Air and Space Museum.

One comment, by a Smithsonian Institution employee, described the area now as having "shirts hung out in the breeze" creating "a distracting visual clamor which totally destroyed the [Mall's] grand design." Another, noting sales of T-shirts inscribed with such insignia as "Beavis and Butthead," asked whether it is "the Park Service's objective to turn the National Mall into a shopping mall?" Another protested:

I went to enjoy the beauty of the Mall and the Museums. Instead, every where I turned I saw and heard vendors, vendors, and more vendors. Are we allowing our beautiful Capital to be turned into a gigantic outdoor flea market?

One comment, while regretting that the Boy Scouts of America itself had not been allowed by the NPS to sell its memorabilia on the Washington Monument grounds, nevertheless supported the proposed regulation, stating "that we have come to a sad state of affairs when commercial vendors, masquerading under the guise of saving the whales are allowed to exploit our National showcase park areas."

Former National Park Service Director James Ridenour wrote in support of the proposed regulation as necessary to control "the carnival atmosphere that erodes the dignity of our national capital parks and memorial." As to the sales occurring near the Vietnam

Veterans Memorial, Ridenour, a Vietnam veteran, wrote that he was:

[O]ffended by the business that has continued to expand in that area. These shanty businesses have become big businesses. This is not some highly sacred freedom of speech issue—this is the despoiling of our nation's greatest treasures and a commercialization that goes beyond what previous administrations ever envisioned.

A number of national veterans groups, including AMVETS, Veterans of Foreign Wars of the United States, Vietnam Veterans of America, Inc. and the Vietnam Veterans Memorial Fund, wrote in support of the proposed regulation and expressed concern that sales activities have caused a commercialized condition of park land around the Vietnam Veterans Memorial. (As explained more fully in the next section, however, other groups, including the Friends of the Vietnam Veterans Memorial, the National Alliance of Families and other local veterans groups oppose the proposed regulation, complaining that it would adversely impact on sales activities by vigil groups near the Vietnam Veterans Memorial).

In summary, the commenters supporting the regulation generally concurred with the judgment of the NPS that the T-shirt displays and hawking, occurring on a daily basis near frequently visited memorials, substantially diminish and impair the park visitors' experience. In addition to the general "flea market" atmosphere, the NPS has observed that sites are occupying ever-larger areas of park land, mostly located near or on walkways close to frequently visited memorials. As a result, visitor circulation has been adversely impacted. Sales operations have also interfered with NPS interpretative programs. Some commenters complained that they have been unable to photograph national landmarks without also capturing demonstration/sales sites in the same picture.

The presence of money within park areas has always been a law enforcement concern of the U.S. Park Police. Sales sites have already experienced several criminal related offenses. Also, in an effort by permittees to reserve "premium" sales sites adjacent to popular memorials, a number of permittees have hired homeless people or have even physically assaulted one another to preserve and occupy their sales site locations.

Increasing T-shirt sales activities have also brought increasing pedestrian and vehicle congestion. This has resulted in

damage to turf, trees and shrubbery. At or near T-shirt sales sites, only mud and compacted soil remain where grass once grew. Soil compaction in these areas is so severe that the NPS has found no horticultural technique which permits the restoration of plants without excluding all activity from the injured sites for a period of several months.

#### *C. Comments in Opposition to the Proposed Rule*

Of the 2,582 comments opposed to the proposed rule, all but five focused solely on the sales activities on park land around the Vietnam Veterans Memorial. 2,415 preprinted postcards were submitted opposing the proposed regulation on the ground that it would:

[R]emove the best opportunity I have to publicly show my support for the organizations and causes represented near the Memorial. Further, the presence of these groups and the sale of *all* of their products is beneficial to the visitors \* \* \*. (emphasis in original).

Forty-six comments voiced concern that if the proposed regulation is implemented, one demonstration vigil now under permit near the Vietnam Veterans Memorial would be forced to "close down." In his comment, the Executive Director of this particular demonstration described the proposed regulation as aimed specifically against his vigil; specifically:

[A] smoke screen designed to conceal the Park Service's real agenda[,] which is part of a long term political effort to remove the POW/MIA activists from the area near the Vietnam Veterans Memorial. It is the result of the combined efforts of career bureaucrats, who can't stand the thought of a handful of veterans, activists, and POW/MIA family members using the First Amendment to raise enough funds through the sale of POW/MIA related T-shirts to continue opposing a failed U.S. government POW/MIA policy.

The proposed rule is content neutral and is not intended to harass, much less "close down," any demonstration. In proposing the regulation, the National Park Service recognizes the important function park land serves for the "purposes of assembly, communicating thought between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 516 (1939). The rule is designed to regulate the time, place, and manner of sales activities to protect the parks and the visitor experience without seriously interfering with the achievement of those essential purposes.

This same commenter challenged the accuracy of NPS's assertion, in the preamble to the proposed rule, that one demonstrator "had gross earnings of \$1,849,683 from the sale of all T-shirts

in 1989-91." See 59 FR 25857. This quotation was taken directly from the Court's order in *Hart v. Sampley*, Civil No. 91-3068 (D.D.C. December 10, 1992).

An attorney commenting on behalf of several nonprofit organizations accused the NPS of "deliberately seeking to create a condition on the Mall whereby it can justify a complete ban on the sale [of] message-bearing merchandise." The NPS rejects this characterization. It has not created the adverse consequences caused by sales activities on park land in order to justify sales restrictions. Rather, as detailed in the proposed sales regulation, it has permitted groups and individuals to sell message-bearing T-shirts, but that fact was not widely known until fairly recently. When the NPS sought public comment on the proposed sales regulations, more persons and groups became aware of the rules. The current proliferation of sales applicants is likely to be simply indicative of the actual number of persons and groups who would like to sell T-shirts on National Capital Parks land.

The NPS has attempted to fairly and even handedly process applications for demonstration/sales activities on park land in accordance with current regulations and guidelines. The applications requesting use of park land, and the permits authorizing such use, are a matter of public record and review. Persons who identify themselves as merely interested in selling T-shirts with no cause related to a demonstration have been turned away. The NPS has also attempted to fairly and even handedly monitor permittees' compliance with the terms of their permits at their demonstration/sales sites. The NPS proposed to amend its sales regulation because of the adverse consequences caused by some of the sales activities under the sales enforcement guideline.

The balance of the other comments that focused on sales activities near the Vietnam Veterans Memorial did not challenge the NPS's motivation, but opposed the proposed rule because it would adversely impact veterans groups' ability to raise money for their cause. One commenter, from a Vietnam veterans organization, wrote that:

In seven years of experience at the [Vietnam Veterans] Memorial, the Friends have concluded that the presence of t-shirt and other sales plays a significant role in the experience for tens of thousands of visitors. Guestbooks which have been maintained near the Memorial by the FVVM show overwhelmingly that the presence of our group has been positive.

While the NPS does not question the sincerity of this commenter's assertion that its presence on park land contributes positively to the park visitor experience, only two of the 5,716 entries in the commenter's guestbooks expressed views on sales activities. One wrote of her appreciation for the opportunity to buy items near the Memorial, but the other wrote: "This merchandise is out of place and degrades the dignity of this shrine."

The Friends also submitted a "Vietnam Veterans Memorial Attitudinal Study." The study, prepared by a marketing research consultant, consisted of interviews of 329 visitors who were "randomly-intercepted in the area of the [Vietnam Veterans] Memorial" over a three-day period. Contrary to the commenter's assertion that sales play a "significant role" in the visitor experience at the Vietnam Veterans Memorial, the study shows more than two-thirds of the respondents did not stop at any demonstration/sales location. Moreover, the study focused solely on the park land adjacent to the Vietnam Veterans Memorial, while the NPS is concerned with the negative impact of sales activities on park land throughout the National Capital Region and cannot legitimately distinguish between T-shirt sales in one area or one cause and such sales in another area or for another cause.

One demonstrator who participated in the first vigil or "booth" near the Vietnam Veterans Memorial in 1987 commented that he was closing down his own operation in part because he "did not have the manpower or the money to pay someone to stay in the parking lot of the NCR building overnight so that we could be 'first in line' when the permit office opened and turn in 14 or so permits applications every day." He opposed the proposed rule, however, "because the [Vietnam Veterans Memorial] Wall is unique \* \* \* [and] vendors should stay at least until the healing of all Vietnam Veterans is complete." He believed that vendors help provide a "chance to talk with a fellow veteran to let out your feelings, to rid oneself of the hurt, and to find out about other veteran related programs, organizations and problems." Under the new regulation, demonstrators will remain free to talk with the visiting veterans and provide oral or written information regarding veteran-related programs, organizations and problems. The only difference is that they cannot sell T-shirts at the same time.

Finally, one commenter indicated that the NPS should not be worrying about T-shirt and other sales because "this money is certainly being used for a

wonderful and well needed cause." The role of T-shirt sales in financing demonstration activity is considered in the next section.

#### D. Commenters' Objections on Constitutional Grounds

Some commenters argued that if demonstrators could not sell such merchandise they would be unable to finance their demonstration activities. The American Civil Liberties Union for the National Capital Area (ACLU), wrote that T-shirts, buttons or lapel pins worn on a person are an integral and prominent part of demonstrations because they "are unusually cheap and convenient forms of communication that convey distinct messages because they connect the message with the speaker."

#### 1. T-Shirts Versus Other Forms of Communication

After careful consideration, the NPS has concluded that the basic problem of commercialization and attendant adverse impacts on park values is caused by T-shirt sales. It has also concluded that the problem cannot be abated by other than a ban on such sales on park land.

The NPS acknowledges that lines must be drawn in deciding the types of such merchandise that may be sold on park land in connection with demonstrations, to allow both demonstrators and park visitors an opportunity to use park land and still preserve the park values operative in the area. In general, the NPS wants to permit the maximum amount of communicative conduct that is consistent with the protection of the core park values in the area. It recognizes that a total ban on all sales in connection with demonstrations would arguably be most protective of the parks, and that a credible legal argument might be made for such a resolution. But the NPS desires to accommodate the sale of message-bearing materials in connection with demonstrations to the extent it does not unreasonably impinge on other park values.

By rescinding its enforcement guideline and amending 36 CFR 7.96(k) so as to permit only the sales of books, newspapers, leaflets, pamphlets, buttons and bumper stickers, the NPS believes park resources, the visitor experience, and the desirability of free expression will all be protected and enhanced.

The NPS has found that the sale of traditional written material in the form of newspapers, leaflets and pamphlets has not presented the problems that the sale of T-shirts and of other

merchandise has caused. The NPS also believes books constitute a larger and logical variant of the newspapers, leaflets and pamphlets that are currently permitted.

The NPS has also, upon reexamination since the proposed regulation was published, concluded that buttons and bumper stickers should be permitted to be sold in connection with demonstrations. The sales of these items have not caused the same problems of commercialization and negative effects on other park values as those caused by T-shirt sales.

Accordingly, the NPS has decided to continue to allow the sale of buttons and bumper stickers on park land.

While the Service has decided to prohibit T-shirt sales on park land, it will of course not restrict or otherwise regulate the wearing of communicative T-shirts. More generally, persons and groups remain free to express their views on park land, in long-standing demonstration vigils as well as shorter-term demonstrations. They may continue to use park land to speak, display signs and banners, march, hold vigils, sell and distribute literature, communicative buttons and bumper stickers, and otherwise communicate their views. At the same time, non-demonstrating visitors will still be able to come to the parks to pursue communicative, inspirational, educational and recreational activities.

For these reasons, the NPS believes that compliance with the sales regulation will not place an unreasonable limitation on First Amendment activity. A wide range of permissible activities remains available to persons who wish to engage in demonstrations and associated sales activities. Ample alternative avenues of communication are preserved. Demonstrators will still be able to sell other merchandise either on property within the District of Columbia's jurisdiction or through the books, newspapers, leaflets, and pamphlets sold or distributed on park land. These areas under District of Columbia jurisdiction are convenient to park visitors and are located adjacent to Washington's Monumental Core. Constitution and Independence Avenues east of 15th Street, NW and all of the north-south streets north of Constitution Avenue and south of Independence Avenue are controlled by the District of Columbia. For many years, demonstration groups have used these areas to sell items not permitted to be sold on NPS areas. Further, the vast majority of park visitors must pass these District streets and sidewalks on their way to the NPS areas.

Finally, in this connection, the NPS is concerned that if it continues to allow sales of T-shirts, it will face ever more difficult line-drawing decisions. Even with T-shirt sales now permitted, the NPS continues to receive requests for permission to sell other types of merchandise, such as coffee mugs, sweat shirts, hats, patches, jewelry, flags, records, audio tapes, video tapes, pictures, and decals—all complete with self-described "First Amendment messages" affixed to each item. Some demonstrator/vendor applicants argue that a First Amendment message is implicit in the merchandise itself. For example, in the past one demonstration group, advocating the protection of endangered rain forests, requested permission to sell candy on park land and argued that the candy possessed communicative protection because its ingredients came from the ecologically sound harvesting of nuts from rain forests. Others have urged the NPS to permit the sale of audio tapes. In addition to posing the same impacts as T-shirts, NPS personnel would need recorders to determine whether the tape related to the demonstration and visitors would need a like machine to determine what message was being expressed.

Plainly, a line has to be drawn somewhere if the National Capital Parks are not to be wholly given over to merchandising with a connection to free expression. The NPS believes an appropriate line is reflected in these regulations.

## 2. T-Shirt Sales as Underwriting the Expenses of First Amendment Expression

The NPS acknowledges the possibility that T-shirt sales on park land improves the financial ability of some demonstrators to engage in demonstration activities. Nevertheless, the NPS does not believe that the First Amendment requires it, as a general rule, to facilitate fund raising by groups or individuals seeking to express their views. Such facilitative conduct is, rather, protected by the First Amendment "only insofar as its restriction imposes burdens on expression itself." *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1540 (D.C. Cir. 1984).

One commenter suggested, as a partial alternative to a sales ban, that the NPS "require all vendors to put on public display a quarterly Statement of Accounts, as well as yearly Statement of Earnings, stating where all the money taken in goes." The NPS questions whether it could legally require demonstrators to publicly display how much money they receive or how it is

spent. Cf. *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988). In any event, such an approach does not address the impacts on the parks and the visitor experience that have given rise to this rulemaking.

## 3. Off-Park, Nearby Locations for T-Shirt Sales

The park land which comprises Washington's Monumental Core, and nearly all other park land in the National Capital Region, is located adjacent to other public property under the jurisdiction of the District of Columbia or the states of Maryland and Virginia. These other governments, particularly the District of Columbia, have generally allowed persons and groups to sell items on sidewalks and along streets in these areas that are prohibited from sale on park land. The NPS does not and is not proposing to regulate such sales or any other sales of merchandise on property outside its jurisdiction. As explained earlier, these areas provide an opportunity for demonstration groups to sell items in close proximity to park areas.

## 4. Other Alternatives

Commenters suggested several alternatives to the proposed regulation, including allowing only certain types of groups to sell items, more narrowly defining what constitutes message-related T-shirts, and restricting the placement and/or types of structures vendors could use. For example, while the ACLU agreed in its comments that "the Constitution does not require the National Mall to be turned into a flea market," it contended that the NPS must first adopt restrictions regarding vendors' structures and against "purely commercial vendors with a tenuous facade," before considering a sales restriction. It also stated that "only if narrower measures are tried and do not succeed will the consideration of broader measures be appropriate."

As explained in more detail in what follows, the NPS has strived hard to arrive at a solution that protects park values and the visitor experience while minimizing any burdens on communicative conduct. It has carefully considered, and in some cases tried, the kinds of alternatives suggested. Some of the alternatives the NPS has tried include: Discussing whether an applicant would voluntarily limit the number of sites; imposing site size restrictions; requiring that sites be attended at all times; confiscating unattended structures; imposing safety standards on site equipment; requiring sanitation measures, including placement of receptacles; rotating site

areas; and seeding and sodding of areas. These measures have fallen short of providing adequate protection to park values in the area. Its extensive experience in managing park land and its consideration of the comments on this proposed regulation have led the NPS to conclude that no alternatives exist that would adequately abate or ameliorate the problems caused by sales activities.

The basic problem is a pronounced commercialization of National Capital Park land with its unique monuments and memorials attracting millions of visitors annually. These sales activities on park land threaten to destroy that distinctive atmosphere. T-shirt sales activities, which include intense competition among permittees to get the attention and money of park visitors, have had a profoundly negative impact on the park experience. T-shirt sales have introduced a relatively constant, intrusive and intimidating air to what was previously, for the most part, a relatively peaceful, inspirational, and contemplative scene. Vibrant and spirited demonstration speech conduct sometimes found in the National Capital Parks is more episodic and has not created such a constant negative impact.

Several Justices of the Supreme Court have recognized the difference between more typical demonstration conduct and sales activities. In *United States v. Kokinda*, 479 U.S. 720 (1990), Justice O'Connor recently stated:

[C]onfrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation. Solicitors can achieve their goal only by "stopping [passersby] momentarily or for longer periods as money is given or exchanged for literature" or other items.

*Id.*, at 724 (plurality opinion)(quoting *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, at 653 (1981)); see also *id.* at 738-39 (Kennedy, J., concurring in judgment).

*a. Limiting T-shirt sales to nonprofit or other particular kinds of groups.* Some commenters suggested that only certain types of groups should be allowed to continue to sell message-bearing merchandise. The commenters have widely differing views, however, as to what type of groups should qualify. One comment suggested the NPS allow sales only by "real Vietnam Veterans' organizations that have had displays at the Wall for years." Another comment called for the NPS to "cull the

for-profit business concessions, yet maintain the integrity of those who truly hold vigils in exercise of their 1st Amendment rights." The sponsors of one ethnic celebration, agreeing that only a limited range of merchandise sales should be allowed on park land "to prevent it [sic] being destroyed by vendors," suggested that only organizations who hold "large demonstration/cultural activities" should be allowed to engage in sales. A local non-profit track and field organization, while "sympathetic with the overall goals of preserving the non-commercial character of NPS lands," nevertheless asked that it be allowed to collect fees and distribute T-shirts to participants who race on park land. Another local running club asked for a similar exception.

Another commenter advocated that only tax-exempt nonprofit organizations who provide supporting documentation should be allowed to engage in sales activities. The comment, from an attorney representing several nonprofit organizations who have been permitted to sell message-bearing T-shirts, complained that "commercial vendors were (and are) permitted to sell souvenir merchandise on the Mall. These vendors are not tax-exempt; nor do their activities have a noncommercial purpose. Rather, *their only purpose* is to make money for the proprietors \* \* \*." (emphasis in original).

The NPS's decision to grant a permit to use park land does not turn on the organizational or tax status of the applicant. NPS regulations do not provide for inquiries into an applicant's tax status or how proceeds may be dispersed. Nor do such inquiries form any part of the basis in approving permits. While one commenter did cite an example of such an inquiry by the NPS in a national park in California, the NPS has determined that the California park unit had done so erroneously.

In fashioning a solution to the problems caused by T-shirt sales in the National Capital Parks, the NPS believes it cannot carve out special exceptions for any category of group. Just as it would be impermissible to preclude all but long-standing "real Vietnam Veterans organizations," it would likewise be improper to preclude all but tax-exempt nonprofit groups. To allow only certain types of groups to engage in sales would disenfranchise individuals and unincorporated groups completely. Other organizations not qualified by circumstance or choice for tax-exempt status, such as for-profit corporations and labor unions, would be likewise excluded. More generally, such an approach would rest access to park land

for sales upon the manner in which a group seeks to organize itself legally. Such a matter ought not be of central concern to the NPS.

The adverse impacts upon park land are the same, irrespective of the nature of the demonstrator/vendor's tax status. In short, the NPS believes it would be unreasonable to require citizens concerned about current issues to incorporate and gain tax-exempt status in order to engage in demonstration/sales activities within the parks. Such a requirement is unrelated to the protection of park resources and would unreasonably discriminate against a wide range of individuals and groups. Moreover, a large number of the demonstrator/vendors currently using park land for T-shirt sales activities are in fact tax-exempt organizations. Despite their tax status, the impact on the park is unacceptable.

*b. Limiting T-shirt sales to very short-term demonstrations.* The ACLU commented that "persons applying for permits for short-term demonstrations [should] be given permission to sell demonstration-related communicative materials from portable card tables that, as in the past, will 'le[ave] with the demonstrators.'" The NPS's experience is that this type of restriction, while conceptually attractive, is practically impossible to implement. The majority of groups and individuals selling T-shirts as a part of their activity seek to do so for long periods of time. The NPS has found, on several occasions, the same group signing up under different names and individual sponsors for successive weeks. This "gaming" of the permit system results in a long-term demonstration by successive short-term individuals or causes.

The NPS does not believe it may reasonably or practically limit a group or individual to demonstrations lasting only one week or day or so per year. By regulation, applications to use park land are generally limited to 21-day increments. They may be extended for additional 21-day increments, subject only to being "bumped" if another applicant submits an application for the same park site and the park area does not reasonably permit multiple occupancy. If the park site does not permit multiple occupancy, the NPS is obligated to propose an alternative park site for the use of the second applicant. 36 CFR 7.96(g)(4)(iii)(A).

This system is grounded in the NPS's belief that, in general, if park land is not being utilized for an ongoing activity, it is available to groups for First Amendment conduct. To turn down a group because they have exhausted their "allotted" days of speech would fly in

the face of that principle. Moreover, the NPS has neither the expertise nor the manpower to develop the investigative and enforcement staff to avoid the inevitable "gaming" that would result as groups and individuals tried to obtain access for additional days and sites.

*c. Adopting standards for the message's relationship to the merchandise being sold.* Some commenters suggested that the NPS impose "merchandise standards" to ensure, in the words of one commenter, that T-shirts being sold contain "a religious, philosophical, political, or ideological message that is inextricably intertwined with the Permittee's nonprofit purposes and activities." This commenter continued:

Many vendors sell purely commercial or souvenir T-shirts that do not contain any message whatsoever. Other vendors take an otherwise commercial or souvenir T-shirt, stamp a small logo on it, or the phrase Washington, DC, and sell that item, although the message is barely visible and/or lacks intellectual content \* \* \*.

Except where a court order (now on appeal) has prohibited it from doing so on the Mall near the National Air and Space Museum, the NPS has for many years prohibited demonstrator/permittees from selling T-shirts that lack any message related to the permittee's cause or activity. It monitors demonstration/sales sites to ensure compliance. If warnings to violators are not immediately heeded, citation and revocation of the permit occur. Between July 6, 1994 and August 13, 1994, for example, the U.S. Park Police revoked twelve permits for violating the requirement that T-shirts have a message related to the permittee's cause. Even with this limitation, sales activities have continued to proliferate to the detriment of the parks and the visitors' experience within the parks. The limitation itself raises troublesome questions; e.g., should the NPS set standards as to how large or permanent or sophisticated the message on the T-shirt must be? How direct must be its relationship with the cause being demonstrated for? How strongly must participants hold their views?

Many T-shirts being sold on park land by permittees appear identical to the T-shirts sold by District of Columbia street vendors, except for the presence of an added message. The message often consists of something as cryptic as "Preserve our Natural Environment" or "DC Statehood." The comment from the Smithsonian Institution notes that:

[A] vendor of wildlife T-shirts from a folding table was the only visible 'demonstration' engaged in by an alleged environmental group. Other than the name of

the group in small letters on the T-shirt depicting wild animals, the salesman knew nothing about the group or its activities and was unable and/or unwilling to discuss with a visitor whether the proceeds of the T-shirt sales were being dedicated to a non-profit purpose.

In describing demonstration/sales activities on the Mall, the Washington Post on July 6, 1994, reported:

The guise of a demonstration at some of the new stands is pretty thin. Vendors have used a rubber stamp to mark souvenir T-shirts and sweat shirts with "D.C Statehood" or "Save the Environment."

Among those selling shirts marked with an inked stamp this week was Merlyn Eda, of Fort Washington. She sat beneath a sign that advocated statehood for the District, and her permit said she was demonstrating for making the District a state, but she said she wasn't much interested in the issue.

"It's a reason to be out here," she said as she straightened stacks of shirts showing the Capitol. "I'd like a better cause, and I'm thinking about one."

Susan Griffin, chairwoman of the D.C. Statehood Party, said neither the party nor the Citizens for a New Columbia have sanctioned the sale of T-shirts to promote their cause.

A man who would only identify himself as Isac was selling T-shirts with pictures of the monuments and the stamped message for the environment.

He said that he didn't know anything about environmental issues and he was working as a salesman on the Mall eight hours a day in exchange for free room and board.

The number of vendors setting up stands in close proximity of each other has set off a price war along the walkway on the Mall where seven sellers, most with identical designs, vie for customers.

Christopher Sullivan, a volunteer for Earth Friends, Inc. said his group initiated the price reductions because it is concerned not about making money but about promoting environmental awareness.

"It looks like hell around here," Sullivan said. "I feel my rights as a legitimate demonstrator have been violated because of these other stands."

As this comment suggests, many customers of T-shirt vendors may be deceived as to whether they are genuinely supporting a "cause" by their purchase. One permittee, purporting to "educate the general public about the importance of environmental protection," has sold T-shirts which depict a cow jumping over the Capitol and which bear a "First Amendment message," ink-stamped and barely discernible (and in at least one case upside down): "PRESERVE NATIONAL PARKS Earth Friends." Two other permittees have sold identical cow T shirts, although with different "First Amendment messages": one an ink-stamped "DC FOR STATEHOOD, WASHINGTON DC," another with

"PRESERVE THE NATURAL ENVIRONMENT." A demonstrator/vendor was overheard advising one park visitor not to be concerned with the "message," because the ink stamp would "wash out in the first washing."

Since the Washington Post article appeared, the NPS has noticed that most, but not all, of the "First Amendment messages" are no longer ink-stamped, but silk-screened. Though many of these message activities lack sophistication, verve or impact, the NPS is rightly extremely uncomfortable basing its decisions regarding access to park land upon the quality or sincerity of a person's message or belief. Once the NPS has satisfied itself that there is some nexus between the cause and the message, it has felt that no further inquiry is legitimate or warranted. In the circumstances, enforcement of this requirement has not lessened the negative impacts from those sales activities significantly, if at all. In these circumstances, the NPS has concluded that the best solution is to steer clear of these delicate questions of regulating the message, by instead going at the heart of the commercialization issue, which is T-shirt sales.

*d. Restricting structures and other sales facilities.* Some commenters advocated restricting the structures from which permittees sell their items. One suggested that trailers and "ostentatious booths" be banned, that only booths which could be set up within twenty minutes be allowed, and that they be removed after 7 p.m. except for important Federal holidays. The ACLU commented that it could "see no reason to prohibit the sale of communicative materials when it is done without the aid of stands or structures." It suggested that, "since the perceived problem arises from the use of long-term, semi-permanent structures, we believe such structures are the appropriate focus of regulation," including "their number, size, location, appearance, and duration of placement."

The attorney representing nonprofit organizations likewise suggested that the NPS impose signage restrictions, with merchandise being displayed on table tops only in a neat and orderly fashion, not exceeding two feet in height. He also suggested that umbrellas, chairs, and other decorative devices employed to amplify the presentation of the permittee's message be permitted only in connection with the sale of message-bearing merchandise, that structures, such as merchandise display racks, be prohibited and that all other materials, such as inventory, storage boxes, transport devices, and the like, be

required to be stored underneath the table.

The NPS has seriously considered these suggestions. As the ACLU noted, the NPS is quite familiar with the regulation of structures. In the National Capital Region, for example, the Service has found it necessary to ban structures from Lafayette Park and the White House sidewalk in order to address security and aesthetic concerns.

Based on its years of experience in managing the Federal park land and dealing with a full range of sales activities, the NPS does not believe that size or structure restrictions adequately address the problems caused by T-shirt sales activities on park land. As explained further below, the NPS already regulates the size of sales areas permitted to each permittee. The problems of commercialization and attendant adverse impacts are caused by the T-shirt sales themselves and the sheer number of demonstration/vendors interested in engaging in such sales activities. Moreover, an outright ban on structures for sales activities would likely create a mobile and potentially even more intrusive commercialization of park land and degradation of the visitor experience. In short, seeking to control the size of structures and area to be used by each permittee would not directly address the commercialization and attendant adverse impacts.

The NPS has long required demonstration vendors to conform to restrictions on site dimensions. Near the Vietnam Veterans Memorial, the NPS has restricted vendors to sites 6 feet by 15 feet. This area permits the storage of substantial amounts of written materials on site. If additional written material is needed, it can be brought to the site as needed. Further, this size both maximizes the numbers of sites as well as allows each permittee sufficient space to present his or her message to the visiting public. In response to the dramatic increase of demonstration T-shirt sales activities on Washington's Monumental Core, the NPS has established the same size dimensions for sales sites in that area as well.

These restrictions alone have not proven adequate to address the problems sought to be ameliorated by this regulation. However, the NPS has decided that the site dimension standard is important and ought to be included in the regulation. A restriction on the size of structures within such sales sites is also adopted. Accordingly, the final regulation incorporates permissible dimensions of sales sites, stands and structures used in sales. Specifically, the final regulation limits sales sites to dimensions of 6 feet wide

by 15 feet long by 6 feet high. Within a site, tables will be limited to one per site, no larger than 2½ feet by 8 feet or 4 feet by 4 feet.

The NPS reviewed the demonstration sales sites currently under permit. Demonstration/sales stands and structures generally consist of tables with dimensions of 2½ feet by 8 feet or, less frequently, dimensions of 4 feet by 4 feet. Both sizes have fully afforded permittees the ability to present their message as well as display their materials. The tables and associated sales activities were generally able to be fully accommodated within dimensions of 6 feet by 15 feet. In fact, the NPS has been imposing the particular sales site limitation since September 1994.

The NPS believes that a height restriction on tables and their appendages is also warranted. It has determined that a height restriction of 6 feet on sales sites will allow groups to display and sell printed materials while reducing the commercial atmosphere on park land.

*e. Zoning the park land to set aside particular areas for sale activities.* Some commenters suggested that the NPS permit T-shirt sales only in certain park areas, preferably located away from the historic monuments and memorials. One commenter suggested that the NPS should design and construct a limited number of lightweight portable booths "in the vicinity of the Memorial, but out of the main flow of the tourist traffic."

Its extensive experience in administering permits has convinced the NPS that it could not designate an adequate amount of park land to handle the number of applicants who have been and will likely seek to engage in T-shirt sales activities without creating the same adverse impacts now being felt. On park land adjacent to the Vietnam Veterans Memorial, for example, the NPS has been unsuccessful in limiting fixed portions of park land for demonstration/vendors. Each of the applicants, whose numbers are steadily increasing, demands access to park visitors near the Memorial. With existing sites already under permit, the NPS has been forced to permit the additional applicants to use other available park land.

Demonstration activities near the Vietnam Veterans Memorial are typically limited to issues related to the war and its casualties. The remainder of the Monumental Core, including the Mall, has been described as "the Nation's front yard," and as such has traditionally been the focal point of demonstrations on a full range of issues and causes—both domestic and international. Having been unsuccessful

in designating limited areas around the Vietnam Veterans Memorial for demonstration/vendor activities, the NPS does not believe it possible to designate limited areas within the Monumental Core.

The statistics bear out this conclusion. In November 1994, for example, notwithstanding cold weather and a decrease in park visitors, the NPS had to designate 260 sites in the Monumental Core, along with 23 sites near the Vietnam Veterans Memorial, to accommodate those who sought demonstration/sales permits. With the advent of better weather and an increase in park visitors, the NPS expects many more applications this spring. In fact, through March 8, 1995, the National Capital Region received 3,092 applications for demonstrations and special events. Ninety percent (90%) of these seek permission to vend T-shirts in the Monumental Core area. By way of comparison, during this same period in 1994, the Region received 2,884 demonstration and special event permit requests, an increase of over 200 applications.

The proliferation of T-shirt sales among demonstrator/vendors has led the NPS to conclude that it would be impossible to reasonably accommodate the demand for demonstration/sales of T-shirts within any limited "sales zones." If a zoning system were attempted, either the NPS would have to devise some method or standards to choose among applicants or designate ever-expanding sales zones. Furthermore, the current first-come, first-served system would not likely result in a fair distribution of very scarce sites and would require a much more intensely managed system.

As noted earlier, applications for 21-day T-shirt demonstration/sales permits are now routinely being submitted a full year in advance and are ever-growing in number. If "sales zones" were so limited as to reduce the adverse impacts on National Capital Parks to more acceptable levels, only a very limited number of applicants would be able to engage in such sales activities. In these circumstances, the NPS believes that allowing all applicants to engage in demonstration/sales activities that do not involve T-shirt sales ultimately imposes less restriction on free expression, as well as being fairer and better for the National Capital Parks and their visitors, than to allow a small number of applicants to engage in T-shirt sales on limited amounts of designated park land.

The NPS is mindful that it has not fared well in the courts in imposing numerical restrictions on demonstrators.

In *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975), for example, the court struck down the NPS's attempt to limit a demonstration in the seven-acre Lafayette Park, a small fraction of the acreage of the Monumental Core, to 500 people. The court found it had a carrying capacity allowing up to 50,000 people to engage in demonstrations at any one time.

More importantly, the NPS believes that a "sales zones" scheme would not satisfactorily control the adverse impact on the parks. The NPS's experience at the Vietnam Veterans Memorial shows that, even when sales are confined to a designated area, unacceptable impacts on park values result.

Defining the precise location of park areas to be set aside for such activity would also be difficult. Permittees engaging in demonstration/sales activities do not congregate at any single locale, but spread out to locations adjacent to popular park features to maximize their visitor exposure. The NPS would continue to be faced with requests for designated sales zones adjacent to most, if not all, of the monuments, memorials, and museums.

Even with the creation of even a modest number of zones scattered throughout areas of the National Mall, the NPS and the nation would effectively lose those areas completely and permanently to commercial activities. The experience of the last year or so suggests that competition for those limited zones would be intense. The zones would likely be occupied 365 days a year, effectively removing them from park use. Not only would perpetual "mini-bazaars" be created, but the physical impact would create scars that would not heal.

For all of these reasons, based on its experience in managing the Federal park land and dealing with a full range of sales activities, the NPS does not believe that the designation of sales zones is a viable or adequate alternative.

#### *D. T-Shirt Sales and the Activities of the Authorized Concessioner for the National Mall*

The NPS's concessioner for the National Mall commented in support of the proposed regulation, stating that "the large number of commercial vendors operating on the National Mall \* \* \* are disrupting the historical, aesthetic, and traditional values of our National Capital parks." The comment also advised that the concessioner was experiencing an adverse economic impact in lost sales due to demonstrator/vendors. Some of the concessioner's employees also submitted comments expressing

concern that sales by demonstrator/vendors could threaten their jobs.

While the NPS agrees with the concessioner about the adverse aesthetic impact caused by sales on Federal park land, the alleged adverse financial impact on the concessioner and its employees has played no role in the NPS's decision on the sales regulation.

Two comments opposed to the proposed rule described the activities of the NPS's concessioner on the National Mall as an "unsightly, inappropriate, and unwelcomed [sic] commercial intrusion," and concluded that "any commercialization of the Mall that has occurred is as much attributable to the NPS as to any specific First Amendment activity." One of these commenters stated:

I personally observed dozens of licensed mobile ice cream and popcorn vendors on all parts of the Mall. In one particular instance, Earth Friends was ordered to move its location across from the Museum of Natural History [because] their presence at that location was purportedly causing pedestrian traffic congestion. Yet, the same location was quickly occupied by an ice cream vendor that attracts twice as many people as did Earth Friend's T-shirt sales.

Additionally, I note that the Park Service maintains (or authorizes) two permanent refreshment stands on the Mall that sell a variety of products, including beer, and several souvenir booths that sell film, maps, books, and other souvenir products. In addition to the merry-go-round, I observed permanent, unsightly refreshment stands directly in front of the Air and Space Museum, the American History Museum, and the Natural History Museum. These refreshment facilities attracted far greater crowds, and pedestrian congestion, than any of the T-shirt operations that I observed.

This description is incomplete and partially incorrect. Most of the vendors mentioned are not on park land. Rather, they are located on the grounds of the Smithsonian Institution or on streets under the jurisdiction of the District of Columbia. The NPS has not licensed popcorn vendors on the Mall.

The NPS regulates concession activities on park land with a principal objective of precluding unwarranted commercialization and adverse impacts on park land. The relevant guidance from Congress, the Concessions Policy Act of 1965, 16 U.S.C. 20, is:

[T]hat the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that

such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas.

Consistent with this mandate, the NPS maintains concession activity on the federal park land of the National Capital Region under carefully designed safeguards. Concessions are limited only to those facilities and services necessary and appropriate for the convenience of the public. They are carefully designed, sited, and otherwise controlled so as to cause the least damage to park values and the park experience.

To serve the millions of visitors to park land between the Lincoln Memorial and the east end of the National Mall, the NPS's concessioner operates nine food and five retail operations from fixed locations. During the peak visitation period, from April through September, these fixed facilities are supplemented by fourteen ice cream carts that operate on the National Mall. The temporary and fixed facilities were designed to be the minimum size and number needed to serve only the immediate needs of the park visitors already drawn to the area. They are carefully located in areas capable of withstanding the attendant impact; many are confined within buildings. The NPS regularly inspects them to maintain requisite standards of physical appearance and operations. The NPS also controls the nature, type, quality, and price of items offered for sale by the concessioner to the park visitor. It routinely evaluates the concessioner's quality of services, requires insurance and indemnification, charges a franchise fee, and annually reviews its financial records. None of these controls has ever been applied to demonstration/vendors, and the NPS believes at least some, if not all, would be inappropriate to impose on persons or groups expressing First Amendment rights.

While some commenters compared concessions accommodations with demonstration/sales booths, none suggested that the NPS impose on permittees the same conditions it has imposed on its concessioner. In any event, for the reasons expressed earlier, the NPS believes that it would be a very delicate matter at best, and more likely inappropriate, for it to try to impose such conditions on the exercise of free expression attendant to demonstration/vendors. More broadly, comparing the purpose and regulation of concessions designed to meet the needs of park visitors with sales activities associated

with demonstrations is like comparing apples and oranges.

The NPS concedes that it sometimes encounters unauthorized food and ice cream vendors on the Mall. It devotes considerable enforcement efforts against such illegal activities. It regularly monitors park land for unauthorized vendors, and when it detects them, it either warns them or cites them and orders them to leave park land immediately. Between July 6, 1994 and August 13, 1994, for example, the U.S. Park Police issued seventeen citations against unauthorized food or beverage vendors found on the Mall.

The proliferation of demonstration/vendors of T-shirts in the last few years has complicated this enforcement problem significantly. As the Smithsonian Institution comment noted:

[M]any illegal [that is, non-permit-holding] vendors, encouraged by potential profits and perhaps hoping to get lost among the increased number of vendors on the Mall, are joining their permit holding counterparts in increasing numbers. We have seen many more illegal ice cream and food vendors, vendors of key chains, hats, umbrellas, and even a photographer who takes visitor pictures with cardboard cut-outs of celebrities on parkland.

The NPS remains committed to eliminating illegal vendors as well as addressing the unacceptable impacts by the demonstrator/vendors.

#### *E. Other Matters Addressed in the Final Regulation*

In its comments, the Smithsonian Institution expressed concern that the language of the proposed sales regulation might create some misunderstanding as to what would be allowed to be sold on park land, with or without a permit. The NPS obviously desires to prevent any such misunderstandings, and therefore reaffirms its intention that only books, newspapers, leaflets, pamphlets, buttons and bumper stickers may be sold under the revised sales regulations. Attempts to offer or sell items, whether directly or by the use of an artifice, other than books, newspapers, leaflets, pamphlets, buttons and bumper stickers on park land are prohibited. For example, restricted merchandise cannot be "given away" and a "donation accepted" or one item "given away" in return for the purchase of another item; such transactions amount to sales. To prevent any misunderstanding, the NPS has changed the language that appeared in the proposed sales regulation.

Finally, in the draft regulations, the NPS had proposed to make two minor numbering corrections in 36 CFR 7.96(k)(3)(vii), (ix) due to the

redesignation of paragraph (k) (57 FR 4574). Pursuant to Public Law 103-279, the NPS no longer has operating responsibilities for the John F. Kennedy Center for the Performing Arts. As a result, the minor numbering corrections suggested in the proposed rule are no longer necessary. Instead, the final rule removes reference to the Center by eliminating 36 CFR 7.96(k)(3).

#### 3. Summary/Conclusion

For all of the foregoing reasons, the NPS believes that the display and hawking of T-shirts, clothing and similar items in connection with authorized demonstrations has had an unacceptable impact on the National Capital Parks and the visitor experience. Its extensive experience in monitoring sales activities permitted under the current sales enforcement guideline has led the NPS to the firm conclusion that those activities have brought discordant and excessive commercialism to federal park land. Such sales have degraded aesthetic values, visitor circulation and contemplation, interpretive programs and historic scenes and have inhibited the conservation of park property. It also believes that no reasonable alternative is available to the action here announced. Therefore, the NPS believes it is necessary to rescind the enforcement guideline and to amend the sales regulation to limit permissible sales to books, newspapers, leaflets, pamphlets, buttons and bumper stickers.

In the considered judgment of the NPS, other measures have been found inadequate to the problem and do not provide a satisfactory level of protection for park value resources in the areas. When such sales activities have so negatively impacted park land and the park visitor, by turning the National Mall, the "Nation's front yard," into a flea market, the NPS believes it is obligated to abate the problems caused by such sales activities.

The NPS believes that limiting sales activities to newspapers, leaflets, pamphlets, books, buttons and bumper stickers is a reasonable time, place, and manner restriction. The restriction is clearly content-neutral in that it applies irrespective of the nature of the message presented. It leaves open ample alternative channels for communication of the information. It also preserves the integrity of park resources and provides for the public enjoyment of our national parks while leaving park resources unimpaired for future generations. As such, it constitutes a restriction which is "narrowly tailored to serve a significant government interest."

#### **Drafting Information**

The following persons participated in the writing of this rule: John D. Leshy, Solicitor, Richard G. Robbins and Randolph J. Myers, Office of the Solicitor, U.S. Department of the Interior.

#### **Compliance with Other Laws**

This rule was reviewed under Executive Order 12866. The Department of the Interior determined that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 USC 601 *et seq.*) because general sales are already prohibited in this area, and individuals and groups seeking to sell as a part of a demonstration or special event are free to sell prohibited merchandise on adjacent non NPS lands.

The NPS has determined that this proposed rulemaking will not have a significant effect on the quality of the human environment, health and safety because it is not expected to:

(a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

(b) Introduce incompatible uses that compromise the nature and character of the area or causing physical damage to it;

(c) Conflict with adjacent ownerships or land uses; or

(d) Cause a nuisance to adjacent owners or occupants.

Based on this determination, and in accord with the procedural requirements of the National Environmental Policy Act (NEPA), and by Departmental guidelines in 516 DM 6 (49 FR 21438), neither an Environmental Assessment (EA) nor an Environmental Impact Statement (EIS) has been prepared.

This final rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

The NPS has reviewed this final rule as directed by Executive Order 12630 and has determined that the regulation does not have taking implications.

The Department of the Interior has certified to the Office of Management and Budget that this final rule meets the applicable standards provided in section 2(a) and 2(b)(2) of Executive Order 12778.

#### **List of Subjects in 36 CFR Part 7**

National parks; Reporting and recordkeeping requirements.

In consideration of the foregoing, 36 CFR Chapter I is amended as follows:

## PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q). 462(k); Sec. 7.96 also issued under D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

2. Section 7.96 is amended by revising paragraph (k)(2) to read as follows:

### § 7.96 National Capital Region Parks.

\* \* \* \* \*

(k) \* \* \*

(1) \* \* \*

(2) No merchandise may be sold during the conduct of special events or demonstrations except for books, newspapers, leaflets, pamphlets, buttons and bumper stickers. A permit is required for the sale or distribution of permitted merchandise when done with the aid of a stand or structure. Such stand or structure may consist of one table per site, which may be no larger than 2 1/2 feet by 8 feet or 4 feet by 4 feet. The dimensions of a sales site may not exceed 6 feet wide by 15 feet long by 6 feet high. With or without a permit, such sale or distribution is prohibited in the following areas:

\* \* \* \* \*

3. Section 7.96 paragraph (k)(3) is removed.

4. Section 7.96 paragraph (k)(4) is redesignated as paragraph (k)(3).

Dated: March 14, 1995.

**George T. Frampton, Jr.,**

Assistant Secretary, Fish and Wildlife and Parks.

[FR Doc. 95-8599 Filed 4-6-95; 8:45 am]

BILLING CODE 4310-70-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 258

[FRL-5186-1]

RIN 2050-AE27

### Financial Assurance Effective Date for Owners and Operators of Municipal Solid Waste Landfill Facilities

**AGENCY:** Environmental Protection Agency [EPA].

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency is amending the criteria for Municipal Solid Waste Landfills (MSWLFs) under subtitle D of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921 *et seq.*, by delaying the effective date of the

Financial Assurance Criteria set out at 40 CFR part 258, subpart G, until April 9, 1997. The extension applies to any size MSWLF, including remote, very small landfills as defined at 40 CFR 258.1(f)(1), and delays the compliance date for MSWLFs by two years, from April 9, 1995 until April 9, 1997 (for remote, very small landfills by 18 months, from October 9, 1995 until April 9, 1997).

**EFFECTIVE DATE:** The amendments in this final rule are effective March 31, 1995. The effective date of subpart G of part 258 (§§ 258.70 through 258.74) which was added at 56 FR 51016 is delayed until April 9, 1997.

**ADDRESSES:** The docket for this rulemaking is available for public inspection at Room M-2616, U.S. EPA, 401 M Street SW., Washington, DC 20460 from 9 a.m. to 4 p.m., Monday through Friday, excluding holidays. The docket number is F-95-FADF-FFFFF. Call (202) 260-9327 to make an appointment with the docket clerk. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

**FOR FURTHER INFORMATION CONTACT:** The RCRA Hotline toll free at (800) 424-9346 or in Washington, D.C. at (703) 412-9810, from 8:30 a.m. to 7:30 p.m. EST, Monday through Friday, excluding holidays; or Nancy Hunt, Office of Solid Waste (5303W), U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460 at (703) 308-8762.

### SUPPLEMENTARY INFORMATION:

#### Preamble Outline

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#### I. Authority

These amendments to Title 40, part 258, of the Code of Federal Regulations are promulgated under the authority of sections 1008(a)(3), 2002(a), 4004(a), and 4010(c) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6907(a)(3), 6912(a), 6944(a), and 6949(a)(c).

#### II. Background

The Agency proposed revised criteria for municipal solid waste landfills

(MSWLFs), including financial assurance requirements, on August 30, 1988 (see 53 FR 33314). The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of closure, post-closure care, and corrective action associated with MSWLFs.

In the August 30, 1988 proposal, rather than proposing specific financial assurance mechanisms, the Agency proposed a financial assurance performance standard. The Agency solicited public comment on this performance standard approach and, at the same time, requested comment on whether the Agency should develop financial test mechanisms for use by local governments and corporations.

In response to comment, the Agency promulgated several specific financial mechanisms in the October 9, 1991 final rule on MSWLF criteria (56 FR 50978), in addition to the financial assurance performance standard of section 258.74, which allows approved States to use any State-approved mechanism that meets that performance standard. Commenters on the August 30, 1988 proposal also supported the development of financial tests for local governments and for corporations to demonstrate that they can satisfy the goals of financial assurance on their own, without the need to produce a third-party instrument to assure that the obligations associated with their landfill will be met. The Agency agreed with commenters and in the October 9, 1991 preamble, announced its intention to develop both a local government and corporate financial test in advance of the effective date of the financial assurance provisions.

The Agency has delayed the effective date of the financial responsibility provisions until April 9, 1995 (see 58 FR 51536) in order to provide adequate time to promulgate a financial test for local governments and another for corporations before the effective date of the financial assurance provisions. The delayed effective date also was intended to provide owners and operators sufficient time to determine whether they satisfy the applicable financial test criteria for all of the obligations associated with their facilities, and to obtain a guarantor or an alternate instrument, if necessary. The Agency also recognized that local governments, in particular, require notice of the requirements in order to plan their budgets for the upcoming year.

The Agency proposed a local government financial test and a corporate financial test on December 27, 1993 (see 58 FR 68353) and October 12,