THE IMPACT OF HR 4089, THE "RECREATIONAL FISHING AND HUNTING HERITAGE AND OPPORTUNITIES ACT," ON THE NATIONAL PARK SYSTEM

The House of Representatives has adopted HR 4089, the "Recreational Fishing and Hunting Heritage and Opportunities Act," and has sent the bill to the Senate. We have been asked by the National Parks Conservation Association to analyze what impact Title I of that bill (the "Bill" or "Title I") would have on the National Park System if adopted in its present form.

Title I § 104(a) requires Federal public land management officials to exercise their authority under existing law to "facilitate use of and access to Federal public lands … for fishing, sport hunting, and recreational shooting." Section (b) adds that the federal agencies shall exercise their management discretion in a manner that "supports" those activities. Some exceptions and exclusions and some broad definitions of these operative terms are in the Bill, as discussed below. It also contains a number of other provisions, some of which are discussed below.

Would Title I Apply to the National Park System in Light of § 104(h)?

Yes. Section 104(h) provides that nothing in Title I "requires the opening of national park or national monuments under the jurisdiction of the National Park Service ("NPS") to hunting or recreational shooting." But that clause has limited effect.

First, § 104(h) is carefully drafted only to provide that Title I does not "require" that "hunting or recreational shooting" be permitted in national parks or monuments. That language is not co-extensive with Title I's provisions. The result is that Title I would <u>permit</u> "hunting and recreational shooting" in national parks and monuments. Currently, as discussed below, those activities are generally prohibited in those places absent an express grant of discretionary authority by Congress.

Second, even in national parks and covered national monuments, § 104(h) does not exclude "fishing" from what is required to be "facilitated" pursuant to § 104(a).

Third, there are 397 units of the National Park System, of which 58 are National Parks and 75 are National Monuments under the jurisdiction of the National Park Service. Section 104(h) does not apply to the other 264 places in the National Park System. Examples of those other types of units are National Historic Sites (78), such as the Carl Sandburg and Frederick Douglass homes; National Historical Parks (46), such as Valley Forge; National Battlefields, Military Parks and similar designations (25), such as Gettysburg; National Seashores (10), such as Cape Hatteras; National Preserves (18), such as Big Cypress; National Lakeshores, such as Indiana Dunes; and National Recreation Areas (18), such as Boston Harbor Islands and Santa Monica Mountains.

What Argument Do Supporters of Title I Advance in Favor of Subjecting the National Park System to Title I?

In the House, some supporters argued that if such places as civil war battlefields were not subjected to Title I, battle reenactments could not occur there. Others argued that without Title I, demonstrations of historic weaponry could not continue to be permitted. These arguments are unpersuasive and seem designed to confuse the issue rather than to explain the real reason for subjecting such places to Title I. First, historic reenactments and weapons demonstrations do not involve hunting. Second, it is certainly not necessary to impose Title I on the National Park System to permit weapons demonstrations to continue, which are legal today. Third, although NPS does host interpretative living history programs on battlefields, NPS does not permit battle reenactments on NPS land; they are always held on near-by private land. Under Title I, however, NPS would not be able to limit reenactments on park land without complying with all the restrictions imposed by Title I, discussed below.

Other supporters of Title I argue that it merely leaves room for NPS to change its mind in the future if it chooses to permit the activities Title I promotes in the National Park System. But that argument is disingenuous. To the extent those activities are consistent with existing governing law, no new statutes are needed to allow such a change in mind. To the contrary, Title I would change the law in a way making it difficult for NPS not to change its mind, as discussed below.

What Are the Activities Promoted by Title I?

As discussed above, § 104(a) of Title I promotes "hunting," "recreational fishing" and "recreational shooting."

"Hunting" is a defined term, and Title I defines it more broadly than it is generally understood. The term includes not only the recreational shooting of wildlife, but also any other type of "lawful … pursuit, … capture, collection, trapping, or killing of wildlife." § 103(2)(A). The term also includes the training of hunting dogs. The type of "hunting" permitted is limited to that which is "lawful." But no guidance is given as to what would be "lawful" in this context, particularly given the thrust of Title I to promote all such activities. It would therefore appear that NPS would be required to permit visitors to the National Park System purposely to kill wildlife there, and not merely as a "sportsmen's" activity.

Trapping, which is included in the definition of "hunting," is not an active outdoorsman's pursuit; to the contrary, wildlife is captured or killed outside the presence of people.

"Collection" of wildlife could include collecting a wide range of creatures, such as butterflies, birds and insects.

"Recreational shooting" includes "any form of sport, training, competition, or pastime, whether formal or informal, which involves the discharge of a rifle, handgun, or shotgun, or the

use of a bow and arrow." § 103(4). This definition could encompass such varied activities as battlefield reenactments, paintball shooting games, training in the use of hand guns and target practice at shooting ranges.

"Recreational fishing" is also defined more broadly than the term might otherwise be understood. § 103(3). The term includes the "lawful pursuit, capture, collection, or killing of fish." Again, no guidance is given as to what would be "lawful" in this context.

How Would Title I Affect the Activities Allowed in the National Park System?

Title I would fundamentally shift the ground on which current laws and regulations are based for the management of the National Park System. As a result, as discussed in the next section, NPS's regulations would likely be invalid, at least in part.

Congress has mandated that NPS manage the National Park System to "conserve the scenery and the natural and historic objects and wild life therein." Organic Act, 16 U.S.C. § 1. In 1978, Congress reinforced this mandate, declaring that this System represents "cumulative expressions of a single national heritage," and that it should be managed for the "benefit and inspiration of all the people of the United States" and "in light of the high public value and integrity" of the System. 16 U.S.C. § 1a. NPS has reaffirmed, after a nation-wide debate in 2005 and 2006, that its mandate requires that conservation be the predominant purpose of the System when it conflicts with recreational uses. NPS Management Policies § 1.4.3.

Each unit of the National Park System was established by a unit-specific Act of Congress or, in the case of some national monuments, a Declaration by the President. In some cases, Congress or the President made a place-specific determination to permit or to require hunting or fishing in that unit. In other cases, the establishing act was silent, in which case the Organic Act governs those subjects. In those cases, Congress has presumed that NPS would prohibit hunting and similar activities, as NPS regulations have done for many years.

Accordingly, NPS manages the National Park System as a collection of "places that offer renewal for the body, the spirit and the mind." Management Policies, at iii. NPS emphasizes that it is committed to "the public's appropriate use and enjoyment, including education and interpretation, of park resources." *Id*. at iv. "Appropriate visitor enjoyment is often associated with the inspirational qualities of the parks. As a general matter, preferred forms of enjoyment are those that are uniquely suited to the superlative natural and cultural resources found in the parks and that (1) foster an understanding of and appreciation for park resources and values, or (2) promote enjoyment through a direct association with, interaction with, or relation to park resources." *Id.* § 1.5.

NPS's regulations recognize these unit-by-unit differences, as well as the purpose and mission of the National Park System. Those regulations provide that hunting and Title I's other promoted activities are prohibited in all units except where Congress has required or permitted them to be allowed. NPS regulations currently prohibit destroying, injuring, removing or

disturbing fish or wildlife except where expressly permitted. 36 C.F.R. § 2.1(a)(1). Hunting is currently permitted by NPS regulations in two situations: (i) where expressly permitted in a unit in its park-specific legislation, and (ii) where the unit's legislation gives NPS the discretion to permit hunting. *Id*. §§ 2.2(b)(1) and (2). But in the latter case, hunting is only permitted after a rulemaking proceeding in which the superintendant makes a determination that hunting there would be "consistent with public safety and enjoyment, and sound resource management principles." *Id*. § 2.2(b)(2).

Title I would change the foregoing. It would permit NPS to allow hunting, fishing and recreational shooting, as defined in the Bill, not only where Congress has required or permitted it in the law establishing a particular unit, but everywhere in the National Park System. Section 104(h) only says Title I does not "require" such activities in national parks or monuments. In addition, because § 104(h) only applies to national parks and national monuments and does not mention fishing, NPS would be required to allow all the activities promoted by Title I in all the 264 units that are not national parks or monuments and, as to fishing, in all 397 units, unless an exception could be found (see below).

In some units, NPS "culls" the population of deer and some other animals when their numbers grow excessive for the conditions at the unit. Depending on a number of factors, including the danger to visitors and to adjacent populated areas, NPS decides whether to use only its own marksmen or to allow qualified private citizens to assist in such culling. Title I, however, would require NPS to allow private citizens to participate in "culling and other management of wildlife populations" unless NPS "demonstrates" based on the "best scientific data available" why volunteers should not be used.

NPS regulations also prohibit "feeding, touching, teasing, frightening or intentionally disturbing of wildlife nesting, breeding or other activities." *Id.* § 2.2(a)(2). Title I, however, would allow even killing of wildlife or taking of wildlife specimens out of park units.

Trapping is prohibited anywhere in the National Park System except where Congress has expressly permitted it. *Id.* § 2.2(b)(3). Title I would expressly permit trapping anywhere in the National Park System. §§ 103, 104(a).

NPS's regulations recognize the importance that wildlife play in fulfilling the mission of the National Park System. Wildlife is to be observed from afar, and NPS takes seriously any attempt to harass or injure park wildlife. Under Title I, however, instead of managing the National Park System as a collection of inspirational and educational places recognizing their "high public value and integrity" (16 U.S.C. § 1a), and permitting only appropriate uses (Management Policies § 1.5), NPS would be called upon to permit the killing, trapping and collecting of wildlife and hand gun practice and paint ball game areas.

The experience of other visitors who come to observe, learn from and be inspired by the superlative wildlife in these places or to experience the solitude one can find there would likely instead have quite a different experience.

Doesn't Title I Provide Exceptions from Its Mandate that Would Give NPS the Power to Prohibit These Activities Where Not Appropriate?

While §104(a) provides an exception on which supporters of Title I's application in the National Park System base much of their argument, that exception would not likely be of much help to the NPS. It qualifies Title I's fundamental mandate if "statutory authority … authorizes [a different path] for reasons of national security, public safety, or resource conservation," § 104(a)(1); if a federal statute "specifically precludes" these activities in a place, § 104(a)(2); or if "discretionary limitations" are imposed, § 104(a)(3).

Subsection (2) does not generally apply in the National Park System because unit-specific statutes are generally silent about these activities unless Congress decides to permit some of these activities there.

Subsection (1)'s exception would appear to invoke the Organic Act's grant of discretionary authority to NPS to limit activities that impact park resources. But Subsection (1) does not appear to permit NPS to limit these activities when they impact park values. NPS protects park values as well as their resources, including such qualities as their contributing to national dignity and their inspirational values. In addition to that restriction on subsection (1)'s applicability to the National Park System, subsection (3) would impose further restrictions on the utility of subsection (1) to the NPS. That is so because the Organic Act authorizes "discretionary limitations," and subsection (3) restricts the imposition of "discretionary limitations."

Subsection (3) provides that an exception from Title I's mandate if "discretionary limitations [on these activities] are determined to be necessary and reasonable as supported by the best scientific evidence and advanced through a transparent public process." This clause would merely permit NPS to impose limitations on Title I's promoted activities under narrow circumstances and with great difficulty.

First, this clause would require a case-by-case determination to limit these activities in any unit — in other words, those places would be open to those activities unless closed. NPS's current regulations provide that (absent express statutory language) units are closed to these activities unless opened in a particular case. Title I supporters would likely argue therefore that NPS's current regulations would be invalid if Title I were adopted.

Second, under Title I, NPS would not need to perform any environmental review at all to permit these activities, but NPS would need to engage in such a process to limit them under § 104(a)(3). That is so because, on the one hand, § 104(c)(1)(B) would eliminate the applicability of NEPA to any action taken under Title I, and it goes even further by providing that "no additional identification, analysis, or consideration of environmental effects, including cumulative effects, is necessary or required." But, on the other hand, § 104(a)(3) provides that, if NPS has discretionary authority to impose any limitations on such activities, such limitations must be "determined to be necessary and reasonable and be supported by the best scientific evidence and advanced through a transparent public process."

Third, reversing the circumstances in which NPS must undertake environmental or other evaluations and/or engage in rulemaking proceedings has a particularly significant effect when adopted at a time of severe budget limitations. In recent years, NPS's operational funding has been less than what is needed to sustain even its current operations. Yet enhanced funding would be needed for NPS to comply with this new rulemaking requirement. The result could be few if any efforts by NPS to limit or prohibit hunting, fishing, recreational handgun shooting and the other activities promoted by Title I.

Fourth, the test imposed by Section 104(a)(3) would raise other barriers to NPS's ability to close any area to Title I's promoted activities. The exception appears to be drafted with litigation challenges in mind.

- NPS would need to make a determination under that clause that limitations are "necessary and reasonable as supported by the best scientific evidence." But Title I contains legislative findings, including that "recreational fishing and hunting are environmentally acceptable and beneficial activities." Title I, § 102(3). Courts "must accord substantial deference" to Congressional findings of fact. *See, e.g., Turner Broadcast System v. FCC*, 520 U.S. 180, 195 (1997). Those findings would undoubtedly be argued to create a presumption that NPS would need to overcome in any attempt to limit any area to Title I's promoted activities.

- Section 104(a)(3) requires support by "the best" scientific evidence, apparently foreclosing decisions based on the NPS professionals' best expert judgment. And the word "best" cries out for dispute in any case as to what is the "best" evidence.

- Title I makes imposition of limitations on the activities it promotes difficult in other ways. Section 104(j) provides that, in "fulfilling the duties" in Title I, NPS would need to consult with councils established by Executive Orders 12962 and 13443. Executive Order 13443 established an advisory committee dominated by sportsmen and sports gear manufacturers, with token representation of the environmental protection community. Executive Order 12962, as amended by President Bush, established an advisory committee largely composed of state and federal fishing and boating commissions, sportsfishing associations and fishing gear companies and manufacturers.

- Moreover, under § 104(g), any action that significantly restricts or closes 640 or more acres to the activities Title I promotes may only take effect if, among other things, "coordination" has occurred with a state fish and wildlife agency and the proposal has been submitted to the appropriate committees of Congress. "Coordination" presumably means something more than "consultation," although what veto power the state agency would have is left unclear.

Would Title I Open the National Park System to Off-Road Vehicles?

Yes. Title I does not only require NPS to permit hunting, trapping, shooting and the other activities it supports; the bill requires NPS to "facilitate use of and access to" the parts of the National Park System where they would now be permitted for those purposes. § 104(a). Hunters have long made clear that they need off-road vehicles ("ORVs") to get to remote areas for hunting and to carry out their dead game. The language of Title I's operative clause would appear to require NPS to permit use of all-terrain vehicles and other ORVs for that purpose. That conclusion becomes clear when the exclusion of "motorized recreational access or use" in Congressionally designated wilderness areas, § 104(e)(3), is compared with the more generally applicable provisions, which contain no such exclusion. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 129 S.Ct. 1849, 1854 (2009).

It has long been recognized that ORVs are incompatible with most parts of the National Park System. In 1972, President Nixon adopted Executive Order 11644, declaring that the widespread use of ORVs on public lands is frequently in conflict with wise land and resource management practices, environmental values, and other types of recreational activity. He mandated, among other things, that NPS could not permit ORVs in the National Park System unless NPS determined that "off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values." E.O. 11644, § 3(a)(4). In some places where ORVs have been permitted, NPS has determined that they can result in significant adverse impacts to wildlife, loss of vegetation and soil cover, creation of ruts and mud that affect water flows, among other things.

NPS has accordingly adopted regulations limiting ORV use in the National Park System. 36 C.F.R. § 4.10. ORVs are only permitted in some places, and only by adoption of a place-specific regulation complying with the requirements and limitations of Executive Order 11644.

Title I would appear to override Executive Order 11644 and NPS's regulation whenever an argument could be made that ORVs are useful for hunters, trappers, paint ball gamers, hand gun shooters or others who want to engage in any of the activities promoted by Title I.

Would Wilderness Areas be Given Special Protection Under Title I?

No. Instead, Title I would make clear that such areas in particular would be opened to hunting, trapping, shooting and fishing. The only difference is that if Congress has designated an area as wilderness, a floor amendment adopted in the House (adding § 104(e)(3)) states that those provisions are not intended to authorize or facilitate "motorized access or use" in those places.

The Wilderness Act of 1964, 16 U.S.C. §§ 1131-36, implements Congressional policy that some areas be preserved and protected in their natural condition as an "enduring resource of

wilderness" and for their enjoyment as such. Those areas must be places where "the earth and its community of life are untrammeled by man," places that retain their "primeval character and influence, without permanent improvements or human habitation," and that have "outstanding opportunities for solitude or a primitive and unconfined type of recreation." 16 U.S.C. § 1131(c).

Currently, the Act provides that federal agencies must review federal land under their care to determine if areas are eligible to be maintained and protected as wilderness. The agencies must then make a recommendation to Congress, reporting what area is eligible for wilderness protection and recommending whether all or some part of that area actually be designated by Congress as such. If an area has been designated by Congress as wilderness, no roads may be built through it, among other things. 16 U.S.C. § 1131(c). However, if an area is legally eligible for protection as wilderness, the NPS currently manages it as such until Congress makes a decision whether or not to designate it as wilderness, even if NPS has not recommended that the area be designated as wilderness. NPS Management Policies § 6.3.1. This preserves the wilderness qualities of the area in case Congress decides to designate more of the area as wilderness than NPS recommended.

Title I, however, would change this approach. First, Title I's § 104(a) expressly applies to "wilderness study areas" and to "lands administratively classified as wilderness eligible or suitable." That section therefore requires that NPS facilitate and provide access in those areas for the activities Title I promotes. In other words, instead of the current approach of maintaining these areas' wilderness characteristics while Congress considers whether to designate them as wilderness, these areas would be opened to those activities whether or not they are consistent with those wilderness characteristics. And that would include permitting ORVs into those areas to provide access to hunters and others engaging in these activities. Section 104(e)(3) only carves out access by and use of ORVs from areas Congress has already designated as wilderness.

Second, § 104(e)(1) requires that even Congressionally designated wilderness areas must be opened to the broadly defined hunting, fishing and shooting activities promoted by Title I. That section amends the Wilderness Act's provision prohibiting certain activities in designated wilderness — including construction of roads, landing of aircraft or construction of any installation or structure — "except as necessary to meet the minimum requirements for the administration of the area for the purpose of this chapter." 16 U.S.C. § 1133(c). Title I's § 104(e)(1), however, states that provision of opportunities for hunting and the other activities it promotes shall be "measures necessary to meet the minimum requirements for the administration of the wilderness area." Accordingly, this section would permit, for example, the construction of roads, structures or installations in designated wilderness areas.

Third, the Wilderness Act, while generally prohibiting commercial enterprises in wilderness areas, authorizes commercial services to the extent necessary for activities proper to realizing the wilderness purposes. 16 U.S.C. § 1133(d)(5). If making opportunities for hunting and Title I's other favored activities is necessary to meet minimum wilderness requirements, as Title I provides, commercial enterprises in wilderness areas are not prohibited there because they

are needed to facilitate those "opportunities." That might include, for example, commercial installations serving the hunting community.

Fourth, Title I's § 104(e)(2) permits implementation of the Wilderness Act "only insofar as [those requirements] do not prevent [government officials] from providing recreational opportunities" there. This is an open-ended limitation on implementation of the Wilderness Act. It is not possible now to predict how far NPS might be pushed, if this clause became law, into opening Congressionally designated wilderness to recreational opportunities long considered inappropriate for those primeval and untrammeled places.

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Robert D. Rosenbaum
Vinita Kailasanath
Helen Mayer