

Comments on Proposed Agency Guidance for Fixed Climbing Anchors:

- National Park Service – DRAFT REFERENCE MANUAL 41: WILDERNESS STEWARDSHIP; Evaluation and Authorization Procedures for Fixed Anchors and Fixed Equipment in National Park Service Wilderness
- U.S. Forest Service – Forest Service Manual 2300 – Recreation, Wilderness, and Related Resource Management; Chapter 2350 – Trail, River, and Similar Recreation Opportunities

From: David E. Adelman, 504 Harris Ave., Austin, TX 78705.

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Thank you for the opportunity to comment on the draft climbing management policies proposed by the National Park Service (NPS) and U.S. Forest Service (USFS). I have written a single set of comments on the two proposals, but I will be submitting them to each agency through their respective comment portals. My comments focus primarily on the new interpretive rule for fixed anchors under the Wilderness Act.

I am an environmental lawyer who focuses on public interest work in the areas of climate change and the major federal pollution statutes. Early in my career, I was an attorney with the Natural Resources Defense Council in its public health and nuclear programs; for roughly the past twenty years, I have been in academia (seven years at the University of Arizona in Tucson and 14 years at the University of Texas at Austin). I have hiked and climbed since the 1980s on public lands in Alaska, California, Colorado, Oregon, Washington, and Wyoming. While I love technical rock climbing, most of my experience has been hiking and climbing without the need for ropes or protection. I therefore come to this issue with a range of perspectives and experiences.

I fully support regulation of climbing and understand that management of climbing in wilderness areas must be consistent with the heightened preservation objectives of the Wilderness Act. However, I also believe that restrictions should be informed by the characteristics of individual wilderness areas and calibrated to the types and volume of climbing. This view is reflected in current agency practice. Within the NPS system, Joshua Tree National Park precludes fixed anchors in many areas of the park and requires permits for new fixed anchors or replacement of existing ones where they are allowed; similarly, the Black Canyon of the Gunnison National Park has long required permits for fixed anchors and placed strict limits on the number of new fixed anchors that can be placed. Other national parks, such as Rocky Mountain and Zion, have policies that restrict fixed anchors to sections of climbs for which placement of removable protection is not possible, but they do not require permits. These policies have evolved in a manner that reflects the distinctive conditions, impacts, and climbing norms in and around individual wilderness areas.

From a pragmatic administrative perspective, I do not believe that management of climbing will be improved by a prohibition on fixed anchors that can be overcome only

when the “necessity” and “minimum impact” elements of a “minimum requirements analysis” (MRA) are met. My principal concern is that the proposed guidance centers the regulatory analysis on an aspect of climbing that is critical for climber safety but only has a nominal impact on wilderness character. This structural misalignment derives, in large part, from the fact that the primary impacts of climbing (added trails/erosion, harm to vegetation and wildlife) are associated with the activities of climbers themselves rather than the type or amount of protection that climbers use. The proposed interpretive rule is all the more perplexing because the NPS and USFS have ample authority outside the Wilderness Act to regulate these impacts directly.

I will focus my comments on three issues: (1) whether the Wilderness Act mandates that fixed anchors be treated as prohibited installations; (2) the implications of legal precedent for agency discretion to allow climbing routes with fixed anchors in wilderness areas under an MRA; and (3) the poor fit of the MRA framework for effectively managing climbing in wilderness areas and safeguarding climber safety. I am particularly concerned that the proposed guidance will undermine agency decision-making and climber safety. I respectfully urge the NPS and USFS to reconsider and restart this rulemaking.

1. The Interpretation of Installation in the Proposed Guidance Is Not Legally Mandated by the Wilderness Act

Neither the NPS nor the USFS proposed guidance provides a detailed rationale for the new interpretation of “installation” as including fixed anchors. The NPS guidance cites the definition of installation in Reference Manual 41 §3.1,¹ and then observes that “[f]ixed anchors fall into this definition because they are installed and remain in place long after the installer has left.” The NPS guidance recognizes that fixed anchors are “small,” but asserts that “there is no ‘de minimis’ exception to the Wilderness Act’s restriction on installations, and that “many fixed anchors in a single area or rock wall can have a significant effect on wilderness character.” I will focus on the alleged lack of a ‘de minimis’ exception, but I want to note that in my experience it is difficult to see fixed anchors on a climb even when you are close to it and specifically looking for them. Other than the climber-related impacts outlined above, I do not see how an area or rock wall with climbs that utilize a limited number of fixed anchors would significantly impact the wilderness character.² The agencies should provide evidence to substantiate this claim.

¹ The agencies’ definition of installation is “anything made by humans that is not intended for human occupation and is left unattended or left behind when the installer leaves the wilderness.” See NPS Reference Manual 41, NPS Wilderness Definitions, at 2.

² Somewhat contradictorily, the NPS has long recognized the limited impact of fixed anchors on wilderness character: “the occasional placement of a fixed anchor for belay, rappel, or protection purposes does not necessarily impair the future enjoyment of wilderness or violate the Wilderness Act.” NPS Draft Reference manual 41, at 3. Similarly, the proposed Forest Service guidance states that: “The placement of a fixed anchor or fixed equipment does not necessarily impair the future enjoyment of wilderness or violate the Wilderness Act, but the establishment of bolt-intensive climbing opportunities may be incompatible with the preservation of wilderness character.” USFS Proposed FSM Section 2355.03(6)(b).

While it is true that the Wilderness Act lacks an express “de minimis” exception for installations and the other prohibited uses and activities under 16 U.S.C. 1333(c), it is also true that the statute does not expressly foreclose such an exception. In fact, the statute does not contain a definition of “installation” (or the other prohibited uses and activities), which leaves the definition up to the agencies and, within this implicitly delegated authority, gives them the discretion to determine whether to provide specific categorical or ‘de minimis’ exceptions. For the most part, the NPS, USFS, and Bureau of Land Management (BLM) have harmonized their definitions of prohibited uses and activities. However, whereas the definition of installation is broad and unqualified,³ this is not true of the definitions the agencies have adopted for other prohibited uses and activities.

The agencies’ definition of mechanical transport, for example, is as follows: “Any vehicle, device, or contrivance for moving people or material in or over land, water, snow, ice, or air that has moving parts as essential components of the transport and which apply a mechanical advantage, regardless of power source.”⁴ However, the agencies expressly exclude from this definition “skis, snowshoes, sleds, travois, non-motorized river craft including drift boats, rafts, or canoes, or similar primitive devices.”⁵ Similarly, while the definition of “motorized equipment” includes “any machine that applies force by transferring energy from a motor, engine, or other non-living power source,” the agencies exclude “machines where no force is applied (electronics), or small personal equipment where the force is negligible (such as watches, electric shavers, or flashlights).”⁶

The only incongruity is that the NPS and USFS have excluded fixed anchors in practice for decades, but simply never incorporated this into the definition of installation. Instead, this interpretation has been elliptical or implicit. For example, the NPS Reference Manual 41 §7.1 states that bolt-intensive sport climbs are “considered incompatible with wilderness preservation” and that management strategies for climbing may include requiring “authorization” for placement of new fixed anchors, replacement of existing ones, or removal of existing ones through “a park’s Wilderness Plan, or other activity-level plan, approved by the park superintendent.”⁷ In short, the agencies cannot claim that the Wilderness Act forecloses them from excluding fixed anchors from the definition of

³ The BLM guidance includes several modest qualifications regarding devices that are carried by people and that seem to overlap with the definition of mechanized equipment. *See* BLM Manual 6340 §1.6(B)(2)(j).

⁴ NPS Reference Manual 41; USFS Manual 2320.5(3); BLM Manual 6340 §1.6(B)(2)(h).

⁵ The BLM guidance is a little more specific: “devices that may provide mechanical advantage but are not used for transporting material over great distances (e.g., pulleys, pry bars, or winches) or for methods of transport where the mechanical advantage is from non-moving parts (e.g., travois) or is incidental to primary means of transport (e.g., ski bindings, horse bits, or oarlocks).”

⁶ BLM Manual 6340 at 1-13. The language in NPS Reference Manual 41 provides a longer listed of exempted equipment: “‘Motorized equipment’ does not include shavers, wrist watches, clocks, flashlights, cameras, camping stoves, solar panels, batteries, explosives, Geiger counters, cellular telephones, portable electronic media devices, radio receivers or transmitters, GPS units, or other similar small, battery-powered, hand-carried personal camping equipment.” The USFS Manual 2320 is also slightly different: “It does not include small battery or gas powered hand carried devices such as shavers, wristwatches, flashlights, cameras, stoves, or other similar small equipment.” BLM Manual 6340 §1.6(B)(2)(h).

⁷ The only circumstance in which Reference Manual 41 §7.1 requires an MRA is “for the placement of fixed anchors or fixed equipment for the purpose of facilitating future rescue operations.”

installation without creating obvious interpretive inconsistencies with established practice and the definitions of these other prohibited uses and activities.

The case law reinforces the discretion that the agencies have exercised in defining the scope and creating exceptions to their definitions of prohibited uses and activities under the Wilderness Act. As a general rule, courts begin with the language of the statute and then apply standard canons of statutory interpretation. *Wilderness Society v. FWS*, 353 F.3d 1051, 1060 (2003). In one of the most important circuit cases, the Ninth Circuit relied on two canons of interpretation: (1) “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning”; and (2) “words in a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Id.* (citations omitted).

I will illustrate the interpretive process using the term “installation.” Since the Wilderness Act does not define installation, we must start with its ordinary meaning, which the Ninth Circuit established by reference to a dictionary. *Wilderness Society*, 353 F.3d at 1061. The American Heritage Dictionary defines installation as “a system of machinery or other apparatus set up for use” (this language is mirrored in other dictionaries as well). While a fixed anchor is clearly not “a system of machinery,” it could be construed as a simple “apparatus for use.” However, this conclusion is far from clear given that the American Heritage Dictionary defines apparatus as “[a]n integrated group of materials or devices used for a particular purpose.” Accordingly, whereas a scientific monitoring station would clearly meet this definition, fixed anchors, which consist of one or two parts (piton, bolt and hanger, sling, fixed rope, ice screw), do not appear to fit the dictionary meaning of “apparatus.” Instead, fixed anchors lie, at best, on the outer bounds of the ordinary meaning of “installation”—much like skis and snowshoes arguably do not fall within the ordinary meaning of “mechanical transport.”

The exclusions in the definitions of prohibited uses and activities may nevertheless appear to be inconsistent with the *en banc* decision in *Wilderness Society*. In that case, the court held that the statute precluded *any* exceptions (beyond those specifically enumerated in the statute) for commercial enterprises, including those with a “benign purpose and minimally intrusive impact.” *Wilderness Society*, 353 F.3d at 1062. Importantly, the court’s holding turned on the specific exceptions for certain commercial activities in 16 U.S.C. § 1333(d). *Wilderness Society*, 353 F.3d at 1062 (“This statutory structure, with prohibitions including an express bar on commercial enterprise within wilderness, limited by specific and express exceptions, shows a clear congressional intent generally to enforce the prohibition against ‘commercial enterprise’ when the specified exceptions are not present.”). This point is distinguishing because the Wilderness Act does not contain any “specific or express exceptions” for installations, or the other uses and activities discussed above. The strict interpretive limit in *Wilderness Society* is therefore inapplicable to the agencies’ interpretation of installation and nothing in the Wilderness Act precludes the NPS or USFS from excluding fixed anchors from its definition.

2. Interpreting Installation to Include Fixed Anchors Would Drastically Limit the Agencies' Discretion to Allow Fixed Anchors in Wilderness Areas

Courts have applied the two-part MRA framework strictly. Agency officials must find that an installation is necessary to meet the “minimum requirements for the administration of the area for the purpose of the Wilderness Act.” *Wilderness Watch*, 629 F.2d at 1037 (citations omitted). In the case of fixed anchors, the relevant purpose would be “preserving opportunities for primitive and unconfined recreation wilderness.” *See, e.g.*, NPS Draft Reference Manual 41, Appendix B, at 13-14. But even when there is little question that fixed anchors will facilitate or enhance such recreational opportunities, this finding alone will not be sufficient—the statute requires that an installation be “necessary to meet the minimum requirements” of the Wilderness Act. *Id. See also Wilderness Watch v. FWS*, 2023 WL 4926848 (D. Montana, 2023) (concluding that “a proposed action in a wilderness area must be justified on the basis of wilderness necessity, not project necessity”).

Although an MRA does not require “absolute necessity,” if other options exist that do not involve a prohibited action and they will satisfactorily meet the recreational purpose (e.g., other climbs that do not require fixed anchors, climbs outside a wilderness area), then new fixed anchors cannot be deemed “necessary.” *Wilderness Watch*, 629 F.2d at 1037-39. One lower court has held that “[t]he wilderness that the Act seeks to preserve is not defined by reference to any particular recreational opportunity or potential utility, but rather by reference to the land's status or condition as being ‘Federal land retaining its primeval character and influence, without permanent improvements or human habitation . . .’ § 1131(c).” *High Sierra Hikers Assoc. v. USFS*, 436 F. Supp.2d 1117, 1135 (E.D. Cal. 2006). The court then concluded that the “enhancement of any particular recreational potential [is not] a necessary duty of wilderness area management” and that it could never be “necessary to meet the minimum requirements” for a purpose of the Wilderness Act. *Id.* at 1134. Further, the court extended this reading of the statute to “safety considerations,” which it found “will authorize only those actions that are strictly and immediately necessary” and that involve “[m]atters of urgent necessity rather than to convenience for use in an emergency.” *Id.* at 1136 (citations omitted).

While the holding in *High Sierra Hikers Assoc.* is premised on an interpretation of necessity that was rejected in *Wilderness Watch*, 629 F.2d at 1137, which is controlling, the court's central holding likely still stands. Namely, that “even safety considerations will authorize only those actions that are strictly and immediately necessary and are not sufficient to authorize the repair of structures [or installations] where some other administrative approach not involving structures [or installations] would suffice.” *High Sierra Hikers Assoc.*, 436 F. Supp.2d at 1136. An important question here is how broadly “other administrative approaches” will be read and whether courts will consider recreational opportunities individually or collectively as the court appeared to do in *High Sierra Hikers Assoc.* If legal precedent follows the latter, placement of fixed anchors would rarely be able to meet the necessity requirement of an MRA.

The court's narrow reading in *High Sierra Hikers Assoc.* of the Wilderness Act's emergency exception has serious implications for fixed anchors.⁸ The use of climbing protection (fixed or removable) is premised on avoiding emergencies of urgent necessity, as such circumstances would imply that protection has failed. If urgent necessity is required, replacement of existing fixed anchors that pose a potential safety risk would be strictly limited. The court's reading would also affect the scope of the emergency exceptions provided in both the NPS and USFS guidance documents.⁹ Specifically, it would override the broader emergency exceptions for replacement of fixed anchors in the NPS guidance, "necessary to exit the climb in the safest and most expeditious manner possible," and the USFS guidance, when there is "a legitimate safety concern." Given that it will take years to conduct MRAs for existing climbing routes in wilderness areas, this legal precedent would lead either to closure of many climbing routes or expose climbers (especially less-experienced ones) to unnecessary risks of fixed-anchor failure.

The case law on MRAs sets an exceptionally high bar for demonstrating that an installation is necessary to meet the minimum requirements for a purpose of the Wilderness Act. The narrow exception that this affords highlights the significance of the NPS and USFS proposal to interpret fixed anchors as falling within the definition of installation. The agencies appear to believe that the MRA process will give them sufficient discretion to continue to allow climbing routes with fixed anchors in wilderness areas, which are home to many of the best and most storied climbs in the country.

The existing legal precedent suggests otherwise. I believe that the most likely outcome is that fixed anchors on the vast majority of climbs in wilderness areas will be removed or (more likely) simply will not be replaced, with at most a small subset of the best or most historic climbing routes with fixed anchors retained. This result will be inescapable in wilderness areas with significant numbers of traditional climbing routes (i.e., those that can be climbed using removable protection) or where climbing is available outside a wilderness area.¹⁰ My intuition is that either or both of these circumstances apply to most of the wilderness areas with significant climbing opportunities. Put simply, the new guidance that the NPS and USFS are proposing would radically alter the landscape of climbing in the United States.

⁸ The relevant language is "except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area)." 16 U.S.C. § 1333(c).

⁹ The proposed NPS guidance states that "[o]n routes that have not yet been evaluated, climbers may make emergency replacements of pre-existing fixed anchors if necessary to exit the climb in the safest and most expeditious manner possible." NPS Draft Reference Manual 41, at 5. The proposed USFS guidance states that "[i]n the interim, emergency replacements of individual fixed anchors posing a legitimate safety concern may occur unless prescribed otherwise through an approved climbing management plan or equivalent planning document." USFS Proposed FSM Section 2355.32(5).

¹⁰ The phrase "climbed using removable protection" does *not* include bolts or slings used to rappel off of a climb for which hiking off the top is not possible. For many climbing routes, especially long, multi-pitch routes, rappelling off the top is the only option for returning to the ground. If this is the case, use of a fixed anchor (either bolts or slings) is mandatory because it provides the only means of setting up a rappel.

3. *The MRA Process Elevates the Nominal Direct Impacts of Fixed Anchors on Wilderness Character Over Climber Safety*

A principal problem with the MRA framework is that it centers the regulatory analysis on an aspect of climbing that is critical for climber safety but only has a nominal impact on wilderness character. Instead of focusing on the primary impacts associated with climbers themselves, the proposed guidance reorients regulation around counting and restricting fixed anchors. Under the USFS guidance, “[t]he placement, replacement and retention of fixed anchors and fixed equipment are permissible in wilderness when it is determined that they are the *minimum necessary* to facilitate primitive or unconfined recreation or otherwise preserve wilderness character.”¹¹ USFS Proposed FSM Section 2355.03(5) (emphasis added). Thus, the focus is on limiting the number of fixed anchors on a climbing route and the climbing routes with fixed anchors.

This framework creates unnecessary tradeoffs between wilderness preservation and climber safety, and it places a heavy thumb on the scale against fixed anchors despite their nominal impacts on wilderness character. The agencies provide no evidence that fixed anchors themselves on partially bolted climbing routes significantly affect the wilderness character of an area. Indeed, it is hard to see how limiting the number of fixed anchors or the climbing routes with them is an effective means of preserving wilderness. A particular concern is that climbers, especially less-experienced ones, will continue to climb routes, either out of ignorance or overconfidence, that have faulty fixed anchors or that no longer have the fixed anchors required to climb them safely. These heightened risks will increase climbing injuries and fatalities, and the number of rescues and evacuations, which often do significantly impact wilderness character. By contrast, placing seasonal or geographic limits on climbing, as the NPS has done under wilderness management plans and other planning processes, directly regulates the conduct associated with climbing that has the potential to significantly impact wilderness areas without sacrificing climber safety.

While it is true that a much higher number of climbers have the skills to climb routes that are fully bolted (so called sport climbs), a premise of both the NPS and USFS guidance documents is that sport climbs (what they refer to as “bolt-intensive face climbs”) are effectively prohibited in wilderness areas because they are “considered incompatible with wilderness preservation and management.”¹² This language implies that *all* of the climbing routes in wilderness areas will require traditional climbing techniques and that these techniques will be the predominant mode of providing protection.

¹¹ The language in the NPS guidance is not quite as stark: “The park should then determine whether a specific route, which includes a suitable number of fixed anchors to address safety concerns, meets the alternative selected in the MRA and therefore qualifies as the minimum necessary in wilderness.” NPS Draft Reference Manual 41, at 8. However, the legal precedent places a strong emphasize on limiting installations, even where public safety is at issue. *See* Section 2 above.

¹² The quote is from NPS Draft Reference Manual 41, at 3 (the NPS guidance also states that “fixed anchors or fixed equipment should be rare and that ‘clean climbing’ techniques should be the norm in wilderness.”). The language in the USFS proposed guidance is slightly weaker: “the establishment of bolt-intensive climbing opportunities *may be* incompatible with the preservation of wilderness character.” USFS Proposed FSM Section 2355.03(6)(b) (emphasis added).

This policy decouples the number of fixed anchors on a climb from the potential number of climbers that can access it, as all climbers in wilderness areas must be proficient with traditional climbing techniques. Consequently, allowing fixed anchors on a route will influence the number of climbers in a wilderness area only insofar as it allows a greater number of climbs to be put up—the number of fixed anchors on any given climb will be irrelevant. Further, although the number of climbs in a wilderness area undoubtedly influences the number of climbers and areas impacted, the agencies have the authority to limit the number and location of climbing routes without creating the tradeoffs with climber safety that are inherent to the MRA framework.

I believe that the new guidance proposed by the NPS and USFS has serious legal, administrative, and safety deficiencies that warrant careful reconsideration. The proposed guidance also represents a major change in agency policy that should receive fuller consideration and a more transparent accounting to the public of the motivations and rationales that are driving it. For a decision of this magnitude, the agencies should proceed through a notice and comment rulemaking under the Administrative Procedure Act and conduct a comprehensive environmental impact statement under the National Environmental Policy Act.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "David Adelman". The signature is written in a cursive style with a long horizontal flourish at the end.

David E. Adelman