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Comments: As an initial matter, I request that the comment period be extended for 30 days. This is acritically important issue to millions of Wilderness users that requires thorough deliberation andexhaustive public involvement. The holiday period and recent spike in covid and otherrespiratory ailments throughout the country have signi?cantly limited the public's ability tomeaningfully comment in the period provided. I am myself just recovering from a two-weekstruggle with covid, and consequently have not had sufficient time to prepare this letter.There are several aspects of the agencies' proposed guidance that I would like to address. Themost concerning is the premise in the draft guidance that a ?xed anchor is a prohibited"installation" under the Wilderness Act and the associated requirement to undertake a minimumrequirements analysis (MRA) to assess whether existing ?xed anchors may remain and existingunsafe ?xed anchors replaced. Given the limited opportunity to comment, I focus here on theseIssues.As explained below, the premise that a ?xed anchor is a prohibited "installation" is not dictatedby the language of the Wilderness Act or its legislative history, as evidenced by nearly 60 yearsof federal agency practice after Congress passed the Act. As a policy matter, the agencies do notneed to adopt this theory to regulate ?xed anchor use to protect Wilderness resources becausethey have plenary authority to do so under their organic acts and related statutes. Also, if thistheory is adopted and MRAs are required to replace unsafe or dangerously-old ?xed anchors, itwill increase the risk of injury or death on Wilderness cliff's (crags) across the country as well asopen a Pandora's Box of controversy and litigation.I urge the agencies to revise the proposed guidance to omit the theory that ?xed anchors areprohibited "installations" under the Wilderness Act and to edit the guidance language to re?ectthat the agencies' policy direction is not premised on this position. Quali?cationsI am an attorney with over than 30 years of experience in federal public land and administrativelaw. After graduating law school and completing a judicial clerkship, I joined the Solicitor'sOf?ce (SOL) of the Department of the Interior through SOL's honors program during the ?rstyear of the Clinton Administration. Over the next two decades I worked in SOL of?ces in DC,Portland, and Salt Lake City, ?nally retiring in the third year of the Trump Administration as theIntermountain Regional Solicitor, an SES position. During my tenure with SOL, most of mywork involved representing the Bureau of Land Management on all public land issues, includingWilderness and WSA management, and providing legal services to senior career and non-careeragency managers. As a SOL manager, I supervised attorneys advising NPS and other Interioragencies. Currently I provide expert, pro bono public land and administrative law advice toseveral non-pro?t public interest advocacy groups and involved individuals.My interest in public land law stems from my early life experiences as a backpacker and climber,as well as a seasonal employee for the Forest Service. Many of my formative experiences werein the remote mountain ranges and Wilderness areas of Arizona, California, and Wyoming, and Ibegan my federal service as a Fire Guard in Wyoming's Wind Rivers and later as a WildernessGuard in the Wind's Fitzpatrick Wilderness before law school. For over 50 years now, I haveclimbed throughout the country, and with others I have established numerous ?rst ascents, manyinvolving the placement of ?xed anchors.I have been aware of the theory that ?xed anchors are prohibited "installations" under theWilderness Act since at least 1998 when I ?rst heard it raised by an advocacy group. For at least25 years, I have kept track how federal agencies approach Wilderness ?xed anchor regulation.After retiring from federal service, when planners at Joshua Tree NP in 2022 indicated that theyhad concluded that ?xed anchors are prohibited "installations," I have spent hundreds of hoursresearching agency and other documents relevant to this issue.In this letter, given the time constraints, I write assuming reviewing agency personnel will befamiliar with this issue and will have access to the agency documents and records regardingevents to which I will refer. If the comment period is extended, I can supplement this letter withdetailed citations as necessary. In any event, I would be pleased to discuss further, in writing orverbally, any matters related to the Wilderness ?xed anchor issue.Legal issueThe draft guidance is based on the premise that a ?xed anchor2 is a prohibited "installation"under section 4(c) of the Wilderness Act. Section 4(c) states, in relevant part, that "there shall beno temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing ofaircraft, no other form of mechanical transport, and no structure or installation within

any[Wilderness area]." Whether or not a ?xed anchor is an "installation" under the Act is a legalquestion: What did Congress intend when it passed section 4(c) in 1964?The Wilderness Act itself does not de?ne "installation." Nor is there anything in the Act'slegislative history to suggest that Congress intended the word "installation" to apply to a ?xedanchor.3 It simply cannot be reasonably maintained that either the Act or its legislative historyindicates Congress' intent that "installation" be interpreted to apply to a ?xed anchor.Presumably the agencies do not dispute this point.There are, of course, myriad canons of statutory construction that can be applied to this issue,such as the "plain meaning rule" or the rules allowing courts to look to other statutory provisionsin the same act to interpret the provision at issue. These judicially made rules, however, do notundermine the fact that the Act and its legislative history do not dictate the conclusion that a?xed anchor is a section 4(c) installation.The statutory interpretation question then comes down to choosing which canons of statutoryconstruction to apply and what weight to give to them. There is signi?cant academic andadvocacy group literature arguing both sides of which the agencies are likely aware. I believethe structure of the Act and the substance of its provisions favor the conclusion that ?xed anchorsshould not be considered section 4(c) installments, but I do not have time to offer my ownanalysis here. In any event, as the proponent of the legal position that a ?xed anchor is a section4(c) installment, the agencies should have the burden of at least explaining their analyses.Unfortunately, neither the draft guidance nor any related information posted on agency websitesprovides reasoning to support the proposition that Congress intended to prohibit ?xed anchors assection 4(0) installations or that the canons of statutory construction dictate such a conclusion.The NPS draft guidance provides some reasoning to support the theory that a ?xed anchor is asection 4(c) installation, but that reasoning is based on the agency's own de?nition ofThe FS draft guidance provides no reasoning.In short, the premise stated in the proposed guidance that a ?xed anchor is a section 4(c)installation is not dictated by either the Wilderness Act or its legislative history.5 To the extentthat the agencies believe otherwise, they should explain their analyses to the public.Administrative HistoryThe proposed guidance's premise is also not supported by the Wilderness Act's administrativehistory. As demonstrated below, for over 50 years after passage of the Act, no federal agencythat manages Wilderness (NPS, FS, BLM, FWS) has promulgated regulations or issued nationalguidance taking the position that a ?xed anchor is a section 4(c) installation. Indeed the vastmajority of individual Park and Forest unit planning decisions that have been made since the Actwas passed have not relied on the "installation" theory for their management prescriptions. Thishistory of administrative interpretation weighs heavily against the agencies' apparent attempt toadopt the theory now.National PolicyBetween 1964 when the Wilderness Act was enacted and the mid-1980s, the agencies made nosignificant attempt to regulate the placement of ?xed anchors in Wilderness, despite thedesignation of numerous \Wilderness areas where ?xed anchors were already present and thecontinued placement of ?xed anchors after designation. Beginning around 1987, the agenciesundertook a series of efforts under both Democratic and Republican Administrations topromulgate rules or issue national guidance addressing Wilderness ?xed anchor use. However,none of these efforts to address the issue nationally resulted in the agency taking the position that?xed anchors are section 4(c) installations.These previous efforts include":1991 NPS deliberations resulting in a July 1991 WC directive to Regional Directors;1993 NPS rulemaking attempt (abandoned);1994-95 FS rulemaking attempt (abandoned);1998-1999 NPS effort that resulted in the 1999 version of DO 41;1998-2001 FS negotiated rulemaking attempt (terminated Without result);2003 -2004 FS effort to add a provision to FS Manual 2320 (abandoned);2004 NPS and BLM rulemaking efforts (abandoned);2004[mdash]2006 NPS effort to revise DO 41 and deliberations resulting in the 2006Management Policies;2007 BLM effort leading to W0 Instruction Memorandum regarding Wilderness?xed anchor use;2011-13 NPS effort that resulted in the current DO 41 and RM 41;2011-12 BLM effort that resulted in Manual 6340; and2015 NPS effort resulting in the Wilderness Stewardship Planning Handbook.In all these national policy-making efforts, although the agencies were squarely faced with thelegality of ?xed anchors in Wilderness, none of the agencies reached the conclusion that ?xedanchors are section 4(c) installations. Given these events, a decision to do so now is very likelyto be found arbitrary and capricious. This risk is particularly high because the agencies have notexplained the reason for their change in position.Two of the above-listed efforts demonstrate clearly that for signi?cant periods of time neither FSnor NPS leadership believed that a ?xed anchor is an "installation" under the Wilderness Act.FS undertook the 1998-2001 negotiated rulemaking after a W0 reviewing of?cial in a May 1998decision upheld a Sawtooth NF decision that found that ?xed anchors are section 4(c)installations and a subsequent F S news release stating an

intent to prohibit Wilderness ?xedanchors nationwide. A few months later, due to public outcry and congressional pressure, theUnder Secretary for Resources and Environment disavowed the decision and announced anegotiated rulemaking to develop rules to govern Wilderness ?xed anchor use.7The negotiated rulemaking was long and costly. FS convened a FACA committee of 24individuals comprising a variety of interests. NPS, BLM, and FWS participated. There werefour two-day, in[mdash]person meetings of the FACA committee and agency personnel, and substantialcorrespondence among the participants. During the committee's discussions, a WildernessWatch representative and one or two others on the FACA committee insisted that ?xed anchorsIn 2011 NPS released for comment a draft of a revised DO 41 intended to update the NPS' 2006Management Policies (which superseded the 1999 version of DO 41). The 2011 draft states that"[t]he occasional placement of a ?xed anchor for belay, rappel or protection resources does notnecessarily impair the future enjoyment of wilderness or violate the Wilderness Act." It statesthat "[a]uthori2ation will be required" for new ?xed anchors, but directs that the "requirementsfor authorization, and the process to be followed," be established in a management plan. Thedraft also states that, to replace ?xed anchors, authorization "may" be required, but does notdictate it. For proposals to place ?xed anchors "for the purpose of facilitating future rescueoperations," the draft states the proposals "should be evaluated through minimum requirementsanalysis."Although at least one commentator (PEER) on the 2011 draft expressly questioned NPS'rationale for its conclusion that ?xed anchors do not violate the Wilderness Act, the ?nal versionof DO 41 released in 2013 carried forward almost all the 2011 draft's language. For example,the ?nal version states again, "The occasional placement of a ?xed anchor for belay, rappel, orprotection purposes does not necessarily impair the future enjoyment of wilderness or violate the"Wilderness Act." It provides that authorization will be required for new ?xed anchors, but"may" be required for replacement, and that "the authorization process to be followed will beestablished at the park level." The only potentially signi?cant difference with the 2011 draft isthat, with respect to the applicability of the MRA process, the ?nal version reads that proposalsfor the placement of ?xed anchors "for the administrative purpose of facilitating future rescueoperations must be evaluated through an MRA."After DO 41 was issued as ?nal in 2013, Wilderness Watch, PEER, and two other NGOs sent aletter to the NPS Director requesting that NPS remove the language in the DO stating that theoccasional placement of ?xed anchors does not violate the Wilderness Act. They asserted theirbelief that this is contrary to the notion of "untrammeled" as used in the Act and that the Act'sprohibition on "structures and installations" must be considered. NPS did not revise DO 41, andostensibly does not propose to do so now (although the proposed revision of RM 41 wouldessentially achieve the same end).The F S' attempt at negotiated rulemaking and the NPS' deliberations leading to DO 41 leave noreasonable doubt that the agencies then did not read section 4(c)'s reference to "installation" asapplying to ?xed anchors. There would have been no basis for the negotiated rulemaking if theFS had concluded ?xed anchors are section 4(c) installations, or for the NPS in D0 41 to statethat the occasional placement of ?xed anchors does not necessarily violate the Act and to limitthe MRA process to administrative purposes to facilitate rescue.Position of OGC and SOLThe agencies' legal counsel, the Of?ce of General Counsel (OGC) for FS and the Office of theSolicitor (SOL) for NPS, BLM, and FWS, during this timeframe also took the position that thereis no basis in the Act or its legislative history compelling the conclusion that a ?xed anchor is asection 4(c) installation. In 2004, in a memo to the Director, Recreation Heritage, andWilderness, from the Acting Assistant General Counsel, Natural Resources Division, OGCconcluded:[T]he F S may have discretion to authorize use and placement of ?xed anchors withoutrunning afoul of the Act's prohibition on installations. That the term "installations" couldbe read to preclude anything that ?ts within the strictest dictionary de?nition of the worddoes not mean, as a matter of statutory construction, that Congressional intent isunambiguously aligned with such a de?nition. To the contrary, there is suf?cientevidence in the Act to suggest some minimal discretion in wilderness administeringagencies to interpret "installations" to allow for placement of ?xed anchors in wildernessareas to further one of the Act's purposes, recreation.The 2004 OGC memo also states that OGC's conclusion accords with the views of the Solicitor'sOf?ce. It recites a 1998 letter from Solicitor John Leshy to OGC, in which the Solicitor statedthat it is "unwarranted to interpret the 'no structure or installation' and 'no permanentimprovement' language of the Act to ban climbing bolts across the board."" A contemporaryMaster's thesis published in 1999 (by Thomas Scales) quoted an attorney in SOL's Division ofParks and Wildlife characterizing the Solicitor's opinion similarly.To my knowledge, neither OGC nor SOL have issued opinions overruling the Acting AssistantGeneral Counsel's 2004 opinion or contradicting Solicitor Leshy's view. During my career atSOL until

my retirement in December 2018, I understood SOL's legal position to be that section4(c) of the Wilderness Act did not prohibit climbers from placing ?xed anchors for their safety.As a senior manager and later SES member of SOL the last several years of my career, I certainlyI request that all records currently in possession of the agencies or archived by NARA be included in theadministrative record for the proposed guidance, including the full negotiated rulemaking docket.PlanningThe overwhelming majority of the wilderness stewardship, climbing management, and similarplans have been issued by individual Park and Forest units addressing Wilderness ?xedanchors do not premise their management prescriptions on the theory that ?xed anchors aresection 4(c) installations. I have reviewed nearly 30 such plans (including BLM plans) and theiravailable supporting NEPA documentation, and only a few expressly adopt this theory as aplanning rationale.The earliest plans addressing Wilderness ?xed anchor use clearly did not View ?xed anchors assection 4(c) installations, even those plans that prohibited their use. For example, it appears the?rst NPS plan to address Wilderness ?xed anchor use was the 1989 Yosemite NP WildernessManagement Plan, adopted relatively soon after 95% of the park was designated Wilderness inthe 1984 California Wilderness Act and included numerous crags with hundreds of ?xed anchors.The plan expressly provided for no ?xed anchor regulation. One of the ?rst F S plans to addressWilderness ?xed anchor use was the 1992 Tonto NF Superstition Wilderness ImplementationPlan. This plan carried forward a moratorium on new bolting, but the moratorium was not basedon the position that ?xed anchors are section 4(c) installations."Numerous NPS and F S plans addressing Wilderness ?xed anchors have been issued since thesetwo adopting a variety of management approaches:Allowing new ?xed anchors without permit (e. g., 2001 Rocky Mountain NPBackcountry/Wilderness Management Plan; 2007 Zion NP Backcountry Management)- Allowing new ?xed anchors without a permit but prohibiting ?xed anchors whereremovable protection is available (e. g., 2004 Black Canyon of the Gunnison NP InterimManagement Plan; 2006 Denali NP&R Final Backcountry Management Plan; 2012Shenandoah NP Rock Outcrop Management Plan).Requiring a permit for new ?xed anchors but not to replace existing ?xed anchors (e. g.,2005 White Mountain NF Land and Resource Plan; 2013 Arches NP Climbing andCanyoneering Management Plan"; 2013 Death Valley NP Wilderness and BackcountryStewardship Plan).Requiring a permit for both new ?xed anchors and to replace existing ?xed anchors,except in emergencies (e. g., 2015 Sequoia and Kings Canyon NPs WildernessStewardship Plan).Prohibiting any new ?xed anchors without exception (e. g., 2004 Daniel Boone NF Landand Resource Plan").Obviously, when the above referenced plans were prepared, none of the units that allowed theplacement of ?xed anchors viewed them as prohibited section 4(c) installations, and for thosethat prohibited fixed anchor placement, the available NEPA documentation does not indicate themanagement prescriptions were based on section 4(c). For several of these plans, the availableNEPA and decision documents indicate that the theory that ?xed anchors are section 4(c)installations was advocated by either staff or commentators during the NEPA process, but thetheory was not adopted as the agency's rationale for its planning decisions (e. g., 2000 JoshuaTree NP Backcountry and Wilderness Plan).It has not been until 2022 that the "installation" theory has established a signi?cant foothold inagency planning, primarily in Joshua Tree NP, which is midstream in a planning process, andBlack Canyon of the Gunnison NP, which completed a plan in 2023 but has not carried it forwardin the Superintendent's Compendium. These two efforts appear to be driven by the same agencypersonnel pushing the "installation" theory in the draft guidance.I have followed these two planning efforts, particularly for Joshua Tree NP, to try to understandthe rationale for the change in legal position. Through comments made during the NEPA processand F OIA requests, the public has repeatedly asked the planners for a detailed explanation. As Iunderstand it, their primary explanation was that RM 41's de?nition of "installation" compels theconclusion that ?xed anchors are "installations" (which is essentially the same explanation in theNPS' draft guidance). 2[deg] Certainly, had this been NPS' understanding in 2013 when both DO 41and RM 41 were released, DO 41 would have said so, and the NPS planning efforts that occurredalter DO 41 and RM 41 were issued would have relied on the "installation" theory as afundamental basis for plan prescriptions.In any event, the de?nition of "installation" in RM 41, which I understand was not subject topublic review and comment unlike DO 41 , is overbroad and contrary to other agency guidance.It essentially de?nes "installation" to be "anything made by humans" that is unattended or leftbehind (other than things "intended for human occupation," i.e., prohibited "structures"). Thereis no support in the Wilderness Act or its legislative history for any human-made item, no matterhow trivial, to be deemed an "installation." The agencies' chief reference for Wildernessmonitoring, Keeping It Wild 2, identi?es a list of human-made things that it states are not"technically a

structure, installation, or development," such as "mining debris" and "trashdumps" (page 47). This is ?atly inconsistent with RM 41 's "anything made by humans"de?nition and demonstrates that the de?nition is baseless.I think a close examination of other agency actions regarding Wilderness ?xed anchors, such asindividual unit orders, permitting decisions, citations, and changes to Superintendent'sCompendia, would con?rm that, for almost six decades now, the agencies generally have notconsidered ?xed anchors to be section 4(c) installations. I also suspect that an examination ofagency inventory and planning records for lands later recommended by an agency fordesignation as Wilderness would reveal that ?xed anchors have never been considered an"installation" for purposes of the inventory or recommendation. In any event, there should be noserious factual dispute that the Act's administrative history generally shows a long-standingunderstanding that a ?xed anchor is not a section 4(c) installation.Policy considerationsAlthough not determinative as to the appropriate interpretation of the Wilderness Act, severalpolicy considerations warrant against adopting the theory that a ?xed anchor is a section 4(0)installation. I anticipate these considerations will be thoroughly discussed by othercommentators, so here I will brie?y address only three that I think warrant close attention.First, there is no question the agencies have plenary authority under their organic acts andassociated legislation to regulate [mdash] even to prohibit and remove [mdash] ?xed anchors as necessary tocomply with planning decisions or to protect wilderness character or other resources. Asindicated in the discussion above regarding planning, individual Park and Forest units have andare taking different management approaches to address Wilderness ?xed anchors and are relyingon their organic act authority with little to no controversy. These approaches are appropriatelytailored to the resource concerns and visitor use patterns of each individual unit. By adopting thelegal position that a ?xed anchor is a section 4(c) installation, the agencies would beunnecessarily spawning controversy and likely litigation as well as substantially limiting thediscretion of individual Park and Forest managers to deal with issues unique to each unit.21Second, if the agencies were to adopt the legal position that a ?xed anchor is a section 4(c)installation, they would not only be upsetting existing unit plans that do not prohibit ?xedanchors, they also would be exacerbating the danger posed by unsafe and aging ?xed anchors onexisting routes in Wilderness areas throughout the country. The agencies' position would preventor at least extremely restrict the ability of climbers from replacing unsafe and dangerously-old?xed anchors as they are discovered.22 Because the agencies do not have sufficient resources to to direct the use of the MRA process as a toolfor considering the issuance of ?xed anchor permits to the extent permitting is adopted as a managementprescription. This is different than taking the position that the MRA process is required as a matter of lawand therefore must be applied to every existing and proposed ?xed anchor in Wilderness nationwide toeither allow the ?xed anchor to remain or a new one to be placed.Where a unit is able to undertake an MRA, the process will be laborious and time consuming,and continue to prolong the risk caused by unsafe and dangerously-old ?xed anchors. As theagencies are aware, permitting decisions are subject to NEPA, NHPA, BSA, and tribalconsultation requirements, among other things. I realize that both agencies have publishedNEPA categorical exclusions (CXs) that may be argued to apply to requests to replace unsafe?xed anchors. However, even if those CXs can be used for a ?xture that has not been subject toNEPA previously, the agencies are obligated to consider and document whether extraordinarycircumstances exist such that invoking the CX is appropriate. And, of course, there is no CXequivalent under the agencies' other statutory and policy obligations. Once underway, the MRAprocess will be subject to delays caused by competing demands from other programs as well asunforeseeable events to which the agency must respond (e. g., ?re, rescue). To the extentreplacement is approved, administrative and judicial litigation may continue to prolong the risk.By taking the position that all Wilderness ?xed anchors in the country are prohibited installationsand that an MRA is required to allow unsafe ?xed anchors to be replaced, in those areas whereMRAs have not been completed the agencies will have at least some responsibility for the failureof a known unsafe ?xed anchor that otherwise would or could have been replaced and anyconsequent injury or death. It will increase the agencies' risk of tort liability under the FTCA,notwithstanding the discretionary function exception.25 For sure, this could be avoided by anationwide closure of routes in Wilderness with ?xed anchors pending MRAs, but this seemsunrealistic and it surely would draw hostile congressional attention and be litigated. Theagencies could undertake more site-specific closures of routes with known or suspected unsafe.This could create a duty to inspect and a level of care that is not in the agencies'interest and is likely not feasible nationwide for budgetary and other reasons. In any event, asthe agencies know, closure orders almost always are controversial and largely ineffective withoutadequate

enforcement.Finally, if the agencies were to take the position that a fixed anchor is a section 4(c) installation,it will open a Pandora's Box of questions, controversy, and litigation regarding other minorhuman-made features that are commonly found within Wilderness, such as shell casings andslugs, trail marking pickets, posts, cairns, and similar currently uncontroversial items related torecreation. As the agencies are aware, there are myriad human-made features in countlessthousands that have not been subjected to an MRA. Deeming a ?xed anchor as a section 4(c)installation and requiring MRAs to evaluate the thousands of ?xed anchors that currently existwill create a precedent of far-reaching and uncontrollable consequences. Again, the agencieshave plenary authority under their organic acts to address Wilderness fixed anchor use to protectWilderness characteristics, with none of the consequences described above.ConclusionAs noted at the outset, I request an additional 30 days to comment. To the extent the agenciesproceed with the guidance, for the reasons explained above, I request that the agencies omit thelanguage in the draft guidance deeming ?xed anchors to be section 4(c) installations, and to editthe rest of the documents to make clear the agencies are not relying on that premise for theirmanagement direction.If the agencies decide to go forward with the draft guidance without making these changes, Irequest the agencies include in their published responses to comments an explanation why theirdecision to adopt this legal position and to direct units to apply it does not require notice-and[mdash]comment rulemaking and compliance with NEPA and other federal law and policy applicable toagency decision-making.27 I also request that the agencies promptly complete the compilation oftheir respective administrative records for the proposed guidance and make the records publiclyavailable.Again, I will provide any citations or documentation supporting any of my representations uponrequest, and I am willing to discuss these issues further in writing or verbally.