



Improving the Visitor Experience at National Parks Through Contemporary Concessioner Operations

**Response of the National Park Hospitality Association to the
Proposal by the National Park Service to Improve the Visitor Service Program
Published on July 20, 2020
NPS RIN 1024-AE57**

National Park Hospitality Association
derrick@parkpartners.org
August 29, 2020



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Director
National Park Service
1849 C Street, NW
Washington, DC 20240

***RE: Regulation Identifier Number (RIN) 1024-AE57, Commercial Visitor Services;
Concession Contracts***

Dear Director:

The National Park Hospitality Association (NPHA) expresses appreciation for the efforts of the National Park Service to improve park visitor experiences through expanded sustainable, high quality and contemporary concessioner-provided visitor services. The proposed rule published on July 20, 2020, would support numerous legislative and administrative missions of the agency, including the NPS Organic Act, the Concessions Management Improvement Act of 1998, the 2016 National Park Service Centennial Act, numerous Executive Orders including #13777, Secretarial Order 3366 and more. We support much of the proposal and will suggest in this and subsequent submissions ways to achieve goals set forth in the notice preamble.

NPHA represents the diverse businesses which are privileged to partner with the National Park Service in meeting the needs of park visitors. While our primary expertise is in providing outstanding lodging and food, transportation and retail services, equipment rental and guiding services and more, our industry is also committed to increasing awareness of, and protection of, park resources and the safety of those in national parks. A reverence for national parks is in our corporate cultures.

As the Proposed Rule indicates, concessioners provide park visitors with goods and services valued at more than \$1.5 billion annually and provide NPS funding greater than \$135 million annually. We also provide professional management of much of the visitation to our parks, in part through the 25,000 employees of our member companies who work within more than 100 park units.

NPHA believes its members are vital tools in fulfilling the mission of NPS established in the 1916 Organic Act, directing that NPS:

"shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

Stephen Mather, who was not only the first Director of the agency but also a primary figure in its creation, understood the vital role of concessioners and their link to public enjoyment of parks. He forged a bond with companies who supported enjoyment in ways that left parks unimpaired. We are proud of the long tradition of concessioners in parks, and the successful use of private capital together with facility and visitor management skills to serve an estimated one-third of all park visitors each year, generation after generation. Concessioner-constructed lodges in many of the nation's most visited national parks remain iconic, well-functioning international attractions.

Since the publication of the Proposed Rule, the nation has gained the Great American Outdoors Act (GAOA). GAOA resulted from unified, bipartisan action committed to reversing decades of deterioration in key park infrastructure, and especially in the infrastructure critical to visitor safety and enjoyment. Concessioners were proud to be among the diverse conservation, recreation, tourism and other interests that made this success possible, and especially applaud the US Department of the Interior and the National Park Service for their role in this giant step ahead for our parks and other special places. With the resources provided by GAOA and new nimbleness under an improved concessioner program, the future will be bright for national parks and their visitors.

The remainder of this submission will comment on and make suggestions regarding six of the topical areas addressed in the Proposed Rule. NPHA will submit comments on additional topical areas prior to the closing of the comment period. The areas we will address here are:

Proposed Change 1: New Concession Opportunities

Proposed Change 5 (in part): Leasehold Surrender Interest (36 CFR 51.51 – 51.67)

Proposed Change 6: Term of Concession Contracts

Proposed Change 7: New or Additional Services

Proposed Change 8: Setting Franchise Fees

Proposed Change 10: Concessioner Rates

We invite your questions regarding our recommendations and appreciate the tradition of effective communication of ideas at the park, regional and national levels.

Sincerely,



Scott Socha

Scott P. Socha, Chair
National Park Hospitality Association
ssocha@delawarenorth.com

***NPHA Initial Comments on Proposed Rule, 36 CFR Part 51
[NPS–WASO–29921; PPWOBSADC0; PPMVSCS1Y.Y00000]***

RIN 1024–AE57

Commercial Visitor Services; Concession Contracts

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Comments on Proposed Change 1: New Concession Opportunities and Providing Better Park Experiences Through New or Additional Services Provided by Concessioners (36 CFR 51.4)

The National Park Service has a strong history of recognizing the importance of visitor services to support great park experiences. Although actions early in the 20th century to provide new opportunities are often cited –such as construction of lodges accessed largely by those traveling by rail – the process has continued. Access to Fort Sumter by ferry was added in 1961, and Alcatraz Island opened to visitors also by ferry in 1973. Historic and new buildings have been opened to provide visitors with services including lodging and food and other services, and guided services including climbing and rafting and backcountry adventures have been added. Well-managed oversnow travel in coaches and individual vehicles have been added and enjoyed by millions in Yellowstone in partnership with concessioners. Showers and laundromats have been added to serve campground visitors in several park units

This pattern has helped Americans enjoy park experiences more – but has also helped accommodate and manage visitors by spreading visitation physically and providing resources to manage visitation, including concessioner staff and funding for NPS operations. The **Federal Register** notice for this proposed rule credits concessioner franchise fees with \$135,000,000 in annual revenue, all supplementary to base appropriations and largely retained and expended locally. If combined with other special fees and annual capital investments, NPS annual revenues are, in fact, at least \$250,000,000 annually. Yet these opportunities and their associated fees are concentrated in a small number of typically very popular park areas. Providing new or additional services to less popular park areas with little or no investment of taxpayer funds could add needed operational resources for those areas and help reduce pressures on popular areas.

We support carefully planned expansion of visitor services to increase visitor enjoyment, especially at NPS units with limited visitation and with the capacity to serve visitors during extended seasons. The **Federal Register** notice described some of the newer successes, including broadband connectivity important to safety and providing visitors with educational and interpretive information. But there are many more opportunities to better connect Americans embracing contemporary cultures and skillsets to fully capitalize on visits to their shared legacy of parks. Examples include new and affordable overnight opportunities in campgrounds, innovative use of new transportation technologies, and rental and servicing of equipment ranging from bicycles to kayaks to specialized clothing. We note that NPS has underway a planning process for improving its developed campgrounds. We support this process and believe that the public will benefit from concessioner operations of many campgrounds now operated by NPS staff.

NPS is and should always be empowered to determine whether a proposed service is necessary and appropriate. Further, expansion of services and expansion to additional units will assist NPS in distributing and managing visitation geographically and in generating sustainable revenues for park operations, including O&M, interpretation, and law enforcement. Carefully done, expansion of visitor services through commercial partners can be an important tool in correcting the disadvantage in funding facing many park units reliant nearly exclusively on appropriated dollars.

NPHA applauds better integration of park planning processes with expanded visitor services. But the reality is that the cited planning processes, which are often very wide in scope, are lengthy and burdensome to park constituents, including concessioners. And these processes have rarely demonstrated significant attention to additional commercial visitor services. Thus, while we support the language regarding enhanced integration of the NPS concessions program into existing park planning processes, we also believe this integration should not replace a clear and nimble supplementary process to specifically consider new or additional services.

We note and appreciate that the proposed rule incorporates NPHA's recommendation that the Director create a clear new path for submitting and achieving appropriate consideration of new or additional visitor services provided by concessioners in proposed Section 51.4 (d). However, we would propose additional language to ensure the above-mentioned goal is achieved.

As proposed, Section 51.4 does not include two important elements. First, **we believe establishing a process for the receipt and consideration of a specific minimum number of proposals for such services will serve as a catalyst for submissions of creative and appropriate services.** Having concrete requirements will help produce results towards these general goals. We continue to suggest ten as the minimum number of proposals to receive full agency evaluation annually

Second, **the proposed rule does not include NPHA's suggestion of consideration of the value of the concept and the costs incurred by an entity in investigating and documenting the new or additional proposed services.** We understand the concern over any inclusion of preference beyond that set out in the legislation governing NPS concessions. Yet organizations with expertise in visitor trends and contemporary hospitality practices can be better motivated to incur the time and cost of developing and offering up ideas for new or additional visitor services if, in the rating process of offers, appropriate credit for any such initiatives is included. Further, for-profit businesses, large or small, can be encouraged to invest substantial resources in developing a concept to better serve park visitors if offered some prospect for recovery of those costs. We believe that there are appropriate and legal means to do that through the revised selection ratings proposed for evaluation of offers in the Federal Register notice.

We further urge NPS to allow an enterprise selected to provide new or additional visitor services to recover up to 50% of qualifying expenses which that enterprise incurred in developing the proposal triggering the prospectus. These costs, which are in fact costs

associated with the services, can be recovered through deductions from the agreed upon franchise fee. Any such deduction would be fair and appropriate because the information proved to be valuable to NPS in its evaluation of the proposed service.

To achieve the spirit of the preamble underscoring the commitment to better visitor experiences, the NPS Director should respond openly and in a timely fashion to proposals by potential service providers who demonstrate a commitment to park resource protection and delivery of great park experiences. To do that, NPS needs to consider proposals in a timely way, and to allow evaluation of concepts and modifications. Worth noting is NPHA's proposal of RentMyTent. The program united a respected domestic tent and related equipment manufacturer with concessioners to allow NPS campground guests to rent and have pre-assembled campsites through reservations. The program had proof of public interest and could have worked, yet it failed because of prescriptive guidelines and limited ability to build awareness of the opportunity at NPS operated campgrounds.

We submit the following recommendations (highlighted and underlined are proposed additions, while struck through language are recommended for deletion):

§ 51.4 How will the Director invite the general public to apply for the award of a concession contract and how will the Director determine when to issue a prospectus for a new concession opportunity where no prior concession services had been provided?

* * * * *

(b) Except as provided under § 51.47 (which calls for a final administrative decision on preferred offeror appeals prior to the selection of the best proposal) the terms, conditions and determinations of the prospectus and the terms and conditions of the proposed concession contract as described in the prospectus, including, without limitation, its minimum franchise fee, are not final until the concession contract is awarded.

(c) The Director will issue a prospectus for a new concession opportunity when the Director determines, in the Director's discretion, that a new concession opportunity in a System unit is necessary and appropriate for public use and enjoyment of the System unit and is consistent to the highest practicable degree with the preservation and conversation of the resources and values of the unit and supports enjoyment of park visits.

(d) The Director will establish procedures to solicit and consider suggestions for new concession opportunities within units of the National Park System from the public (including from potential concessioners) ~~as part of~~ through the System's

planning processes for such opportunities as well as through an annual invitation for suggestions of improving visitor experiences through commercial partners.

(e) In determining whether suggested concession opportunities are necessary and appropriate and whether to issue a prospectus for a concession contract to provide such opportunities, the Director will consider factors including whether the suggested concession opportunities will result in better visitor experiences; whether the services are already being adequately provided within the System unit or the communities located near the System unit; the feasibility of the suggestions; the compatibility of the suggestions with governing law and policy; the innovative quality of the suggestions; the potential for augmented operational resources for the park unit; and the potential impacts of the suggestions on visitation and on the economic wellbeing of communities located near System units.

(f) Any prospectus issued pursuant to the above paragraph shall be subject to competition. ~~No preference to a concession contract shall be granted to a party based on that party's having submitted, or failed to submit, a suggestion described in this section~~ except that However, in evaluating offers submitted in response to such a prospectus, the Director should take into account any offeror's prior submission of opportunities which have been incorporated into the prospectus. The Director may also specify in the prospectus recovery of a portion of the costs incurred by a successful offeror in generating a proposal for new or additional visitor services where that information was useful to the agency in its determination that a prospectus was warranted.

(g) The Director may consider suggestions for new visitor services as additional services to be provided through an existing concession contract as described in § 51.76.

(h) Nothing in this section shall constrain the discretion of the Director to solicit or consider suggestions for new concession opportunities or collect other information that can be used by the Director in connection with a new concession opportunity.

Comments on Proposed Change 5: Definition of Major Rehabilitation and Encouragement of Private Investment in Visitor Infrastructure (36 CFR 51.51)

Early leaders of the National Park Service (NPS) and Congressional supporters embraced a dual mission of protecting some of America's most unique areas and attracting and hosting visitors whose experiences led them to be champions of this new idea. From its start, the NPS faced needs beyond the funding provided through appropriations and sought innovative solutions. Visitor services was an early and successful area of innovation in adding resources.

NPS and its predecessor park agencies embraced partnerships with leading businesses sharing the agency's appreciation for special places and a willingness to adopt business strategies based upon solid long-term investments relying upon market-based revenues to cover not just operating costs but also recover capital investments. The investments were complicated by the determination that neither the facilities built for visitor services nor the land on which the facilities stood could be owned by private entities, and the reality that investments could not be repaid solely through short-term operations.

Today's treasured, world-class visitor infrastructure – the grand lodges and associated structures in parks like Yellowstone and Glacier, the Grand Canyon and Yosemite and more – is the product of a remarkable and visionary partnership which has utilized long term concessions contracts and unique financial agreements to attract private capital investments, minimizing the need for public funds for services that are essentially commercial through payment by the benefitting visitors.

The specifics of the NPS/concessioner arrangements have changed over time, including a limitation on the length of concessions contracts to 20 years under the Concessions Management Improvement Act of 1998. The more limited length of contracts was combined with a new creation – the Leasehold Surrender Interest (LSI). While not conveying any ownership of the physical structure, LSI did establish a more certain process for a company investing in needed visitor infrastructure to secure funding.

In its Proposed Rule for improving visitor experiences through concessions operations in park units, NPS endorses continuation of the strategy of attracting private investments in appropriate facilities as well as requiring concessioners to maintain, expand and improve those facilities and further notes the uniqueness of this arrangement:

“under concession contracts with the NPS, the concessioner invests in facilities they do not own. As a result, the concessioner cannot receive a return on the investment through a sale of the property. LSI provides them that opportunity in the form of a guaranteed return to the concessioner on its investment.”

NPHA has suggested changes to LSI, including in its submission to the Department in 2018. NPHA addressed several key issues, including:

- 1) Clarity in the capital investments eligible for LSI, and specifically calling for adoption of GAAP for capital investments;
- 2) Consistency in determination of LSI systemwide;
- 3) Additional actions to utilize the powerful tool provided by Congress for attracting private investments in the National Park System for modern, quality visitor infrastructure; and
- 4) Capitalizing on the clear record of fiscal efficiency achieved through concessioner-managed capital investment projects.

NPHA recognizes and supports several changes proposed by NPS for treatment of LSI. Under NPS' current regulations, any work on an existing capital improvement must meet the definition of "major rehabilitation" for the investment in the work to qualify for LSI. NPHA applauds NPS' proposal to adjust the existing definition of a major rehabilitation from 50% to 30% of pre-rehabilitation value because it will allow more work to qualify for LSI which in turn will improve the visitor experience. NPHA endorses NPS' proposal to remove the requirement that such work be completed within 18 months from its start for it to qualify as a major rehabilitation.

The proposed changes will improve the regulation's consistency with the 1998 Act's goal of encouraging private investment as a vital way to improve the visitor experience.

To further achieve NPS' stated goal of simplifying the criteria for work that qualifies as LSI, NPHA recommends that NPS remove the term "comprehensive" from the definition of major rehabilitation in Section 51.51. Existing criteria in the regulation make clear that LSI applies only where the investment is substantial and adding the undefined term "comprehensive" appears unnecessary and risks confusing the standard.

NPHA further and strongly recommends implementing the revised language related to LSI to existing concession contracts, rather than only new contracts as now proposed. Doing so would ensure that the benefits to the visitor service made possible by this change will be realized systemwide in the near term. We see no benefits to the public from excluding investments simply because a contract is already in place.

NPHA appreciates NPS' request for comments on how NPS can further improve the proposed regulations to encourage concessioners to invest in capital improvement. As noted above, NPHA supports NPS' proposed changes to LSI pursuant to redefining major rehabilitation. Nonetheless and as set out in its initial comments, NPHA very much believes that the goal of improving the visitor experience will be better met by NPS by determining LSI eligibility based on the nature of the work to be done, rather than the cost of the work. The Congressional intent in specifically using the term "capital improvement" was to focus on the nature of any work done whereas the current and proposed NPS regulation requires the work to meet the criteria of "major

rehabilitation” based on the cost of the work. NPHA believes that the criteria for what work on existing capital improvements can qualify for LSI must incorporate the Congressional intent of “capital improvements,” whether as defined under GAAP or some other commonly used industry definition. These basic concepts include that the work enhances the value or useful life of an existing structure or adapts it to a new use. These concepts, however, are not incorporated in the proposed regulation which sets out the criteria for what improvements to capital improvements qualify for LSI.

GAAP is a time-tested standard that NPHA believes provides the best balance between reflecting Congress’ intent in using the term “capital improvement” with the desire to have the criteria for meeting that term be as straightforward as possible. The GAAP definition of “capital improvement” has been consistent and is infrequently modified. We understand from documents appended to the Proposed Rule that NPS is concerned by potential future changes to GAAP. To avoid being subject to such, NPHA notes that NPS can codify the current GAAP definition for capital improvements and disallow revisions to the definition unless specifically approved by NPS.

NPHA also recognizes NPS’ concern over having a standard for “capital improvements” that is too broad. Excessively high LSI values can hamper competition and competition, like LSI, benefits the public. NPHA appreciates that NPS must therefore strike a balance between LSI and competition which produces the maximum public benefit. In addressing this trade-off between promoting facility improvements through LSI and enhancing competition, NPHA encourages NPS not to pursue competition for the sake of competition. This unintended outcome occurs when NPS, out of a concern over any increase in LSI values potentially impacting competition, discourages improvements to existing facilities. That outcome will decrease the quality of visitor experiences, a detrimental impact on that experience that very well may outweigh any gain through further enhancement of competition. In addition, an incoming concessioner will appreciate the ability to receive a quality infrastructure at or near turn-key quality rather than be forced to endure not only the hurdle of facility overhaul but the lost revenues from construction down-time. NPS has many tools at its disposal which allow it to maximize the public benefit through a robust combination of both LSI and competition, such as NPS’ proposal to set contract terms for longer than 10 years where warranted. NPHA believes a revised standard for LSI that more fully incorporates the inherent elements of a “capital improvement” is consistent with both the 1998 Act as well as NPS’ concerns as noted above.

In addition, in the 1998 Act (at § 101915(b)(7)) Congress set out the importance of protecting concessioners’ aggregate investment in capital improvements over the life of a contract. This protection is actually not for the concessioners, but for the public whose experience in the parks benefits from this protection. The proposed regulations, however, ignore the aggregate investment and appear to focus on individual projects. This narrow focus could result in an overall project which would clearly be a capital improvement being completed under multiple, incremental projects which, by

themselves, would not qualify for LSI solely based on their individual cost. This outcome discourages concessioners from making these investments. And to the extent a project may be broken down to smaller projects to avoid granting LSI, that approach would result in the overall costs being much higher than necessary. Considering the foregoing comments, NPHA recommends that NPS allow for separate projects to be eligible for LSI when part of an overall rehabilitation to an existing structure.

NPS can encourage concessioners to invest in capital improvements with new policy guidance on fixtures that is fully aligned with real estate law and standard industry practice. As with the term “capital improvement,” Congress explicitly stated in the 1998 Act that the costs of fixtures should be treated as LSI. Congress, however, provided no specific definition of this term, which suggests that the standard industry meaning should be utilized. NPS’ application of the term “fixtures” has at times been contrary to industry norms. Based on the experience of some concessioners, NPS has defined items such as walk-in coolers and freezers, kitchen hoods, sinks, vanities, faucets, toilets, and fire sprinkler systems as personal property, and not as fixtures, thus denying eligibility for LSI. NPHA believes that NPS’ position is not consistent with normal industry definition of fixtures. This discourages concessioners from investing in these important capital improvements.

NPS’ classification of vital facility components as personal property and not fixtures is also troublesome at the end of a concessions contract. The concessioner must either sell them to a successor concessioner or remove them at contract end. This creates tension and potential delay in the transition process. Removal of clearly needed items from the facilities is usually not realistic and creates an unfair situation for an incumbent who effectively has no choice but to sell them to a successor concessioner. Alternatively, if the fixtures were removed, it would seriously harm both NPS, the successor concessioner and ultimately the visitor. NPHA recommends that NPS revise its policy guidance regarding the term “fixtures” to ensure that all items typically considered by industry to be fixtures are in fact treated as such and thus become available to a successor at a properly depreciated LSI value.

Finally, recent experience with COVID-19 has underscored the inadequacy of in-park employee housing for NPS and concessioner staff. Concessioners have the ability and interest to achieve important advances in this infrastructure, as demonstrated by several major in-park projects. One facility achieved widespread recognition for achieving LEED Platinum certification, demonstrating world-class operational capability that is appropriate for a site in a national park. We urge inclusion of authorization for LSI for employee housing facilities approved by NPS and serving either or both NPS and concessioner employees.

RECOMMENDED REVISIONS TO § 51.51: NPHA offers two alternatives, with our preference being Alternative B.

Alternative A:

§ 51.51 What special terms must I know to understand leasehold surrender interest?

* * * * *

Major rehabilitation means a planned, **comprehensive** rehabilitation of an existing structure that:

(1) The Director approves in advance;

and

(2) The construction cost of which exceeds thirty percent of the rehabilitation value of the structure; **or**

(3) Is a qualified capital investment approved by the Director in advance as vital to visitor health, safety, and enjoyment or to the health and safety of NPS and concessioner employees with a life expectancy of at least 30 years.

Alternative B:

§ 51.51 What special terms must I know to understand leasehold surrender interest?

* * * * *

Major rehabilitation means a planned, **comprehensive** rehabilitation of an existing structure that:

(1) The Director approves in advance;

and

(2) Capital improvements as defined by Generally Accepted Accounting Principles, or GAAP, as published by The Financial Accounting Standards Board (FASB) and in effect on October 1, 2020; **or**

(3) Is a qualified capital investment approved by the Director in advance as vital to visitor health, safety, and enjoyment or to the health and safety of NPS and concessioner employees with a life expectancy of at least 30 years.

Comments on Proposed Change 6: Term of Concession Contracts (36 CFR 51.73)

Experiences over 22 years with the Concessions Management Improvement Act of 1998 put the National Park Service in excellent position to adjust the implementation of that statute and improve the effectiveness of the park concessions program. One of those adjustments in the proposed regulations set out in the **Federal Register** notice is identifying ways the agency can make changes to the length of concession contract terms based on what has and has not worked well over the past two decades. The outcome of these adjustments will be that the public can be even better served by the agency's concessioner partners while visiting National Park System units. In addition, these adjustments can also ensure that operations under National Park Service concession contracts contribute even more to the protection of the natural resources of the relevant park unit. The National Park Service's proposed adjustments to the agency's existing practices are commendable for their clear focus on achieving the agency's goal set out in the preamble of the **Federal Register** notice of providing the public with more recreational opportunities and more memorable experiences on National Park units while also protecting the natural resources within those units. These adjustments will extend the Department of the Interior's successes in implementing Executive Order 13777 to revise and improve existing regulations, as well as comply with direction under Secretarial Order 3366, which requires "new, or increases and expands existing, recreational opportunities" on Interior-managed lands as well as "improve contracting processes for recreation-specific concessioners."

NPHA strongly supports NPS' proposed regulatory provisions set out in the **Federal Register** notice regarding the **length of term for concessions contracts, including elimination of the provision in the current regulations that contracts should be "as short as prudent."** As the NPS proposal states, this direction in the current is not found in the 1998 statute. Similarly, NPS proposes to eliminate any preference for contracts of ten years or less since more than twenty years of experience has prompted this comment by the agency: "In practice, **the NPS has found that a ten-year term or longer is often in the best interest of the public** because it helps ensure a reasonable opportunity for return on investment for offerors thereby generating more interest in the opportunity when a shorter term might make the opportunity commercially unviable."

NPHA also strongly supports NPS' proposal to include **optional term or terms lengthening the base contract term**. The options would be exercised if the concessioner received "**favorable annual ratings**" or when "**there has been substantial interruption of or change to operations due to natural events of other reasons outside the control of the concessioner.**" We concur with the NPS assessment that the options will incentivize "high performance" and achieving other agency goals, such as occupancy and other service improvements. This practice is used by many federal agencies and has proven to be highly beneficial to the government. As with NPS' other proposed modifications of the regulations, this proposal would benefit the public by further ensuring quality recreational opportunities and services in National Park System units. An additional benefit is that **the proposed**

changes would reduce the workload and costs to both NPS and its concessioner partners associated with having to prepare new prospectuses and offers, evaluating the offers and selecting a new partner and implementing those contracts by lengthening the intervals where the current concessioner demonstrates superior efforts. NPHA also agrees with NPS' position that existing contracts could be amended to include this provision.

The goal of NPS in providing option periods is to "incentivize the concessioner to focus on high performance under the contract." Thus, to ensure the maximum effectiveness of having potential option periods, NPS must determine what incentivizes concessioners the most. NPHA believes the best way to make this determination is to seek the input of concessioners and ensure the criteria for receiving an option year are clear and consistent. NPHA also suggests that the option term provision be subject to the consent of the concessioner. While we anticipate that the optional term will be usually welcomed, a concessioner may determine that the extension is not in its best interest and thus decline.

As to the criteria it will set for receiving option years, NPS' proposed regulation provides that NPS will define in each contract how exactly NPS will determine if the concessioner has received "favorable annual ratings" and "met the performance criteria" making it eligible for an option year. To ensure the agency and public receive the maximum benefit of providing potential option years, NPHA believes it is critical that the criteria in the contracts be very clear as to the minimum rating required to be eligible for an optional term and also that the agency's practice be consistent nationwide. To ensure concession contracts are clear and consistent as to the level of performance required to be eligible for an optional term, NPHA recommends that NPS set out guidance as to these issues in its Commercial Services Guide and require each park unit to ensure its concession contracts are consistent with this guidance.¹

While NPHA agrees that the determination of how to fully incentivize concessioners must remain with NPS, NPHA encourages NPS to seek the input of concessioners as to what specifically would incentivize them as part of the process the agency uses to make this determination and prepare its policy guidance. NPHA believes concessioners can provide valuable feedback that will help ensure NPS' determination maximizes the incentive provided. For example, if the base term of the contract is reduced solely to provide for additional option years, the result may be counterproductive in that the actual term of the contract becomes much less certain and the risk of having a shortened term will negatively impact the content of a concessioner's proposal, including the level of proposed franchise fees. Another issue that could reduce the effectiveness of option years is that NPS' current rating system contains certain rigid provisions (*i.e.*, automatic capping of overall ratings based on Special Attention Items, even when a concessioner promptly cured any problems) which can automatically result in unfavorable ratings for inadvertent and minor errors by a concessioner. NPHA encourages NPS to review its existing ratings system to ensure it provides

¹ NPS' Commercial Services Guide has proven to be a very effective way for NPS to ensure its concessioners are aware of and thus able to adhere to NPS' policies.

concessioners with a fair opportunity to correct any deficiencies in their performance and thus does not hinder the effectiveness of providing option terms.

Additionally, and particularly considering the issue raised above, the proposed rule imposes a very rigid mandate that a concessioner receive a favorable rating in each year of operations to qualify for option years. A potential downside to this mandatory requirement is that, if a concessioner receives less than favorable ratings in its initial year of operations, it may be disincentivized for the entire remaining contract term to maximize its performance. That result is not beneficial to the public. For that reason, NPHA recommends that rigid criteria be removed.

Below is language which sets out NPHA's recommendations discussed above:

§ 51.73 What is the term of a concession contract?

(a) A concession contract will generally be awarded for a term of 10 years **or less** and may not have a term of more than 20 years (unless extended in accordance with this part). The Director will issue a contract with a term longer than 10 years when the Director determines that the contract terms and conditions, including but not limited to the required construction of capital improvements or other potential investments related to providing both required and authorized services, warrant a longer term. It is the policy of the Director under these requirements that the term of concession contracts should take into account the financial requirements of the concession contract, resource protection and visitor needs, and other factors the Director may deem appropriate.

(b) The Director may include in a concession contract an optional term or terms, in increments of at least one year, ~~where the total term of the contract, including all optional terms, does not exceed 20 years.~~ Such a contract shall provide that an optional term may be exercised by the concessioner if the Director determines that:

(1) The concessioner has received favorable annual ratings ~~for every year~~ during the term of the contract to date, as defined in the contract, and has met the performance criteria defined in the contract for the exercise of an optional term; or,

(2) There has been a substantial interruption of or change to operations due to natural events or other reasons outside the control of the concessioner, including but not limited to government-ordered interruptions, and the exercise of an optional term is warranted in light of the interruption or change to operations.

Comments on Proposed Change 7: New or Additional Services for Existing Contracts (36 CFR 51.76)

NPHA applauds the proposed clarification of the ability of a concessioner to add new or additional services judged to be necessary and appropriate by NPS but not originally specified in the agreement between the parties. Rapid changes in technology, transportation, contemporary hospitality standards, climate change and more have altered park visitation characteristics and patterns. Accommodating those changes in ways that protect resources, provide for visitor safety, and increase visitor enjoyment often requires changes in transportation, food service, activities, connectivity to virtual resources and more. The Centennial Act included specific direction to facilitate responsiveness by NPS to visitor needs.

NPHA generally supports the proposed regulation change but urges clarification of the process for allowing new or additional services, guidance to park units on determining whether such new or additional services qualify for expedited approval and guidance on whether certain new or additional services are closely enough aligned to existing authorized services so that changes may be agreed to through annual operating plans rather than contract modifications.

Specifically, we urge NPS to exercise full authority to allow alternative delivery processes for key services, including food and beverage service, lodging, and transportation. If a concessioner has authorization for food service in an indoor dining setting, for example, but is able to demonstrate visitor preference for food delivery as take-out, through delivery to accommodations, or through a mobile system relying upon existing food preparation and inspection processes and within reasonable distance of existing food services, NPHA urges the agency to allow such new or additional services through amendments to the annual operating plan and under existing terms, including applicable franchise fee provisions. Similarly, if a concessioner has authority to provide lodging and can demonstrate the need for and a capability to provide expanded lodging at an appropriate location in the same park unit, including a campground, the concessioner should be allowed to utilize equipment categorized as personal property to offer alternative visitor overnight accommodations. Among the appropriate provisions would be rented camping equipment, including tents, and cabins and RVs not permanently installed. Alternative transportation could include alternative vehicles in size, openness, and propulsion to meet health codes and explore future means to move park visitors. We support full consideration of special events including, but not limited to, local artist shows and workshops and events using locally produced foods and beverages and linked to the history, culture and resources of a park unit, especially where such events are part of a strategic plan to promote non-peak visitation and to reach nontraditional park visitors. We also support allowing the concessioner to add various levels of broadband connectivity, appropriate entertainment and learning programs to support educational and public service programs.

NPHA is generally in agreement with the provisions of the proposal regarding any impact on preferential right (*e.g.*, a right of first refusal) to provide new or additional

visitor services beyond those already provided by the concessioner under the terms of a concession contract.

NPHA urges that these revised regulations apply to new as well as to existing concessions contracts.

We support the following revisions to the proposed rule:

§ 51.76: May the Director amend a concession contract to provide new or additional visitor services or grant a concessioner a preferential right to provide new or additional visitor services?

(a) The Director may ~~propose to amend the applicable terms of an existing concession contract~~ **provide for new or additional services under the annual operating plan of the concessioner if the expected additional revenues will not increase gross receipts by more than 10% or amend the applicable terms of an existing concession contract where revenues are anticipated to exceed 10% of existing gross revenues** and are related to services already provided under the contract or ~~to~~ provide new and additional services where the Director determines the services are necessary and appropriate for public use and enjoyment of the unit of the National Park System unit in which they are located. ~~and are~~ **New and additional visitor services must be** consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit **and contribute to visitor enjoyment of and understanding of the unit and the National Park System**. Such new and additional services shall not represent a material change to the required and authorized services as set forth in the applicable prospectus or contract **and shall be subject to the same franchise fee provisions provided under the contract. Changes can include but are not limited to extensions of seasons, operating hours and increases in capacity limitations.**

(b) Except as provided above or in subpart E of this part, the Director may not include a provision in a concession contract or otherwise grant a concessioner a preferential right to provide new or additional visitor services beyond those already provided by the concessioner under the terms of a concession contract.

(c) A concessioner that is allocated park area entrance, user days or similar resource use allocations for the purposes of a concession contract will not obtain any contractual or other rights to continuation of a particular allocation level pursuant to the terms of a concession contract or otherwise.

Such allocations will be made, withdrawn, and/or adjusted by the Director from time to time in furtherance of the purposes of this part.

Comments on Proposed Change 8: Setting Franchise Fees (36 CFR 51.78)

Concessioners are extremely proud of their contributions to the preservation and maintenance of National Park System units and the facilities and infrastructure within those units. A large part of this legacy is based upon fees generated by the services concessioners provide to the public. The **Federal Register** notice for this proposed rule notes that concessioner franchise fees paid to the National Park Service total \$135,000,000 annually, funds supplementary to base appropriations and 80% of which are retained and expended locally in the park unit where the fees were generated. These fees are becoming more and more important to park units given the high maintenance costs associated with older infrastructure in remote park units. While the Great America Outdoors Act recently signed by President Trump is unprecedented in the benefits it will provide to park infrastructure, its duration is limited, and its funding is just 50% of currently documented needs. More still needs to be done. The proposed regulations go a long way towards building on the successful precedent of concessioner-funded operations, maintenance, rehabilitation, and expansion.

NPHA generally supports the proposed changes to the regulations related to setting franchise fees. The proposed changes include adding provisions that highlight the benefit to the public of increased competition as well as reliance on general hospitality industry data for purposes of determining the appropriate minimum acceptable franchise fee to be set out in a prospectus. NPHA also supports the revised regulatory language requiring the agency to provide the basis for its determination of the appropriate minimum franchise fee.

NPHA appreciates the discussion in the **Federal Register** notice of how NPS' practices compare to its policy and goals. That discussion makes it clear that NPHA is in total agreement with the agency's goals. However, based on the variety of experiences of its members, NPHA does not necessarily agree fully that the revisions, which NPHA supports, are consistent with NPS' current practices. NPHA's concern, as discussed further below, is that the agency's past method of setting minimum franchise fees has at times unintentionally and unnecessarily limited competition. It has also at times increased the importance of the specific fee percentage proposed to the detriment of obtaining higher levels of resource protection and visitor services, contrary to explicit legislative direction that payments to NPS should be a secondary selection factor. Congress mandated that the agency, when setting the minimum franchise fee, ensure that the fee be subordinate to the other factors used in evaluating which entity submitted the best overall bid. These factors include protection of the natural resources and providing appropriate visitor services. The ability of an offeror to achieve high scores on these factors, however, can be directly impacted and limited by the amount of franchise fee it must commit to be considered for award of the contract.

Comments made by entities that were interested in submitting proposals in response to NPS concession prospectuses but ultimately declined to do so have made clear that the decision was based on the minimum franchise fee being too high given the costs of meeting the other criteria under the contract and the risks of concessioner operations.

The minimum franchise fee at times thus appears to become the most important factor because it alone has eliminated offers from interested parties. This outcome is contrary to Congress' direction and the agency's efforts to ensure that the specific fee percentage not be a priority in selecting an offeror, much less a definitive factor.

In addition, the minimum franchise fee set out in prospectuses has at times also worked against the agency's stated priority of obtaining high levels of resource protection and visitor satisfaction. Under the statute, the minimum acceptable franchise fee is based on the expected revenues remaining after providing for a net profit and the estimated costs of operations. Thus, the higher the minimum franchise fee, the less likely an offeror can propose additional measures to protect resources and improve the visitor experience.

NPHA's goal is a minimum franchise fee that (1) encourages maximum competition while still being consistent with the agency's obligation that the fee involve a consideration of the probable value of the rights provided by the contract and (2) allows offerors to propose high levels of resource protection and world-class visitor services. Therefore, in seeking the right balance between these competing factors when setting the minimum franchise fee, NPS should consider the benefit of allowing offerors to propose greater levels of costly resource protection and improved visitor services as part of their operations, which would necessarily result in a reduction of the likely net profit and fee that can be paid to NPS.

NPHA is not asserting minimum franchise fees should be set at zero or nominal amounts to allow for maximum competition or extremely costly operations. However, NPHA respectfully believes that some of the minimum franchise fees set out in recent prospectuses unnecessarily limited offerors' abilities to propose even better measures to protect resources and provide for higher visitor satisfaction, which may have resulted in proposals NPS would have determined were the best and would have been selected for award of the contract. Moreover, given that the prospectuses result in fully open competition, the risk of the franchise fees set out in proposals being lower than the appropriate level is very low.²

² Even if the minimum acceptable franchise fee were set at zero, that zero fee threshold would not increase the risk that NPS would have to accept a proposal proposing a zero percent franchise fee. Because the open competition for concession contracts results in the market determining the fair and appropriate fee, that process virtually guarantees that the proposed fees are at the appropriate levels. Given this fact, there is no upside to setting a minimum franchise fee and only a downside due to the risk the minimum fee is set too high.

We recognize that NPS has discretion in deciding the minimum franchise fee. We also recognize that the agency has a difficult task in deciding on the best balance among protecting the natural resources, ensuring the public is provided with superior services and fees representing rental costs. Concessioners also are continually faced with trying to strike this balance in their roles as operators of the facilities. With that in mind, NPHA believes that it is in the agency's as well as public's interest that the determination of the appropriate minimum franchise fee should be more heavily influenced by a desire to set the fee at a level which would allow offerors to strengthen their proposals (and thus scores) with regard to the selection factors which focus on resource protection and visitor services. Doing so would not only allow for greater resource protection, it also could lead to higher visitor satisfaction and thus potentially higher overall revenues as a result. Notably, even if implementing this approach resulted in a lower franchise fee percentage, it could nonetheless result in higher overall return to the park unit and its visitors. NPS would, however, retain control over deciding which proposal it felt provided the best balance of visitor services, resource protection and revenue to the agency.

NPHA also encourages NPS to provide greater transparency in determination of the appropriate minimum franchise fee.³ Many offerors assume the minimum fee set out in the prospectus, given its title as the "minimum acceptable franchise fee," is set at the lowest possible level and thus capable of allowing an offeror to increase that fee while still receiving an appropriate net profit. However, based on NPS' published methodology for determining that fee, the minimum fee is actually set at the very point where a concessioner would likely not receive an appropriate net profit if the concessioner proposed a higher fee. While concessioners recognize they must do their own due diligence in assessing the viability of a contract opportunity and NPS' calculations are merely offered for information and cannot be relied upon, it is in everyone's interest that NPS minimize any misunderstandings as to what the minimum

³ The report entitled 36 CFR 51 Concessions Contracts Revisions- Regulatory Impact Analysis (RIA) and Initial Regulatory Flexibility Analysis (IRFA) prepared by Industrial Economics, Incorporated (June 16, 2020) describes the various elements of the NPS' assessment of the minimum franchise fee (page 2-6); *see also* pages 2-10—2-11 ("IEI Report"). As stated in the report, NPS: conducts a franchise fee analysis, which recommends a minimum acceptable franchise fee for the contract. The analysis includes market analysis, historical financial and operations analysis, proposed required and authorized services, detailed financial analysis by revenue department, explanation of the methodology for determining the hurdle rate, an overview of all considered scenarios, the rationale for the selected scenario, details on the required investments, and an investment analysis including franchise fee calculation.

However, while NPS sets out certain limited information in a prospectus, we are unaware of NPS disclosing any details as to how it used this information to calculate the minimum franchise fee, including the hurdle rate it incorporated into its decision.

franchise does and does not indicate. A detailed explanation of what the minimum franchise fee represents and how it was determined would assist in achieving this goal.⁴

NPHA recommends that in the prospectus development process, NPS estimate its expectation of a fair franchise fee in a fashion similar to its current practice, but **then reduce that rate by 25% and include the lower rate as the minimum acceptable franchise rate**. This approach would then **allow offerors to compete as Congress intended by letting offerors propose what they believe is the best balance of efforts to protect park resources and provide quality visitor services (which are the primary selection criteria) along with the most competitive fee**.

To achieve this, NPHA offers the following (recommendations in bold and highlighted, with deletions struck through):

§ 51.78 Will a concession contract require a franchise fee and will the franchise fee be subject to adjustment?

(a) Concession contracts will provide for payment to the government of a franchise fee or other monetary consideration as determined by the Director upon consideration of the probable value to the concessioner of the privileges granted by the contract involved. This probable value will be based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract. The Director shall set the minimum acceptable franchise fee in the prospectus at a level which the Director determines will encourage participation in the competition and so that concessioners can provide necessary and appropriate visitor services to the public, consistent with the foregoing requirements. In determining the minimum acceptable franchise fee, the Director shall use data including relevant general hospitality industry data for similar operations to determine ~~the minimum acceptable~~ **a projected** franchise fee and ~~provide a basis for the assessment of the~~ shall include 75% of that amount as the minimum acceptable franchise fee in the prospectus. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving park **areas resources** and of providing necessary and appropriate visitor services **for enjoyment of the park at reasonable rates. The Director shall set forth criteria for evaluating offers that contain commitments for protecting and preserving park resources and providing enhanced visitor services as an alternative to increased franchise fees.**

⁴ NPHA respectfully disagrees with the implied assertion in the IEI report that NPS should not disclose details of its franchise fee analysis because doing so may increase the risk of litigation. IEC Report at 3-8. If a prospective concessioner believes the minimum franchise fee is not valid when in fact it is, the chance of them filing a legal challenge is actually decreased, not increased, by NPS disclosing its analysis and demonstrating that its analysis is valid. The risk of litigation is actually increased by NPS refusing to be transparent by not disclosing these calculations given that a refusal to disclose creates a concern that the agency has something to hide.

Proposed Change 10: Concessioner Rates (36 CFR 51.82)

In its suggestions for better serving visitors through concessioner operations submitted to the US Department of the Interior in August 2018, NPHA suggested that the Department review and fully embrace the statutory direction of the 1998 Act (54 USC 101916), which supported reliance on market forces and required an approval process as unburdensome to the concessioner as possible. We appreciate that the proposed rule incorporates these principles.

The published proposal recognizes that it is a concessioner's role to propose rates. NPHA recognizes NPS' legitimate role of rate approval and the statute's direction that "rates and charges may not exceed market rates and charges for comparable facilities, goods, and services, after considering certain factors." The 1998 Act also states that the rate approval process must be as prompt and as unburdensome to the concessioner as possible and rely on market forces to establish the reasonableness of rates and charges to the maximum extent practicable. 54 U.S.C. 101916(b)(1).

NPHA supports NPS' proposal for several changes to § 51.82 to meet these requirements, and to apply these changes to current and future concession contracts. The proposal states:

First, the NPS proposes to use the language in the 1998 Act and state clearly in the regulations that the Director will approve rates and charges that are reasonable and appropriate in a manner that is as prompt and as unburdensome as possible and that relies on market forces to establish the reasonableness of such rates and charges to the maximum extent practicable.

Second, the NPS would add a new paragraph (c) that would require the Director to identify the rate approval method for each category of facilities, goods, and services in the prospectus. If the Director determines that market forces are sufficient to establish the reasonableness of rates and charges, the rule would require the Director to make a competitive market declaration (rather than using other NPS annual rate approval methods), and rates and charges would be approved based upon what the concessioner determines the market will bear.

The proposal would **allow other rate approval methods only when the Director determines that market forces are inadequate** to establish the reasonableness of rates and charges for the facilities, goods, or services.

The proposal further notes dramatic changes in visitor mobility and capabilities of accessing information about services and facilities in gateway communities:

"[C]ompetitors in some locations use dynamic pricing to set rates, which means that prices are adjusted to reflect demand. The task of approving reasonable and appropriate rates and charges in these scenarios is burdensome. Unlike private sector companies, concessioners must undergo an annual rate approval process each year where maximum rates are set through a complex comparability process that occurs months in advance of the season. The concessioners are

then not as able to adjust rates quickly and efficiently, particularly in times when visitor demand is higher than was forecasted. The proposed changes acknowledge this fact and would allow the NPS to more fully consider competitive, demand-driven pricing methods where it makes sense to lessen this burden.”

Expanded use of competitive market methods may result in increased rates and revenue. Such increased revenues can support overall park operations, including an increased ability of the concessioner to invest in improvements in services to park visitors and increases in revenues to the NPS, since franchise fees rise with any such revenue increases. This is a beneficial situation. Competitive market methods are also a proven way to redirect demand to alternative dates, times and experiences, valuable tools for a system which has not expanded capacity in most locations for years.

The proposal also proposes a new paragraph establishing rules for how the Director [*in reality, a park superintendent or other agency employee*] responds to requests from existing concessioners to change rates and charges to the public. The new language would require the Director to issue a response within 30 days of receiving a “**complete and timely**” request under the terms of the contract “**when possible.**” The rule would require the Director to explain in writing any finding that the requested changes are not adequately justified under the circumstances. NPHA applauds the new direction, including the prompter determination, but suggests elimination of the qualifiers or clearly establishing the definition of a “complete and timely” request and making the proposed rates final after 45 days without NPS action.

NPHA further recommends inclusion of a suggestion from its original submission that the Director avail herself/himself of available expertise in evaluating rate requests, including the Interior Business Center (IBC) and consultants now used by NPS in its concessions program.

NPHA members interact with other public and private businesses in the travel and tourism and recreation fields, including agreements on providing services two or more years out. Traditional rate approvals have hampered concessioner participation in this market by not approving rates far enough in advance. Competitive market rate approvals can resolve this now-significant problem. So could national permission to utilize **anticipated rates** established by concessioners prior to any review for approval, where competitive market declarations are not utilized. Anticipated rates are based on the best available information and projections and is entirely consistent with the statutory direction. If NPS subsequently determines pursuant to its seasonal rate approval process that the rates should be lower than the anticipated rate provided to the visitor based upon the approved rates for the season, the rates charged to the visitor are in fact lowered. Notably, the actual rate charged never exceeds the anticipated rate. NPHA believes that NPS should require all park units to utilize this common and contemporary approach.

Proposed regulatory language

Below is language which sets out NPHA’s recommendations discussed above:

(b) The Director shall approve rates and charges that are reasonable and appropriate in a manner that is as prompt and as least burdensome to the concessioner as possible and that relies on market forces to establish the reasonableness of such rates and charges to the maximum extent practicable. Unless otherwise provided in the concession contract, the reasonableness and appropriateness of rates and changes shall be determined primarily by comparison with those rates and changes for facilities, goods and services of comparable character under similar conditions with due consideration to the following factors and other factors deemed relevant by the Director: length of season; peakloads; average percentage of occupancy; accessibility; availability and cost of labor; and types of patronage.

(c) The Director shall identify the rate approval method to be used for each category of facilities, goods, and services to be provided when preparing the prospectus for a concession contract. The Director will use the least burdensome and most market-based method that is appropriate. Whenever the Director determines that market forces are sufficient to ensure reasonable and appropriate rates, the Director will make a competitive market declaration, and rates and charges will be approved based upon what the concessioner determines the market will bear. Other rate approval methods will be used only when the Director determines that market forces are inadequate to establish the reasonableness of rates and charges for the facilities, goods, or services. **In situations where visitors are making reservations more than 90 days in advance of their visit, the agency shall allow concessioners to notify visitors of anticipated rates which will then be reviewed and adjusted, if necessary, at or before the time of the visit pursuant to the agency's completed rate review process.** The Director will monitor rates and charges and competition and may change the rate approval method during the term of the contract to reflect changes in market conditions.

(d) The Director shall issue a **decision approving or rejecting response** to a request by a concessioner to change rates and charges to the public **based on a substantive review of the request** within 30 days of receipt of a complete and timely request in accordance with the conditions described in the contract ~~when possible~~. **The agency shall provide the concessioner in advance with a description of the information required for the request to be complete, and, if the agency determines the request is not complete, inform the concessioner of such determination within 20 days of receipt of the request.** If the Director does not approve of the rates and charges proposed by the concessioner, the Director must provide in writing the **substantive** basis for any disapproval at the time of the response by the Director. **The agency shall consult with the Interior Business Center at the Department of the Interior or an alternative external source as part of its review process. Any rate request will become effective without agency response after 45 days.**