

**STATEMENT FOR THE RECORD OF
VICTOR S. PERLMAN,
ON BEHALF OF
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS**

**IN CONNECTION WITH
"NEW FEES FOR FILMING AND PHOTOGRAPHY ON PUBLIC LANDS"
FULL COMMITTEE OVERSIGHT HEARING**

BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES

December 12, 2007

I. Introduction.

Mr. Chairman, Ranking Member Young, and the other distinguished members of the Committee, my name is Victor Perlman, and I thank you for the opportunity of addressing the Committee today. I am the Managing Director and General Counsel of the American Society of Media Photographers. The American Society of Media Photographers, or ASMP, was founded in 1944 as the Society of Magazine Photographers. ASMP is the largest organization in this country, and in the world, representing professional photographers who make photographs primarily intended for publication in the various media. These photographs can appear in fine art books and prints, in magazines, in advertisements, in corporate brochures and annual reports --- in short, in any form of publication, whether in print or in digital media.

ASMP has approximately 6,000 members, most of whom are full-tie, freelance photographers, who have been producing some of this country's best photography for publishers, advertising agencies and corporate clients for the more than sixty years of ASMP's history. We estimate that there are over 100,000 part- and full-time freelance photographers with interests similar to those of our members in this country. I am submitting this statement on behalf of ASMP in the hope that the Committee will direct the Secretary to bring the proposed regulation back in compliance with the letter and spirit of its parent legislation, PL 106-206, from which it has unfortunately deviated.

ASMP's members are publication, or "commercial," photographers. Even though the interests of our members and uses of our members images are somewhat different from those of the photographers represented by the other members of this panel speaking on behalf of the photography world, we specifically support their testimony and the positions they are presenting.

I was fortunate enough to testify before the House Subcommittee on National Parks and Public Lands in 1999 in connection with House Bill H.R. 154 that eventually became PL 106-206. At that time, it was clear that the underlying

assumption of the Bill, and therefore that of Congress, was that activities and people who place unusual or substantial burdens or demands on our natural resources, on our government employees, or on the public should pay for them in proportion to the burdens and demands that they impose. Further, however, a crucial part of the concept behind the Bill was that people who do no more than what tourists typically do should not be subject to any more restrictions or costs than tourists. It appears that this latter concept has been abandoned in the proposed regulation.

In order to understand our concerns about the regulation currently before this Committee, you must first understand a few facts about the nature and business of freelance photography in the publication field. Freelance photographers are self-employed. As such, they are not accorded any employer-provided benefits. They are not paid a regular salary, do not receive a paid vacation, and must purchase their own cameras, equipment and supplies. They are responsible for all of the overhead expenses associated with running a business, must pay for their own health, liability and disability insurance, and are not eligible for unemployment compensation. These hidden cost factors make the freelance photographer's financial investment in every photograph that he or she makes far higher than would appear at first glance. In addition, the numbers that we have seen tell us that the average annual income of commercial photographers is quite modest, especially when compared to people with comparable educational backgrounds working in other fields.

There are two primary ways in which a photograph intended for publication comes to be made by a freelance photographer: either as part of an assignment from a client or as part of what is known in the trade as "stock photography." Stock photographs become part of a library or inventory of images that the photographer makes available for licensing to buyers who want to use those images for limited times and purposes. At the time a stock photograph is made, there is neither any client to pay the costs nor any certainty of there ever being one from whom a licensing fee may be received. The majority of professional photographs that are available for publication are held in such stock libraries.

In fact, those stock libraries are no longer the exclusive domain of professional photographers. Since technology has been making it easier to create high quality images, there are many talented amateur photographers in this country whose works are now being published, especially in digital media. Some of them have started placing their images with stock photography libraries to be marketed alongside the images created by professional photographers.

Because of this last factor, it would be arbitrary and grossly unfair to draw a distinction in the requirement of permits and/or fees based on whether a photographer relies primarily on his images for his income or relies on them only to supplement his income. It is, therefore, crucial that the regulation base the need for permits and/or fees on the activity, not on the identity, of the

photographer. That is the approach taken in PL 106-206, but it appears to have been abandoned in the proposed regulation that is supposed to implement that legislation.

Unlike motion pictures and audio-visual video productions, most outdoor still photographs are made by single, individual photographers working without substantial crews, assistants, special effects or unusual equipment. What they do is essentially what tourists do, what you and I do, Mr. Chairman, when we are on vacation recording this country's natural wonders on film (or more likely these days, on digital media) for future enjoyment. PL 106-206 wisely recognized that professional still photographers should be treated the same as tourists, as long as they are placing only the same demands on our natural resources and civil servants as tourists. The regulations that implement PL 106-206 must do the same, but as currently worded, do not.

Fees and permits are not appropriate, or needed, to tax and impede the average citizen in visiting our natural wonders and bringing home a photographic record of that visit. PL 106-206 did not and does not require fees or permits of average citizens --- even when those average citizens happen to make their livings as freelance photographers. The proposed regulation appears to change that fundamental approach.

II. Where the Proposed Regulation Deviates from PL 106-206.

The preceding information was crucial to ASMP's support of PL 106-206 and was reflected in the final language of that legislation. Unfortunately, many of the changes reflected in the proposed regulation would undo the policy behind PL 106-206.

It is easy to see that the basic concept behind the proposed regulation has gone off track regarding still photography by comparing its language with the language of the statute. The language of PL 106-206(a) directs the imposition of permits and fees for commercial filming, while section (b) states the starting point for still photography: "the Secretary shall not require a permit nor assess a fee for still photography on lands administered by the Secretary..," subject to certain exceptions and conditions. This stands in sharp contrast to the language provided in the DOI's summary of the proposed regulation, and elsewhere in the announcement of the regulation and in the rule, itself, where it characterizes PL 106-206 incorrectly as "direct(ing) establishment of reasonable fees for commercial filming activities or similar projects, such as still photography..." The statute says that commercial filming and still photography are to be treated differently, but the proposed rule says that they are similar and to be treated the same.

The language of the statute makes it clear that the general rule is that permits and fees are presumed not to be required for still photography, subject to specific exceptions for atypical situations:

*(c) STILL PHOTOGRAPHY.—(1) Except as provided in paragraph (2), the Secretary **shall not** require a permit nor assess a fee for still photography on lands administered by the Secretary if such photography takes place where members of the public are generally allowed. The Secretary **may** require a **permit, fee, or both**, if such photography takes place at other locations where members of the public are generally not allowed, or where additional administrative costs are likely (emphasis added).*

The regulation, on the other hand, turns this presumption on its head by stating in Sec. 5.3(b) that “**Still photography requires a permit** if...” The language of the proposed regulation abandons the presumption that permits for still photography are generally not required, subject to some specific exceptions. It substitutes an approach and a mindset that requiring permits is an affirmative command.

Second, as indicated in bold above, the legislation makes it clear that permits and fees are separate and distinct, and that the requirement of a permit does not automatically suggest that there should be a requirement of a fee. That distinction, also, is lost in the proposed regulation. Even worse, those fees would be mandated --- and expanded to include both application cost recovery and a usage fee--- under the language of Sec. 5.7 of the proposed regulation.

Third, the proposed regulation appears intended at simply raising revenues at the expense of those people who can least afford it: freelance professional photographers. Currently, only the BLM charges location fees, while the NPS and FWS do not. It is clear that universalizing the approach of the one department that is in the minority on this issue, rather than the approach of the majority, has the goal of raising revenues, purely and simply. Unfortunately, when applied to freelance professional still photographers, this requirement would drastically impact their ability to make any kind of living out of nature photography and would drastically reduce the number and quality of photographic images made on DOI lands that would be available for the public. This would damage our national photographic heritage irreparably.

Fourth, and probably most importantly, the proposed regulation directly abandons the underlying concept behind PL 106-206 that professional still photographers should not be required to obtain permits or pay fees if they are doing only what tourists do. This can be seen in Sec. 5.3(b), which sets forth the list of conditions triggering permits for still photography and which also includes the statement that “(d) Use of film, video or still photography equipment by visitors does not require a permit as long as the activity occurs in areas designated for public use during public hours.” That is, the proposed regulation would distinguish between professional photographers and “visitors.” This language makes it clear that permits would be required under the proposed regulation based on the identity of the photographer, not on the activity, an approach that was directly rejected in the statute that the proposed regulation is

supposed to implement. The language in Sec. 5.3.(b) should apply to all still photographers, irrespective of how they may happen to earn their livings.

In addition, using the distinction between visitors and commercial photographers creates an impossible enforcement burden on park staff and the public, alike. How can one tell who is a professional photographer just by looking at him? How is an amateur who occasionally licenses the use of an image to know whether --- and when --- he is a considered a professional for permit and fee purposes? How is park staff to be able to tell the difference --- by requiring a copy of the photographer's Form 1040? The distinction between visitors and commercial photographers is simply unworkable from every perspective and at every level.

Next, the requirement of "appropriate " insurance in connection with obtaining a permit would, for many working photographers, create both a financial hardship and delays in the permit process that would prevent many great photographs from ever being made, let alone being made available to the public. This requirement, combined with the absence of standards for determining what is "appropriate," could be used as a de facto method for barring almost all still photography at a facility.

Further, the Department of the Interior's blanket assertion that "this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act" is absolutely and completely incorrect. The proposed regulation would have a severe impact on at least tens of thousands of still photographers, almost all of whom are small businesses operating as sole proprietorships or other small business entities. The further statement that the proposed regulation "Will not cause a major increase in costs or prices for consumers (or) individual industries..." is totally inaccurate. The increased costs would either be passed along to consumers or, in most cases, be absorbed by the small business comprising the industry of publication photography. The simple fact that ASMP has gone to the trouble and expense of sending me here today tells you that these assertions are not true.

In addition, the vague and subjective standards provided by the regulation under which permits could be denied are problematic for all concerned: park officials, photographers and the viewing public. Sec. 5.4 contains no standards for making the various permissible determinations. Worse, Sec. 5.4(5) allows the denial of a permit where there is an (undefined) determination that "the activity is inappropriate or incompatible with the purpose of the refuge." I certainly do not know what that language really means or how to apply those "standards," and I question whether there is anyone on this panel who does.

III. Financial Impact of Fees on Still Photography.

When I testified in connection with PL 106-206 in 1999, I voiced some reservations about the future that, unfortunately, now appear to be well founded, when I said, "Our concern is not with what this Bill currently provides, but with

possible future changes that could take place as the Bill goes through the legislative process.” In connection with that concern, I provided some supplementary information about the business of freelance, publication (or commercial) photographers. It now seems appropriate to reiterate some of facts for your consideration in evaluating the proposed regulation and its potential impact.

I mentioned earlier that freelance photographers must buy their own equipment. For a professional photographer, it is routine to have to spend thousands of dollars for a single lens. Even for a location photographer, who does not have the overhead of equipping, stocking and running a studio, the cost of equipment was typically in the range of \$70,000. and often more, when I testified in 1999. The impact of computers and related equipment and software, along with almost a decade of inflation, has both driven that number upwards significantly. The constantly changing nature of technological innovations has caused those expenses to recur frequently as equipment now becomes obsolete within a year or two of purchase. That is the situation for location photographers. A photographer who does both location and studio work has an investment in property, plant and equipment of many multiples of that figure.

We can safely assume that a professional photographer will make many hundreds of photographs during a good day's shoot. Of those photographs, however, only a small number will ever survive. Industry reports tell us that an average of 2% of the photographs made by professional photographers get through the editing process and make their way into stock libraries.

Of those images that are put in stock libraries, industry reports also tell us that only 2% will ever produce any revenues during the life of the photograph.

For that 2% of 2% that actually sell, our information is that the average price of a stock sale was approximately \$220. back in 1999. Sadly, that number seems to have declined over the past decade or so for a variety of reasons. For example, Getty Images recently announced a licensing model that would grant unlimited web use of high quality photographs for \$49. per year. Of the amount paid, the agencies licensing the stock images take commissions that now exceed 50% on average and a number of the best known stock agencies are now charging commissions of 70%, plus expenses.

Thus, for each of the few images that sell, photographers receive an average of well under \$100., from which they have to pay all of their direct and indirect costs of production. Most freelance photographers would probably make more money doing almost anything else, but they continue to make photographs, despite the economics, because they love what they do. However, if you consider the finances described above, you will see that imposing fees on photographers for access to national lands will turn what is already a marginal economic proposition into a losing one. While professional photographers may be willing to work for

relatively little money, nobody can stay in a business in which he or she loses money.

Losing professional quality photographers does not hurt only those photographers and the industry. It also means losing the images that they produce, and that hurts everyone, including the public and, in particular, future generations, who will be deprived of a richer photographic heritage.

IV. Aside from financial considerations, the requirement of a permit would prevent the vast majority of outdoor photographs from being made.

Even if no fees were imposed on still photographers, the simple need for permits for routine photography would eliminate most of those beautiful photographs of our natural vistas, and the animals that inhabit them, that we all want and have come to expect to see. Have you ever wondered why most amateur photographs rarely come close to rivaling professional photographs of the same scene? In addition to the skill and knowledge of the photographer, there is a crucial element in all photographs: light. Photography means, literally, "writing with light." To have a great outdoor photograph, you must have great light. Great light for photography is not the same as great light for anything else. The best light for photography is found at the ends of the day: a couple of hours before and after sunrise, and a couple of hours before and after sunset; and if you want a photograph of the incredible animals that live in our national parks, you have to photograph them when they are awake, outside their living quarters, and active. That is almost never during the mid-day. Great nature photographs are rarely if ever made during normal business hours.

Now, if a photographer has to get a permit in order to photograph on national lands, that means that he has to be at an office, perhaps 50 miles away from where he wants to photograph, no earlier than 8:30 in the morning when the office opens. By the time he get his permit (assuming he can get it immediately, while it could actually take a couple of weeks), drives to his location, and is ready to start photographing, the light is gone, and he might as well pack up for the day. The next day's light may be unsuitable for making professional quality photographs. In fact, light changes constantly, animals move quickly, and everything in nature is in constant flux. A photograph that is delayed is a photograph that is lost. The mere requirement of permits for still photographers would mean that many of the photographs that beautify the offices of many members of this Committee could never have been made if the photographer had been required to obtain a permit.

V. Conclusion.

Mr. Chairman, PL 106-206 was drafted to provide reasonable protections for the national lands, the agencies charged with administering them, working photographers and the public. Sadly, the proposed regulation would undo many of those protections and would yield a great loss to our national photographic heritage. Ansel Adams was a proud ASMP member. Consider whether

photographs like “Moonrise, Hernandez N.M.” could ever have been made if he had had to wait until he had applied for, paid for, and eventually received, a permit. On behalf of all working commercial photographers, I urge you direct the Secretary to bring the proposed regulation back in conformity with the approach taken in PL 106-206: the general rule that still photography does not require permits or fees, absent unusual circumstances. I thank you and the members of this Committee for your time and consideration.

Respectfully submitted,

Victor S. Perlman
General Counsel and Managing Director
American Society of Media Photographers, Inc.
150 North Second Street
Philadelphia, PA 19107
Tel: 215-451-ASMP Ext. 1207
Fax: 215-451-0880
E-mail: perlman@asmp.org
Url: <http://www.asmp.org>