

Allegheny Defense Project



September 14, 2017

Objection Reviewing Officer
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Attn: Administrative Review Staff

Pursuant to 36 C.F.R. § 218, this objection is filed on behalf of the Allegheny Defense Project and Adirondack Mountain Club (“Objectors”) regarding the Forest Service’s Draft Decision Notice (“Draft DN”) for the proposed Tracy Ridge Shared Use Trails and Forest Plan Amendment Project (“Project”) on the Bradford Ranger District of the Allegheny National Forest (“Allegheny”). The Responsible Official for the Project is Forest Supervisor Sherry Tune. Objectors provided the Forest Service with substantive, timely comments regarding the Project¹ and have standing to object. *See* 36 C.F.R. § 218.5(a). Formal notice of the objection period appeared in the newspaper of record, the Warren Times Observer, on July 31, 2017, initiating the 45-day objection period ending on September 14, 2017, making this a timely objection.

If approved, the Project would convert approximately 12.5 miles of the 34-mile hiking only trail system in the Tracy Ridge National Recreation Area (“NRA”) to shared use – open to hiking and bicycling. *See* Draft DN at 1. While the Forest Service refers to this 12.5-mile conversion as a “relatively small portion of the Tracy Ridge trail system,” (Draft DN at 3), it is actually 37% of the trail system in the Tracy Ridge NRA. This is a significant change in use and the Forest Service should have prepared an environmental impact statement (“EIS”) for the Project and expanded its analysis of cumulative effects. The Forest Service’s analysis in the environmental assessment (“EA”) is insufficient and, therefore, cannot support a finding of no significant impact (“FONSI”).

I. The Forest Service must prepare an EIS.

The Forest Service must prepare an EIS for the Project. An EIS is required for major federal actions significantly impacting the quality of the human environment. 42 U.S.C. § 4332(C). The “[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14.

¹ *See* Objectors’ respective comments on the Draft EA (included in the project record). Objectors incorporate by reference and reiterate the points raised in our respective comments on the Draft EA. *See* 36 C.F.R. § 218.8(b)(4).

“*Significantly* as used in NEPA requires considerations of both context and intensity[.]” *Id.* § 1508.27 (emphasis in original).

Context “means the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” *Id.* § 1508.27(a). “Significance varies with the setting of the proposed action.” *Id.* Intensity “refers to the severity of the impact” and regulations identify a list of factors to consider for measuring the intensity of a federal action. *Id.* § 1508.27(b). A review of the Project’s context and intensity reveals the need for an EIS.

First, however, it is important to counter the perception that because of the Project’s alleged minor impacts on the physical environment that it is not a major federal action. As the NEPA regulations make clear, impacts on the quality of the human environment do not just include impacts to the natural and physical environment but also on “the relationship of people with that environment.” 40 C.F.R. § 1508.14. Here, the Forest Service is proposing a major change on “the relationship of people with” the Tracy Ridge NRA.

The Tracy Ridge NRA was established by Congress in 1984. *See* Draft DN at 5. Tracy Ridge is one of just three roadless areas in the Allegheny and, although the Forest Service did not recommend Tracy Ridge for wilderness, it did acknowledge that it “met the criteria for wilderness” designation. *See* 2007 Forest Plan FEIS at Summary-32 and 2-28. In 1994, the forest supervisor at the time, John Palmer, closed the Tracy Ridge NRA to mountain bike use (as well as horseback riding). *See* Ex. 1.

In the 2007 Forest Plan, the Forest Service stated that Tracy Ridge was one of eight areas on the Allegheny that have “the highest quality remote habitats” left in Pennsylvania’s only national forest. *See* 2007 Forest Plan FEIS at 3-193. According to the Forest Service, “[o]verall, natural processes are operating within [Tracy Ridge NRA] and the[] area[] [has] been minimally affected by outside forces except along the border[.]” *Id.* at 3-341. In that same forest plan, the Forest Service stated that bicycle use is **unsuitable** on Tracy Ridge National Recreation Trails. *See* 2007 Forest Plan at 31.

Now, the Forest Service seems to have simply changed its mind about the suitability of mountain bikes in the Tracy Ridge NRA. When an agency changes course like this, it “is obligated to supply a reasoned analysis for the change[.]” *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 42 (1983). The Forest Service fails to supply a reasoned analysis for opening Tracy Ridge to mountain biking when the long-standing policy of the agency has been to prohibit mountain bikes in this area.

For over two decades, the Tracy Ridge NRA has been officially closed to mountain bike use and, since 2007, the trails in the Tracy Ridge NRA were declared to be “unsuitable” for mountain bikes. In attempting to rescind these orders, the Forest Service simply states that because “mountain biking has become an increasingly popular and accepted use of public lands” that “[o]pening a relatively small portion of the Tracy Ridge trail system to bikes would expand opportunities for this growing recreational use.” Draft DN at 3. There are a few problems with this.

First, the Forest Service does not cite anything for its assertion that mountain biking has become an “accepted use of public lands.” Second, even assuming that is the case, that does not mean that such use is appropriate on *all* public lands, especially an area like Tracy Ridge. As the Forest Service stated in the EA, “[i]ntroducing another user group to the Tracy Ridge trail system will **undoubtedly** increase the potential for user conflict on the trail system.” EA at 16 (emphasis added). Third, as stated above, opening 12.5 miles to mountain bikes is not a “relatively small portion” of the trails in the Tracy Ridge NRA; it is 37% of the trail system. Such a significant change, after decades of telling the public that mountain bikes were not appropriate in this area requires much more than “well, we changed our mind because mountain bikes are allegedly more popular.”

In addition to the potential user conflicts that will “undoubtedly increase,” the Forest Service glossed over the impacts to wildlife. As stated above, the Forest Service cannot ignore the fact that Tracy Ridge provides some of the best remote habitat in the Allegheny National Forest. Tracy Ridge is one of just three roadless areas in the Allegheny and is one of eight areas that provide “the highest quality remote habitats” left in the Allegheny. See 2007 Forest Plan FEIS Summary at 2-28 and 3-193. While the mineral rights are privately owned, this area has not experienced oil and gas development like other parts of the Allegheny and surrounding private and state lands. Moreover, the Forest Service restricts logging and new road construction in Tracy Ridge. See 2007 Forest Plan FEIS at 3-338. Thus, this area is one of the few areas in the entire Allegheny where wildlife can expect to have limited human encounters. Opening up and marketing this remote, roadless area to mountain bikers may substantially impact wildlife in one of the few areas of Pennsylvania’s only national forest where wildlife can exist where “natural processes are operating” with “minimal[] [e]ffect[s] by outside forces[.]” *Id.* at 3-341.

Consideration of the intensity factors further support the need for an EIS. In reviewing the intensity of a project, an agency considers the following factors:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b). Regarding the first factor, the Forest Service claims that the Project “will provide benefits in the form of additional trail miles open to mountain bikes and the repurposing of an underutilized trail system” but that the impacts will not “rise to the level of a significant effect.” Draft DN at 10. The Forest Service seems to ignore the fact that “a significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1). Throughout the Draft DN, the Forest Service trumpets the alleged benefits of opening Tracy Ridge to mountain bikes. These alleged benefits include using mountain bikers to address the backlog of trail maintenance in Tracy Ridge. *See* Draft DN at 3. That is a significant effect, even if the Forest Service believes it to be beneficial.

Regarding the second factor, the Forest Service claims that “[i]mplementation of the proposed action will not result in any significant increased risks to public health and safety.” *Id.* at 10. The Forest Service acknowledges that “some members of the public may perceive that mixing hiking and bicycling constitutes a safety hazard” but that “the data does not support this contention.” The Forest Service does not cite what “data” it is referring to. Moreover, the Forest Service ignores the fact that the trails in Tracy Ridge are designed for hiking and pedestrian use only. The Forest Service has not proposed redesigning the trails to meet or account for the design parameters for mountain bike use in accordance with the Forest Service’s own literature and guidance. *See* Trail Fundamental and Trail Management Objectives and Training Reference Package at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5341754.pdf; Trails Management Handbook (FSH-2309.18) at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5403600.pdf. Without designing the trails to meet agency design parameters, the Forest Service cannot claim that its approval of the Project will not result in any significant increased risk to public health and safety.

Regarding the third factor, the Forest Service claims that opening Tracy Ridge to mountain bikes will not change the “overall character of the NRA or the [inventoried roadless area].” *Id.* at 11. As stated above, this is not true. This is one of the highest-quality, remote areas in the Allegheny. Mountain bikes have been prohibited from this area for decades for a reason. Simply changing its mind because the agency wants to encourage mountain biking and receive volunteer help with its trail maintenance backlog is not the kind of “reasoned analysis” the law requires. *See Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 42 (1983).

Regarding the sixth factor, the Forest Service claims that “[t]he proposed action does not establish a precedent for future actions with significant effects, nor does it represent a decision in principle about a future consideration.” Draft DN at 11. This is inaccurate. The Forest Service

explicitly acknowledges that a portion of the 12.5-mile shared use system will remain closed until “a short loop section is built in the future.” *Id.* at 4. The Forest Service understands that this “short loop” is necessary to cut down on illegal, off-trail riding and “allow users to loop back to the trailhead and shared use portions of the system.” *Id.* Nevertheless, the Forest Service claims this “short loop” is not part of this Project and “will require a separate analysis and decision.” *Id.* As will be explained in the next section, this amounts to unlawful segmentation. Moreover, by approving the Project, the Forest Service establishes a precedent for the future loop, which would almost certainly not be constructed unless this Project is approved first. It also represents a decision in principle that the future loop should be constructed.

Regarding the seventh factor, the Forest Service claims that “no cumulatively significant impact on the environment is anticipated.” *Id.* at 12. The Forest Service ignores the fact that “[s]ignificance cannot be avoided by terming an action temporary or by breaking it down in to small component parts.” 40 C.F.R. § 1508.27(b)(7). Here, the Forest Service is attempting to break a larger project into small component parts by considering the 12.5 miles of trail conversion in one project and the construction of a new loop in another project. This is not permitted under the NEPA regulations.

For the foregoing reasons, the Forest Service failed to provide a reasoned explanation for wanting to open Tracy Ridge to mountain bikes after barring such use for decades. The Forest Service did not provide an adequate analysis of the context and intensity of the Project. Therefore, the analysis is fatally flawed and cannot support a FONSI. The Forest Service should prepare an EIS that considers in detail the direct, indirect, and cumulative impacts of the proposed action.

II. The Forest Service is unlawfully segmenting the Project from a connected, cumulative, and similar bicycle trail construction project.

The Forest Service’s scope of review in an environmental analysis must encompass connected, cumulative, and similar actions. *See* 40 C.F.R. § 1508.25(a); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014). Actions are connected if they automatically trigger other actions which may require an EIS, cannot or will not proceed unless other actions are taken previously or simultaneously, or are interdependent parts of a larger action and depend on the larger action for their justification. *Id.* at § 1508.25(a)(1). “[A]n agency must discuss ‘[c]onnected actions’ – that is, ‘closely related’ actions – ‘in the same impact statement.’” *Nev. v. Dep’t of Energy*, 457 F.3d 78, 91 n 8 (D.C. Cir. 2006). Cumulative actions are those actions that, when viewed with other proposed actions, have cumulatively significant impacts and should therefore be discussed in the same EIS. *Id.* at § 1508.25(a)(2). Similar actions are those actions that, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. *Id.* at § 1508.25(a)(3). An agency should analyze similar actions in the same EIS when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single EIS. *Id.* Importantly, “significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7).

“An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.” *Del. Riverkeeper*, 753 F.3d at 1313. In *Delaware Riverkeeper*, the court held that the Federal Energy Regulatory Commission (“FERC”) improperly segmented four interconnecting pipeline projects located along Tennessee’s 300 Line, which runs west-to-east across northern Pennsylvania. The court stated that the four projects were “indisputably related and significantly ‘connected’” to each other. *Id.* at 1314. The court held that there were no logical termini for the projects and that they had no substantial independent utility because they were “inextricably intertwined.” *Id.* at 1315-17. The court further emphasized the importance of the timing of the four projects, noting that they were “reviewed separately by FERC, approved, and then constructed in rapid succession between 2010 and 2013.” *Id.* at 1308, 1317-18.

Here, the Project and the future loop are “indisputably related and significantly ‘connected’” actions. The Forest Service acknowledges that “[a] portion of the 12.5 [mile] shared use system ... will remain closed to bikes” until a new “loop section is built in the future.” Draft DN at 4. According to the Forest Service, however, the decision to be made regarding this Project will not authorize the construction of this other loop segment and that it would “require a separate analysis and decision.” *Id.* This strains credulity since the future loop almost certainly would not be constructed without this Project proceeding first. Moreover, the future loop is an interdependent part of a larger action (i.e., opening Tracy Ridge NRA to mountain bikes) and depends on this larger action for its justification. Therefore, the Project and the future loop are connected actions that must be considered in a single EIS.

The future loop is also a cumulative action because it will have cumulatively significant impacts when combined with the Project. As stated above, the future loop will involve new mountain bike trail construction in the Tracy Ridge NRA. Opening up existing trails and constructing new trails for mountain bikes will significantly change the recreation experience in Tracy Ridge. It will also introduce a new environmental impact in one of the most remote areas of the forest. The Forest Service acknowledged in the EA that the introduction of mountain bike in Tracy Ridge will “undoubtedly increase” the potential for user conflicts. This includes not only impacts to this congressionally-designated area but also to the North Country National Scenic Trail, which is a short distance from the proposed shared-use trail and where mountain bikes are prohibited. The potential for significant cumulative impacts is high when the Project and the future loop are considered together. Therefore, the Forest Service must prepare an EIS.

Finally, the Project and the future loop are similar actions. Construction of the future loop is reasonably foreseeable since the Forest Service states that a portion of the 12.5-mile trail system will remain closed to mountain bikes until a new “loop section is built in the future.” Draft DN at 4. The Project and the future loop share similar geography since they are in the same area and one would connect to the other. They also are likely to share similar timing since the court in *Delaware Riverkeeper* said that four interconnecting pipeline projects that were constructed over a four-year period shared similar timing. Thus, the Project and the future loop are similar actions that must be considered in an EIS.

The failure to consider the Project and the future loop in a single EIS renders the analysis invalid and incapable of supporting a FONSI. The Forest Service should prepare an EIS that considers both the Project and future loop as a single federal action.

III. The Forest Service fails provide any assurances that mountain bike use will be properly monitored and not lead to further impacts and maintenance backlogs.

According to the Forest Service, “mountain bikers are an untapped resource to address” trail maintenance backlogs. Draft DN at 3. “Simply put,” the Forest Service says, “continuing to manage Tracy Ridge as a single-user trail system is an unsustainable course.” *Id.* Yet, the Forest Service cannot guarantee that opening Tracy Ridge to mountain bikers will have a corresponding reduction in the maintenance backlog.

First and foremost, the Forest Service would be introducing a new, more intensive impact to these trails, thereby likely increasing the need for maintenance. While the Forest Service claims that mountain bike groups allegedly have an “outstanding reputation” in other parts of the country, Draft DN at 3, that does not mean the trails in Tracy Ridge will be properly maintained once the system is changed to shared use. The Forest Service has utterly failed to provide any kind of monitoring plan to ensure that if the trails in Tracy Ridge of changed to shared use with mountain bikes, that they will be adequately maintained. Without such a monitoring plan, the Forest Service cannot approve the Project.

IV. If the Forest Service refuses to consider any part of this objection because of an alleged failure to have previously raised the issue in previous comments, then the Forest Service regulation is inconsistent with NEPA.

The Forest Service recently overhauled its administrative appeal regulations. *See* 36 C.F.R. Part 218 (2013). Instead of a post-decision administrative appeal, the Forest Service now uses a pre-decisional objection process. This process is designed to make it harder for the public to participate and easier for the agency to approve projects. To the extent that the Forest Service relies on these regulations to deny any part of this objection, those regulations are inconsistent with NEPA and, therefore, invalid.

NEPA “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). “[P]ublic scrutiny [is] essential to implementing NEPA.” *Id.* § 1500.1(b). The Forest Service’s regulation that an objection may be denied if there is no “connection between prior specific written comments on the particular project or activity and the content of the objection” (36 C.F.R. § 218.8(d)(6)) substantially frustrates the “public scrutiny” that is “essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). Therefore, if the Forest Service denies any part of this objection, it will be a violation of NEPA and its implementing regulations.

V. Conclusion

The Project may be well-intentioned but is misguided. Mountain bike trails may be appropriate in other parts of the Allegheny National Forest but not in the Tracy Ridge NRA, which is an inventoried roadless area and one of the most remote, high-quality habitats left in Pennsylvania’s

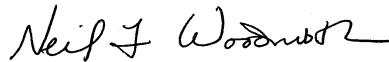
only national forest. The Forest Service acknowledges that the potential for user conflicts will undoubtedly increase if these trails are converted to shared use, has not provided any plans to redesign the trails for mountain bike use, and has no existing plan to monitor impacts and ensure that mountain bike users provide the kind of maintenance the Forest Service alleges will occur.

The existing analysis cannot support a FONSI. The context and intensity of the Project require preparation of an EIS. That EIS should consider the direct, indirect, and cumulative effects of the Project in much greater detail and the existing EA. Furthermore, that EIS must consider the future loop as a connected, cumulative, and/or similar action to the Project.

Sincerely,

/s/ Ryan Talbott

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Enclosure