

To the National Forest Service
Comments of American Mountain Bike Riders on FSM 7700 and 7710 E-bikes
#ORMS-2619

October 23, 2020

American Mountain Bike Riders. Who we are.

These comments are filed on behalf of American Mountain Bike Riders (AMBR). AMBR is the only nation organization that advocates for e-mountain bike (eMTB) access to non-motorized natural surface trails.¹ We care about and conserve where we ride. We advocate for equal access for pedal-assist bikes where other mountain bikes are allowed. A Class 1 electric mountain bike ² (eMTB) is a mountain bike and should be permitted where existing bikes are allowed but not where existing bikes are not allowed. eMTBs are the fastest growing share of mountain biking riders. eMTBs open new potential for bike riding adventures, long endurance high-altitude rides, and cross-country traverses. Less than one horsepower pedal-assist bikes extend access to older riders and those with disabilities. Casual riders can keep up with a faster riding partners, while reducing their carbon footprint by parking the car and maintaining an active lifestyle.

Summary and Conclusions

Provisions of the NFS proposal that AMBR opposes:

- Permanently prohibiting all classes of e-bikes, even those that are not self-propelled, from non-motorized trails in the national forests, and confining eMTB on totally inappropriate trails for off-road vehicle;
- Repudiating the management framework adopted by all other federal land management agencies and majority of states of classifying e-bikes as bikes, while publishing misleading statements that the NFS proposal “aligns” with the rest of the America; and
- Locking in place a defective procedure of downgrading existing non-motorized to motorized trails as the only method for e-bike access.

The NFS should do what it told the public it was doing, align with the management of e-bikes of the rest of the U.S. land management agencies and states by defining e-bikes as bikes, not motor vehicle. We don't see how in good conscience the NFS can say one thing to the public and then do the opposite.

¹ Other mountain bike organizations may say they support access for all types of mountain bikes in all parts of the U.S., but in fact do not advocate for access for eMTBs. Only American Mountain Bike Riders advocates for all types of mountain bikes, and explicitly focuses on e-mountain bikers access, the largest group of mountain bike riders denied access to non-motorized trails by the NFS.

² Unless otherwise stated, eMTB is used to mean a pedal-assist Class 1 or 3 mountain bike. e-Bike is used to refer to all classes of e-bikes

The public has not been told that the NFS proposal is to consider increase access for eMTBs by downgrading non-motorized trails to motorized trails. How could the public know the consequences of the proposal when the crucial terms “non-motorized trails” and “motorized trails” never appear. Not once, not in Federal Register, Notice/PR or changes themselves.

One change will correct the previous misstatements and omissions, and actually “align” with all federal land agencies: in 7705, strike from the definition of an E-Bike, the words “motor vehicle” and substitute the word “bicycle”. Then, use the new proposed guidelines to designate non-motorized trails appropriate for e-bike use, by class; rather than using the criteria to change the designations of trails from non-motorized to motorized.

The proposal is built on a questionable foundation, at least as to pedal-assist e-bikes. If Classes 1 and 3 are not “a type motor vehicle” under the Travel Management Rule definition of a motor vehicle, then they are not motor vehicles under the new definition proposed. Pedal-assist eMTBs are not “a type of motor vehicle” according to the plain language in the TMR and by design and operation.

AMBR Strongly Opposes The Proposal As It Is Written.

Thank you for the opportunity to comment. We were eager to welcome any potentially positive proposal on e-bike access from the National Forest Service (NFS).

For a half-a-dozen years, the NFS has been saying that it is monitoring e-bike developments and open to adjusting its policies. That had become an oft-repeated refrain as the NFS stood-pat. After swift changes at the BLM and NPS and steadily increasing e-bike access in the majority of states, the public and non-motorized trail users waited for action from the NFS.

Unfortunately this is neither that welcomed proposal nor potentially positive. This, if fact, is a lost opportunity for public participation. The proposal is cryptic and does not explain in any way how recreational opportunities will be achieved or increased. It is clear from the comments received to date that the vast majority of the public, trail users, even mountain bikers themselves and the bike industry have misunderstood the proposal.

The core of the NFS proposed changes is in fact unstated. An “unstated core” seems an oxymoron, but it is, what it is. The unstated core is that the only additional trail access for e-bikes will be by changing the designation of non-motorized trails to motorized trails.

As the only nationwide advocates for eMTB access to natural surface trails we want to be crystal clear on our position. We are opposed to achieving access for eMTBs to non-motorized trails by changing the trail designations to motorized trails, even with the tag “E-Bikes Only.”

We share the same values and love for our natural environment as our fellow trail users, the hikers, equestrians, and traditional mountain bikers. Most of them feel as we do.

They are ready and willing to share natural surface trails but not by changing them motorized trails.

The NFS proposal is DOA, dead-on-arrival. It provides the hope of future access, but solely by swallowing the poison pill of downgrading trails to motorized.

Is there an argument more subscribed to within the trail users and conservation communities than the “slippery sloop” or “camel’s nose under the tent”? Can there be a better case to believe that it is true than to propose changing non-motorized trails to motorized for bikes labeled by the NFS as the equivalent of genuine motor vehicles?

The public and backcountry users are told that all e-bikes are the same as motorcycles and ATVs and that the NFS will change trails to motorized use for just one form of motor vehicles, the e-bike. If all users of non-motorized trails fear the risks of future changes for genuine motor vehicles, they will not allow non-motorize trails to be changed to motorized for e-bikes.

The approach to this dilemma seems to have been don’t mention anywhere in the changes proposed that e-bike access will come at the price of changing trails to motorized. Since that is not disclosed, it follows that the NFS has not addressed whether future access for other motor vehicle categories could be allowed, once trails have been changed to motorized.

These consequences are the result of the NFS’s insistence on continuing to label e-bikes as motor vehicles and manage all e-bikes as a motor vehicle. That has been the NFS position and it remains the NFS position, despite the rest of the nation going in the opposite direction and basing management of e-bikes as bikes. And it is both unnecessary and even contrary to NFS’s existing regulations, which as we will show below, do not define pedal-assist e-bikes as a motor vehicles.

If one is wedded exclusively to the position that all e-bikes are motor vehicles, however, then the only way to increase recreational opportunities for e-bikes is to build more motorized trails or to change non-motorized trails to motorized trails. The NFS has painted itself into a corner that requires it to tear down the structure of non-motorized trails to get out.

We have little doubt that hikers, equestrians, and riders of all types of bikes will go ballistic if a popular hiking or riding area is to be changed from non-motorized to motorized. A likely result is that a forest will propose a trail to downgrade; it will face massive opposition and get shot-down. Trail access for e-bikes will end there.

AMBR and other e-bike riders are not short-sighted. We will not support the NFS now, nor if this proposal is adopted, when it proposes to downgrade trails to motorized. We too will defend non-motorized areas against genuine, as compared to contrived, motor vehicles.

Unless e-bikes are removed from the motor vehicle classification (as National Park Service and U.S. Fish and Wildlife Service have done) or a process is included to

remove e-bikes from motor vehicle classification (as Bureaus or Land Management and of Reclamation have done):

1. The proposed changes are a serious step backward for present and future opportunities for bicycle use of our national forests by permanently prohibiting all class of e-bikes, even those that are not self-propelled, from the vast network of non-motorized NFS trails, and sequestering them on totally inappropriate and potentially dangerous off-road vehicle trails built for high-horsepower internal combustion off-road motorcycles and ATVs;
2. These proposed changes in fact, mis-aligns, rather than align, the National Forest Service with the rest of the federal land management agencies and majority of states by classifying and managing all e-bikes the same as dirt bikes, motorcycles, ATVs, ORV, and every other type of motor vehicle;
3. These proposed changes lock in place a doomed, non-starter procedure to add e-bike access by downgrading existing non-motorized to motorized trails for “e-bikes only.”
4. These proposed changes are unnecessary and in truth no change at all, because the NFS can downgrade a non-motorized trail to a motorized trail and limit to e-bikes today and it has done so;³ and
5. These changes are proposed so that the NFS can appear to be adapting to new recreational opportunities, but actuality to continue the NFS as the only management agency that refuses to accept that a pedal-assist bike is a bike and regulate it accordingly.

The Correct Action To Take

The fix is simple. It is in fact what the NFS has told the public is proposed: actually align with the rest of the nation. A do-over of the proposal is not necessary. Rather do exactly what the NFS notified the public it proposes.

The NFS should do as the rest of the U.S. government and the states, recognize that an e-bike is a bike, not a motor vehicle (nor even defined as a motor vehicle in T.M.R. 212.1; see below). Then use its modified procedures and NEPA reviews to designate trails for eMTB access as proposed, “where bicycle use is allowed, [based on] the extent to which effects from e-bike use are comparable to effects from existing bicycle use, accounting for, as appropriate, differences in speed; potential effects from increased or concentrated use; and any site-specific considerations.”

These excellent criteria and NEPA reviews can then be used as the NPS and BLM have done, and the NFS has told the public it intends to accomplish with its proposal.

³ “In addition, trail riding opportunities for e-bikes on existing non- motorized trails may be considered and designated as motorized trails by administrative units and ranger districts under travel management planning efforts, based on special new l vehicle class designations in accordance with 36 CFR 212.55.” Electric Bikes and Trail Management, March 24, 2016.

One change will accomplish this: **in 7705 - DEFINITIONS, strike from the definition of an Electric Bicycle (E-Bike), the words “motor vehicle” and substitute the word “bicycle”.**

A e-bike is then a bike, with three class of bikes, and then can be managed by bike class. The local forest can apply the “Specific Criteria and Guidance for Designating E-Bike Use on Trails” to select trails for e-bike use on “trails that are managed for bicycle use or where bicycle use is allowed . . . “ applying the criteria set forth.

A Flawed Public Participation Process

The basic facts of the proposal are not mentioned or suggested in the official notice published in the Federal Register or press release. For example, NFS does not say that: the proposal:

- Rejects the definitions and management of the rest of the US government and states. Not mentioned; in fact opposite is stated.
- Locks in place a defective procedure for downgrading non-motorized trails to motorized trails as the sole mechanism for e-bike access. Not mentioned.
- Classifies as a motor vehicle e-bikes that can move only by peddling and which in appearance, performance, ecological and social impacts, and just-plain common sense is just another bike. Not mentioned.

Not one of these effects is mentioned in the NFS public notice/press release, or even in the language of the proposed changes. Nowhere. The crucial terms “non-motorized trails” and “motorized trails” never appear.

The real import and effect of this proposal is so under-the-radar that its true operation and consequences are missing. The kindest interpretation is that the proposal is not what appears to be. Not even in same realm as it truly is.

The NFS has told the public in its press release/notice that this proposal is:

- “to expand e-bike access”;
- to provide “consistent, straightforward guidance on this increasingly popular recreational activity”;
- to “generally align with proposed changes at other federal land management agencies”; and
- to allow “line officers at the local level to more precisely designate trails for e- bike use. . . .”

Not one of those statements is correct.

The proposal does not expand e-bike access. In fact it continues current management by NFS of e-bikes restricting them to motorized trails. Not one foot of current trail is made available by this proposal.

Calling it straightforward is audacious, since its operation and effects on non-motorized trails are not mentioned. Same for statement that allows chance “to more precisely designate trails for e-bike use.” No where in the NFS press release/notice does it say

that what is at stake is the re-designation of existing non-motorized trails to motorized trails for e-bikes only. Is changing a non-motorized trail to a motorized trail more precise?

Finally, the statement that is the cause of the public's misunderstanding of the proposal: that this will "align" the NFS with other federal land management agencies. **The NFS aligns by rejecting the position of the rest of the U.S. Government.** It is contrary to the positions adopted by the all of the Department of Interior agencies, NPS, BLM, Bureau of Reclamation (Reclamation) , and U.S. Fish and Wildlife Service. It is contrary in approach, principle, result, spirit, and tone.

To begin with, the Interior Department's federal management agencies began from the principle that "e-bikes shall be allowed where other types of bicycles are allowed." That was the basic new standard established by Secretary Order 3376 in August, 2019.

The NFS proposal is directly contrary. It defines a "bike" as non-motorized and all classes of e-bikes as motor vehicles. By definition therefore the NFS position is that an **e-bike is not a bike.**

Next, and this is the fundamental contradiction between the NFS and the rest of the federal government, and also the majority of states: all the others, either remove or set up procedures to remove e-bikes from the motor vehicle category and treat them as other bikes. e-Bikes thus have access to existing non-motorized trails the same as other bikes where appropriate and authorized by local officials.

If the NFS adopts these its changes, other bikes will continue to go on non-motorized trails, but e-bike cannot; e-bikes will only be allowed on motorized trails. Same as now; same perhaps forever. No exception. Local officials cannot deem e-bike use appropriate and then authorized on non-motorized trails.⁴ Unless a local forest succeeds in downgrading a non-motorized trail to a motorized trail, there is no change and no more access for e-bikes.

The NFS is not just going (really continuing) against the judgment of the rest of the federal government and the majority of states, it is saying the opposite to the public by claiming to "align with proposed changes at other federal land management agencies." [The changes by other federal agencies actually now adopted, no longer proposed.]

On the very day the NFS published the proposed changes with the "align" misrepresentation, it sent out an internal "Communication Plan" for NFS staff only. The Communication Plan acknowledges that the Interior Department agencies "are taking slightly different approaches to managing and promoting e-bike use." Further, "The DOI has issued a proposed rule that would exempt e-bikes from the definition of 'off-road vehicle' or 'motor vehicle.'"

⁴ The Supervisor of the Tahoe National Forest tried and opened some non-motorized trails to eMTBs in 2019. He even correctly stated that current NFS manuals and regulations did not prohibit eMTBs on non-motorized trails. The NFS did not back him, and reversed his order.

The NFS knew it was NOT aligning with any of the other federal land management agencies and the key difference was in keeping e-bikes as motor vehicles. It knew that the statement that the proposal “will generally align with proposed changes at other federal land management agencies” was not correct.

The public reads the NFS statement that it “aligns”, however, and assumes that something similar to the NPS and BLM is proposed by the NFS. And since the NFS did not explain nor mention the consequences of that difference on access to non-motorized trails, most of the public did not, and still does not realize it.

And there is irrefutable proof that the public is being and has been misinformed by the proposal as it is written: the thousands of public comments already filed on the proposal. These clearly demonstrate that:

- Almost all comments think that the proposal increases trail access for e-bikes to the same trails used by other bicycles,
- Almost none of the comments realized that the proposal is to allow trail access for e-bikes by classifying them as motor vehicles and limiting them to motorized trails, and
- The only commenters who understood that the way the NFS will add access is to downgrade non-motorized trails to motorized trails for e-bikes were the few organizations with professional staffs who are steeped in the rules of the NFS. (See e.g., Wilderness Society and Wyoming Wilderness Association) Small organizations, even interested mountain bike groups didn’t understand that e-bikes were being permanently assigned to motorized trails.

People on both sides of the controversy over e-bikes are confused.

Some commenters say they are in favor of e-bike access but for the proposal; others say that against e-bike access, but also for the proposal.

This isn’t a matter of commenters taking different positions but of not understanding the proposal. People who are taking the time to write don’t have a clue of what is actually proposed, because the NFS either kept it hidden or misstated the actual proposal. It is a shame to have wasted the opportunity for genuine public participation. Just to have said in the Federal Register notice, the press release, or the proposed changes, what the NFS said in the Communication Plan to its own staff, that DOI agencies had taken “slightly different approaches to managing and promoting e-bike use . . . that would exempt e-bikes from the definition of ‘off-road vehicle’ or ‘motor vehicle.’”

Even better, to have explained to the public why the NFS finds it necessary to reject the judgment of all other federal land management agencies and the majority of states.

Does the NFS have a different existing legal and programmatic framework that would preclude managing e-bike use as do the other agencies? The BLM has an even more differentiated structure for different classes of motor vehicles, and will accommodate e-bikes as bikes, not as motor vehicles.

The NPS has a highest requirements for stewardship in the federal government. Yet it incorporated e-bikes as bike and did so quickly. In fact, in the year that the NFS has

watched the other federal agencies set up management and access of e-bikes as bikes, the NPS has fully adopted the changes, completed appropriate level NEPA reviews, and designated trails for e-bike access. NPS implementation is done. Almost all 400 NPS units today manage of e-bikes as bikes.⁵

It is reasonable to ask, why is the NFS completely different than the rest of the U.S. Government?

Proposal Lacks Policy, Goal, Or Objective

The proposal lacks direction. Is it for or against more e-bike access? It has paragraphs called Objectives (7702) and Policy (7715.03). Both say the same thing:

To consider emerging technologies (such as e-bikes) that are changing the way people access and recreate on NFS lands. For example, where suitable for use, e-bikes may provide new opportunities for individuals who might otherwise be prevented from experiencing an NFS trail without assistance from an electrical motor.

Is it a coincidence that the one example chosen and repeated twice reads like an accommodation for riders with disabilities: “opportunities for individuals who might otherwise be prevented from experiencing an NFS trail without assistance from an electrical motor.” The NFS could achieve that objective merely by withdrawing its unsympathetic “Guidance” on Electric Bikes and Trail Management (March 24, 2016), which three times in two pages repeats, “no exceptions” for trail users with disabilities.

Is to “consider” something a policy or an objective? It would seem a good idea to always consider changes in the way people access and recreate on NFS lands, but does that mean forest supervisors should seek out opportunities e-bike access? Probably not, since a forest supervisor presumably knows that the ability to downgrade non-motorized to motorized already exist. See Electric Bikes and Trail Management, March 24, 2016.

Compare the policy and objective to “consider” with that of the other federal land management agencies. The Department of Interior started with this stated goal: “This Order is intended to increase recreational opportunities for all Americans.” (SO 3376). It sets forth truly straightforward directions: “E-bikes shall be allowed where other types of bicycles are allowed; and E-bikes shall not be allowed where other types of bicycles are prohibited.”

The NPS issued its Policy Memorandum 19-01 in August 2019, with a clear policy direction: “The intent of this policy is to allow e-bikes to be used for transportation and recreation in a similar manner to traditional bicycles.”

⁵ “The National Park Service policy adopted over a year ago has already resulted in more than 385 national parks evaluating e-bike use. The expanded bicycling experience has already been adopted at popular parks like Great Smokey Mountains National Park, Grand Canyon National Park, Rocky Mountain National Park, Zion National Park, Yosemite National Park, Yellowstone National Park, Acadia National Park, Grand Teton National Park, Olympic National Park, and Glacier National Park.” Department of Interior, Press Release, 10/2/2020

The NFS remains equivocal on e-bike access. That explains the lack of a real policy buttressing and guiding the proposal. The proposal is a restatement of current policy and rules: labeling all e-bikes as motor vehicles and allowing non-motorized trails to become motorized.

The extant powers have led to almost no access for e-bikes in the NFS system — except on trails designed and designated for heavy, big horsepower dirt bikes and off-road motorcycles. Restating the same authority will accomplish the same: nothing.

A new direction is needed. It begins with a policy to classify and manage e-bikes as bikes according to class and stop pigeonholing eMTBs as motorcycles and dirt bikes.

The Proposal Is Built On The Unsupportable Contention That A Pedal-Assist E-Bike Meets The TMR Definition Of A Motor Vehicle.

The proposal defines an e-bike as a motor vehicle based on definition of a motor vehicle in the Travel Management Rule (TMR). The new proposal starts from the premise that all classes of e-bikes are motor vehicles; explicitly, each class of e-bikes is “a type of motor vehicle. . . .”

If some classes do not come within the definition, specially if pedal-assist e-bikes, are not motor vehicles under the TMR, then calling them a motor vehicle now is hindsight. A re-interpretation of a federal regulation 15 years after notice and adoption. It does not, however, change the legally binding definition in the TMR.

The proposal is built on a questionable foundation, at least as to pedal-assist e-bikes. If Classes 1 and 3 are not “a type motor vehicle” under the TMR, then they are not motor vehicles under the new definition proposed.⁶

The NFS position that all e-bikes are motor vehicles is spell out, in its entirety, in a single paragraph of the “Guidance” on Electric Bikes and Trail Management (March 24, 2016):

The Forest Service’s Travel Management Rule (TMR) and E-Bikes: The TMR defines “motor vehicle” as “any vehicle which is self-propelled, other than: (1) a vehicle operated on rails; and (2) any wheelchair or mobility device, including one that is battery-powered, that is designed solely for use by a mobility-impaired person for locomotion, and that is suitable for use in an indoor pedestrian area.” 36 CFR 212.1. E-bikes have a motor, thereby are self-propelled, and are not covered by the exceptions in the definition. Therefore, e-bikes are motor vehicles and are subject to regulation under the TMR, which requires designation of National Forest System (NFS) roads, NFS trails, and areas on NFS lands for motor vehicle use. 36 CFR 212.51(a). Direction on e-bikes was included in a

⁶ In effect, this would leave Class 1 and 3 e-bikes as they are now, before the adoption of the proposal. That is, not in a defined category. Class 1 and 3 would not be motor vehicles nor included in the new definitions in 7705 of a bicycle because they are not a “solely human-powered device”, nor e-bikes as defined in 7705 because they are not motor vehicles. Since not motor vehicles, local forest could permit them on non-motorized trails where appropriate. The NFS could cure this ambiguity by striking the words “a type of motor vehicle” from 7705.

response in the *Federal Register* notice for the final over-snow vehicle rule. The response states: “New technologies that merge bicycles and motors, such as e-bikes, are considered motor vehicles under §212.1 of the TMR.” 80 Fed. Reg. 4503 (Jan. 28, 2015).

Stripped of the exceptions for vehicles on rails and wheelchairs and the notice 10 years later on e-bikes (which just as the proposed new definition in this proposal is not part of the definition in the TMR and has no legally binding effect), then NFS definition and application to e-bikes is short and straightforward:

The TMR defines “motor vehicle” as “any vehicle which is self-propelled”

E-bikes have a motor,

thereby are self-propelled

The NFS choose to explain its logic in a classic syllogism:

All motor vehicles are self-propelled

e-bikes have a motor

e-bikes are motor vehicles

It does not take Aristotle to see the flawed logic. First the definition of a motor vehicle in the TMR **does not require a motor**. The TMR definition of a motor vehicle is five words: “any vehicle which is self-propelled.” A motor is not part of the definition. Ironic though it seems, the motor is irrelevant.

To begin with, all of the times and places that the NFS calls an e-bike a motor vehicle because it has a motor or is a motorized vehicle are wrong. The NFS does not define a motor vehicle as a vehicle with a motor or a motorized vehicle. Perhaps in hindsight it wishes it had, as the NPS and BLM defined a motor vehicle as a type of vehicle with or propelled by a motor.⁷ But, NFS did not, and repeating that an e-bike has a motor and is thus a motorized vehicle will not make it so.

A motor vehicle under the TMR is any vehicle that is self-propelled. And it should not be necessary to add, this is not our definition or argument or sophistry. It is plain English applied to the five words the TMR uses to define a motor vehicle.

To be true to the definition, the NFS syllogism should have been:

All motor vehicles are self-propelled

All e-bikes are self-propelled

All e-bikes are motor vehicles

But is the minor premise correct? Are all e-bikes self-propelled? That is the only question according to the TMR. It is also the only question that we have **never** found raised or considered by the NFS anywhere.

⁷ The Forest Service could have defined a motor vehicle as the BLM does, as “any motorized vehicle . . . designed for, travel on . . . natural terrain”. Or the NPS which In 36 CFR §1.4, defined a motor vehicle as: “Motor vehicle means every vehicle that is self-propelled and every vehicle that is propelled by electric power.”

The TMR definition, and thus the proposal to continue to treat Classes 1 and 3 e-bikes as motor vehicles, turns on the definition of words written and adopted in published regulations by the NFS. Are all e-bikes “self-propelled?”

1. According to Every Published Definition of Self-Propelled, and By Design and Operation, Pedal-Assist e-Bikes are Not Within the Definition of a Motor Vehicle in the TMR.

What is the commonly understood meaning of “self-propelled”? Below is **every definition of self-propelled** in a published English language dictionary that we could find:

1. Self-propelled in The New Oxford American Dictionary means, “moving or able to move without external propulsion or agency.”
2. Webster Unabridged: “propelled by itself. Vehicle: propelled by its own engine, motor, or the like, rather than drawn or pushed by a horse, locomotive, etc.”
3. The Cambridge Dictionary says, “able to move by its own power.”
4. Merriam-Webster: “containing within itself the means for its own propulsion.”
5. The American Heritage Dictionary: “Containing its own means of propulsion: a self-propelled golf cart.”
6. Dictionary.com: “propelled by itself.”
7. Collins English Dictionary: “(of a vehicle) provided with its own source of tractive power rather than requiring an external means of propulsion.”
8. vocabulary.com and Princeton's WordNet: “containing within itself the means of propulsion or movement;” and “moved forward by its own force or momentum.”
9. vocabulary.com of a self-propelled vehicle: “a wheeled vehicle that carries in itself a means of propulsion”
10. Wikitionary: “Having its own means of propulsion that moves with it.”

[All other definitions were verbatim copies on one of the above.]

Every published dictionary defines self-propelled to mean **able to move by itself or containing its own propulsion**. Not a single dictionary defined self-propelled to mean movement aided by external propulsion, nor even a vehicle with some external power. More important, not one dictionary defines self-propelled as the NFS did in deciding that an e-bike is a motor vehicle; that is, “E-bikes have a motor, thereby are self-propelled.” Not even close; not implied, suggested, or deducible that “self-propelled” could be a vehicle with a motor or even a vehicle propelled by a motor.

A pedal-assist e-MTB cannot move by itself; nor does it contain its own means of propulsion. Or stated differently, a pedal-assist e-MTB can't move “without external propulsion or agency.”

If the rider does not peddle, the bike does not move. No throttle; no switch, no accelerator, nothing other than the application of human peddling power will make it move.

At its most basic, sit on a pedal-assist e-bike, and there is no way to make it move, other than by peddling or of getting off and pushing the bike. In that respect both a pedal-assist e-bike and a traditional bike are identical — not similar, but identical. Neither is self-propelled; both rely on human-power to move. A class 1 and 3 eMTB depends solely on human power both to move the bike and to engaged the assistance of a 1-horsepower motor.

The moment the riders stops peddling, technically the instant there is no force against the pedal by the rider, the motor cuts off. And the shut-down is instantaneous by design. Mountain bikes, including eMTBs, are designed to be ridden on natural surfaces. Over rocks, roots, gravel, and sand. Mountain bikes on trails bounce, ricochet, or recoil off obstructions and often are momentarily headed off-trail unless corrected. The last thing the rider wants is for the motor to continued applying power, even for an instance, in the off-trail direction. No peddling pressure, no motor assist and no added propulsion is a basic mountain bike benchmark.

Going uphill, if the rider simply eases foot pressure on the pedals, the motor disengages. It is just like any other bike, when gravity is not assisting to move the bike, stop peddling and the bike stops. If the NFS drafters had ridden a class 1 or 3 eMTB they might have experienced the sudden “clunk” the rider feels when pedaling uphill and then pauses, even momentarily. The bike stops abruptly.

When coasting the motor provides no assist. Studies and observations have found no difference in downhill speed between and eMTB and a traditional MTB. It is the terrain, slope, sightlines, and skill of the rider that determine downhill speed of all mountain bikes.

It is for all these reasons, that studies have confirmed that speeds of e-mountain bikes and traditional bikes are comparable, both uphill and downhill. Just a couple of weeks ago, the National Park Service reached this conclusion in adopting its rule excluding e-bikes from motor vehicle category:

In addition, the terrain and slope of some trails provides a natural limitation to the speed at which a cyclist can reasonably move. Further, although some studies showed average riding speeds on electric mountain bikes are slightly faster than conventional mountain bikes, other studies found that, perhaps counterintuitively, average e-bike speeds were less than average conventional bike speeds which may reflect the slightly older demographics of e-bike riders, and that differences in speed between e-bikes and bicycles are most pronounced on the uphill segment of a trip. (Hall et. al. 2019; Langford, Cherry et al. 2017).

In sum, by operation or on-the-ground tests, pedal-assist e-bikes propulsion is comparable to a bike, and even actual speed confirms it.

The TMR definition focuses exclusively on how a machine is moved, its means of propulsion, not if it has a motor. It is critical therefore for those who apply the TMR definition to actually understand how pedal-assist e-bikes operate.

From everything the NFS has written about e-bike in the last 10 years, there does not appear to be understanding or familiarization with pedal-assist e-bikes. The NFS is not to be blamed. By 2020, half-a-dozen studies had confirmed that eMTBs major problem was not ecological impacts or safety but perception. The PeopleForBikes eMTB Intercept Study, April 2017 concluded: "Education and experience are important, i.e. it is difficult to formulate an educated opinion of eMTBs without first seeing and riding one. Riding an e-MTB changes perceptions from the negative or neutral, to neutral or positive."

Taking into account how a pedal-assist e-bike actually functions, we can now state the only logical and correct syllogism:

Self-propelled vehicles are able to **move by themselves**.

Class 1 and 3 e-bikes are not able to **move by themselves**.

Class 1 and 3 e-bikes are not self-propelled vehicles.

2. The National Forest Service Cannot Legally Ignore the Plain and Unambiguous Meaning of "Self-Propelled"

Even federal agencies are obligated to give ordinary words their ordinary meaning. "Self-propelled" is not a technical term to be given a different, technical meaning. It has only one meaning, although it is expressed in slightly different, but related terms. There is no other known meaning, let alone a meaning to substantiate NFS construction that self-propelled means a vehicle with a motor or propelled by a motor.

This isn't the place for a legal brief. But even so, the applicable legal doctrines are simple.

The TMR definition is a regulation produced in notice-and-comment rulemaking. A reviewing court would show deference to the agency's construction, and ask, is the agency's interpretation permissible under the **regulation's actual text**?

According to the plain meaning rule, words must be given their plain, ordinary, and literal meaning. If the words are clear, they must be applied. There are exceptions, such as absent of a contrary definition within the statute or regulations, or if the normal meaning would produce an absurd and unconstitutional result. None of those exception exist here.

Absent one of these exceptions, courts rely primarily on the plain meaning of regulations. In *Auer v. Robbins*, 519 U.S. 452, 461 (1997) for instance, the U.S. Supreme Court upheld the Secretary of Labor's interpretation of his own regulations based primarily on dictionary definitions of the critical regulatory phrase "subject to."

Likewise, in *Christensen v. Harris County*, 529 U.S. 576 (2000), on the basis of the text of the regulation alone, the Court rejected an agency's construction of a regulation.⁸

To conclude that the NFS leap from “self-propelled” to “vehicle with a motor” or even “vehicle propelled by a motor” is a “permissible” construction, however, the NFS must overcome two impediments. First if the motor is critical, then why isn't “motor” any part of the definition at all? That is self-evident: if a motor alone is determinative, why isn't it part of the regulatory definition?

Second, the NFS's construction in effect reads out the key word “self” in “self-propelled.” The NFS construction makes the word “self” surplus or useless. In legal terms it becomes mere surplusage. There is a well-established judicial canon against reading actual words out of the regulation and treating as mere surplusage.⁹

The NFS construction of “self-propelled” is further discredited by comparing similar language by the NPS. The NPS clearly recognized that “self-propelled” did not include “propelled by a motor” because it used both as separate parts of its definition of a motor vehicle. In 36 CFR §1.4, the NPS defined a motor vehicle as:

“Motor vehicle means every vehicle that is self-propelled and every vehicle that is propelled by electric power, but not operated on rails or upon water, except a snowmobile and a motorized wheelchair.”

Finally, the NFS has occasionally invoked its own comments years after the TMR regulatory definition was adopted in an attempt to buttress its erroneous construction of the TMR.¹⁰ These of course can't change the words or legally mandated construction of regulatory language.

⁸ See, e.g., *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 296-97 (2d Cir. 2006) (rejecting BIA panel interpretation of INS regulations because regulation “plainly states” that waiver of application may take into account “factors that arose subsequent to the alien's entry” such as marriage to a U.S. citizen; *Exportal Ltd. v. United States*, 902 F.2d 45, 50-51 (D.C. Cir. 1990) (The APA compels a plain meaning approach to regulatory interpretation and concludes that because the agency “has expressed itself in language that has a plain meaning, we look no further than the text of its rule”); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 381 (D.C. Cir. 1983) (rejecting agency's interpretation of term “manner” in its own rule because interpretation “does violence to the language of the rule”).

⁹ *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)

¹⁰ E.g., 80 Fed. Reg. 4500, 4503 (Jan. 28, 2015) (response to comments on agency's winter travel management rule stated that “[n]ew technologies that merge bicycles and motors, such as e-bikes, are considered motor vehicles under § 212.1 of the TMR”); Mar. 24, 2016 Electric Bikes and Trail Management (“E-bikes have a motor, thereby are self-propelled, and are not covered by the exceptions in the definition. Therefore, e- bikes are motor vehicles and are subject to regulation under the TMR, which requires designation of National Forest System (NFS) roads, NFS trails, and areas on NFS lands for motor vehicle use.”)

CONCLUSION

AMBR acknowledges the NFS's desire to consider changes, even if this proposal falls short of real change and will not increase recreational opportunities for people who use and care about for our national forests lands.

Soon there will be no observable differences between an eMTB and a conventional MTB. Mountain bike riders, on undetectable eMTBs, may become regular users of non-motorized trails. The NFS rule that eMTBs are motor vehicles and confined to motorized trails will be largely unenforceable, rendered moot by technological change.

The NFS can wait to be swept up by predictable advances in electric bike developments. Or the NFS can begin to understand, monitor, and manage new developments and new form of recreation that benefit the American people.

Thank you for your consideration of our comments. If you have any questions, please contact us at AMBR.

Respectfully submitted,



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