

13 June 2023

**Re: OBJECTIONS Pursuant to 36 CFR 218.8 to
Mendenhall Glacier Visitor Facility Improvements Project
Draft Record of Decision**

To the Objection Reviewing Officer:

Pursuant to 36 CFR 218.8(d)(4) I am submitting these timely objections to the US Forest Service's (FS) Draft Record for Decision for the Mendenhall Glacier Visitor Facility Improvements Project.

Responsible Official: Frank Sherman, Forest Supervisor for the Tongass National Forest.

Timeliness and eligibility to object

These objections are timely filed. Notice of the Draft ROD and FEIS was published in the Ketchikan Daily News on May 12, 2023. I have participated in Mendenhall Glacier Visitor Facility Improvements Project since 2019. The issues raised herein were raised in comment letters on initial scoping (February 2020), Environmental Impact Statement scoping (January 2021), the Draft Environmental Impact Statement (May 2022) and the Supplemental Draft Environmental Impact Statement (February 2023).

- 1. The FS has failed to comply with 40 CFR 1501.1 and 40 CFR 1502.14, misrepresented the Purpose and Need for the project to predetermine the outcome of the process, and suppressed meaningful public involvement in the NEPA process¹.**

Growth in the number of visitors to Juneau is not equivalent to growth in visitation to the MGRA: The assumption underlying this FEIS from the purpose and need statement to the design of the alternatives is that **visitation** to the MGRA is projected to increase at the same annual rate that commercial cruise ship tourism is hypothesized to increase in Juneau. The FS presents this assertion as a matter of fact, but in reality, **visitation** cannot increase much at all absent a decision by the FS to issue commercial special use permits to increase visitation.

As the FEIS points out, the MGRA is different from lower-48 or road system-based forest areas where visitors arrive by personal means (cars, bikes, foot, etc.), the FS has little to no control over the number of visitors, and the FS is reacting to increased visitation outside its control. In the case of the MGRA, the FS controls the majority of visitation through the issuance of commercial special use permits. The number of commercial visitors to the MGRA is currently capped at a level set in the 2019 MGRA Capacity Limits Supplemental Information Report and cannot increase until that limit is changed through the present NEPA process. According to the FEIS, 85% of visitors to the MGRA arrive with from cruise ships

¹ Miller comments SDEIS, 21 February 2023

with commercial service providers ². Therefore, regardless of any level of growth that may occur in the number of cruise ship passengers arriving in Juneau, the level of **visitation** that can result from that increase is currently zero.

In response to this issue being raised in the comments on the SDEIS, the FS responded:

There are no data that shows that visitation to the MGRA would not continue to follow existing patterns of visitation experienced for more than the last 10 years. That is, approximately half of the cruise ship visitors in Juneau visit the MGRA on a tour.

This fails to acknowledge two critical facts: 1) the reason half of the cruise ship visitors visit the MGRA is because the FS has set the commercial special permit capacity at that level – this is not a naturally occurring situation, 2) visitation can only continue to follow existing patterns of visitation experienced over the last 10 years if the FS **takes action to issue permits to allow that level of visitation to occur**.

And herein lies the problem: the FS has not complied with 40 CFR 1501.1 and evaluated its decision regarding its chosen rate of increase in visitation. There is no growth in visitation, at 2% or any other level, absent this decision. There is also, in fact, plenty of data to show that visitation to the MGRA will not automatically follow existing patterns of visitation despite what the response to comments claims. Every NEPA analysis since 1979 has evaluated growth in commercial visitation and nearly every action has rejected the highest level of commercial capacity evaluated, and in 2015, the total capacity of the visitor center was actually *decreased*. The history of commercial tourism management at the MGRA demonstrates that decisions on whether and how much commercial recreational visitation can change 1) are discretionary federal actions, 2) are solely within the control of the FS, and 3) are major federal actions within the meaning of 40 CFR 1501.1.

Even if the FS actually meant to state that **demand** for visitation, rather than the visitation itself, is projected to increase, the FS would still be required to evaluate the level of increase it is proposing to allow – specifically why the FS decided on the specific level of demand that it plans to meet – as required by 40 CFR 1501.1. This issue was the subject of numerous comments and questions starting with the MGRA Strategic Plan process which have been systematically ignored by the FS. Despite intimations to the contrary, the FS is under no obligation or mandate to meet the demands of the commercial tourism sector to issue special use permits. This is evidenced not only through a review of existing laws, the Tongass Land Management Plan³, FS policies, and existing capacity analyses for other parts of the Tongass⁴, but also through examination of prior environmental assessments, statements, and decision documents for the MGRA⁵ none of which have tied increases in visitation or capacity to a specific level of tourism growth in Juneau. The current level of commercial recreational capacity at the MGRA substantially exceeds the recommended level for recreational special uses in the Tongass Land

² FEIS, 1.1.1.1 (p 1-3)

³ 2016 Tongass Land Management Plan, 4-44

⁴ 2014 Shoreline II Project Visitor Capacity Analysis, KMRD Visitor Capacity Analysis (Appendix C, KM Outfitter and Guide Management Plan

⁵ 1996 MGRA Management Plan; 2015 Decision Notice and FONSI MGRA Management Plan Revision, Commercial Guide, Outfitter and Transport Services; 2019 MGRA Supplemental Information Report; 2021 Economic Analysis for Proposed Directive Governing Strictly Point-to Point Commercial Transportation

Management plan, as well as levels for all other Tongass National Forest units and the levels for many National Forests in the rest of the United States. Simple statements such as

“[t]he MGRA and associated infrastructure was (sic) developed using Federal dollars for the purpose of public recreation use and with the understanding that many users would be visiting from outside of Southeast Alaska⁶

do not meet the purpose and policy that requires “Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment⁷.” The FS is not free to arbitrarily choose a level of projected increase in a circumstance where the FS controls access without evaluating that decision under NEPA.

The FS has conflated its selected level of increased visitation with the purpose and need for action.

The purpose and need for an EIS defines the situation “to which the agency is responding in proposing the alternatives including the proposed action⁸.” By definition, therefore, it is an existing situation or a situation that is anticipated to occur without any action by the agency. In the FEIS, the stated Purpose and Need is:

The purpose of the project is to update infrastructure and create recreational opportunities at the MGRA that ***can accommodate projected future visitor use*** while protecting the unique characteristics and outstanding beauty of the area⁹

The “projected future visitor use” is defined in the primary section: “The number of visitors to the MGRA is projected to increase at a rate of approximately 2 percent annually for the next 30 years as the cruise industry continues to grow.....with a projection of 1,000,000 visitors annually by 2050¹⁰.” As discussed above, this level of projected use cannot occur absent a FS decision to increase the commercial recreational allocation. The projected use does not exist as something to which the FS is ***responding***, but only as a situation the FS ***will create***.

This is highly problematic since the decision framework for the FEIS includes the decision “whether to adopt proposed changes to....commercial use as part of the selected alternative¹¹.” Since the need for an action and the action itself cannot be the same thing, the projected increase in visitation that can only occur through the selection of one of the action alternatives cannot appropriately be the need for the project.

It is contrary to NEPA for agencies to “contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence)”¹². By conflating the purpose and need with the FS’ chosen level of visitation growth, the FS has both inappropriately predetermined the outcome of the NEPA process and failed to meet the requirements of 40 CFR 1502.14 to evaluate all reasonable alternatives to the proposed action. Since the purpose and need can only be met through an alternative that allows the specified 2 percent annual growth in commercial recreational visitation,

⁶ FEIS Section 2.5.5.2 p 2-92

⁷ 40 CFR 1500.1 Purpose and Policy

⁸ 40 CFR 1502.13 (2019)

⁹ FEIS Section 1.2.1 p 1-8

¹⁰ FEIS Section 1.2, p 1-7

¹¹ FEIS Section 1.4, p 1-10

¹² *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) (citing [42 U.S.C. 4332\(2\)\(E\)](#))

reasonable alternatives that could address the failure of existing capacity of facilities “such as parking lots, restroom facilities, the Visitor Center, and trails” to meet “current demand on high visitation days” are not considered, or are summarily dismissed. This would include alternatives that decrease commercial capacity, as was done in 2015, increase capacity at lower levels, or that upgrade facilities to meet the current capacity. None of these reasonable alternatives is considered in FEIS.

Accommodating projected future visitor use and meeting the demands of the visitor industry are nested objectives in the Purpose and Need statement since it is the demands of the visitor industry that are presumed to result in higher projected use. However, as discussed above, the history of environmental analyses for the MGRA has established a precedent whereby decisions on the level to which the FS accommodates the demands of the visitor industry and increases commercial recreational capacity are subject to NEPA review. The FS abuses its discretion by including a major discretionary federal action as the need for the proposed project without having previously subjected that action to NEPA review.

By conflating demand for commercial visitor capacity with projected growth in a situation in which the FS controls access the FS has precluded meaningful public involvement in the decision-making process.

Numerous comments submitted by myself and others as far back as the initial development of the MGRA Strategic Plan have questioned the level of increased visitation and allocation to commercial recreational visitors. These comments have largely gone unregarded. In the response to comments in the FEIS, the FS responded to questions regarding capacity by stating that commercial capacity limits would not meet the purpose and need for the project¹³. The FS did not disclose that the projected level of increased visitation in the purpose and need was itself a discretionary federal action subject to NEPA review. By stating that the increase was projected, and tying it to growth of tourism in Juneau, the FS gave the impression that the increase was an inevitable outcome of cruise ship tourism growth. As a result, many members of the public were likely unaware that the amount of projected visitor increase in the FEIS is directly controlled by the FS. The “twin aims” of NEPA are to require agencies to “consider every significant aspect of the environmental impact of a proposed action” and to facilitate public involvement¹⁴. In the FEIS, the FS has failed to achieve either of these aims.

Suggested Remedy: The FS has acted arbitrarily and capriciously in failing to a) evaluate its decision to increase visitation to the MGRA at 2 percent per year under 40 CFR 1501.1, including examining alternative levels of visitation, b) base the Purpose and Need for the action on a decision that the FEIS is purporting to evaluate (increase in commercial recreational allocation) thereby predetermining the outcome of the process and failing to consider an appropriate range of alternatives, c) fully explain its discretionary decision to place the interests of the commercial visitation sector above that of competing uses of the resource, and d) mislead the public and preclude meaningful public involvement in the decision making. The FS cannot, at this stage, disentangle the need for the analysis from the actions proposed to address that need, nor can the FS replace the public engagement that would have occurred absent the misrepresentation of the need as separate from the FS decision on commercial capacity increases.

¹³ “Limiting the number of people allowed to visit the MGRA at one time would essentially limit the number of people that may visit the MGRA at all since many arrive on cruise ships that stay for only one day. Limiting access to the MGRA would not meet the purpose and need for the project to accommodate increasing visitation” Multiple locations including comment response 32-1, FEIS Appendix A

¹⁴ Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983)

2. The FS has failed to address the environmental consequences of the proposed action with regard to direct effects on waste infrastructure¹⁵.

Waste: Any substantial increases in the number of visitors to the MGRA can only happen if the FS issues commercial recreational special use permits for the increase. The preferred alternative will increase capacity at the MGRA to approximately 1 million people. Facilities will be developed to accommodate this level of visitation. These facilities will generate waste in the form of garbage (food and other municipal type waste) and sewage.

Section 102 of NEPA requires Federal agencies to assess the federal actions “significantly affecting the quality of the human environment¹⁶.” 40 CFR 1508.8(g)(1) defines direct effects an action as those “which are caused by the action and occur at the same time and place.” The increase in visitation to the MGRA results directly from the FS decision to increase commercial recreational capacity and to build facilities to accommodate it. The waste generated by the visitors is therefore a reasonably foreseeable direct impact of the FS decision to increase the number of visitors¹⁷. There is no discussion of impacts to waste infrastructure in the FEIS

The Mendenhall Wastewater Treatment Facility is designed to serve a population of ~ 30,000 people. Adding the sewage from 1 million people to the waste stream to be processed by that facility is clearly a major federal action under the intent of 40 CFR 1508.18. The response to this issue in the public comments was:

The design team considered the potential impacts of increased commercial capacity and allocation at the MGRA on wastewater and solid waste facilities. All connections to the public water and wastewater utility would need to be permitted by the City and Borough of Juneau, who would consider potential impacts to public utilities.

Consideration of this issue by the design team outside of the discussion of impacts in the FEIS does not meet the requirements of NEPA, and the suggestion that assessing impacts of such a large increase in necessary sewage capacity should be the job of the City is frankly ridiculous. Not only does this transfer responsibility for evaluating impacts from the action agency to an outside organization, it also shifts the cost for necessary capacity upgrades from the federal government to the residents of Juneau. Wastewater permitting is not discussed in FEIS Section 1.9 Applicable Permits nor is there any evidence that the scale of the wastewater needs were discussed with the City of Juneau (section 1.7.3). Obvious impacts resulting directly from a discretionary federal action need to be evaluated by the federal agency in charge of the project.

The proposed alternative includes the sale of food and drink at the glacier, which has been rejected in several past Management plan updates and analyses. Food and drink generate waste that will require disposal in the municipal landfill. The FS does not address the amount of waste expected to be generated by 1 million tourists, but the generation of the waste results directly from the FS decision to increase commercial recreational capacity and build facilities that include concessions for food and drink. According to the Juneau Public Works Division, the Juneau landfill has only a 20-year remaining life

¹⁵ Miller SDEIS comments, 21 February 2023

¹⁶ 42 USC 4332, Sec. 102(C)

¹⁷ “reasonable foreseeability means that “the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” Sierra Club v. Marsh, 976 F.2d at 767

expectancy at current waste disposal levels¹⁸. Waste disposal by the FS may significantly and adversely affect that lifespan. The FS is obligated to analyze direct impacts of its proposed action on infrastructure.

Suggested Remedy: The FS should amend the EIS to include a discussion of the direct impacts from the proposed action on waste infrastructure in Juneau and include mitigation for adverse effects that cannot be avoided.

3. The FS decision has failed to evaluate the range of reasonable alternatives as required under 40 CFR 1502.14, particularly those suggested by the public during the comment periods.¹⁹ The existence of a viable but unexamined alternatives renders an EIS inadequate²⁰

The action alternatives included in the FEIS are all based on the same level of predetermined visitor increase (2 percent per year). They vary only in the time period over which they are implemented. The action alternatives also all contain the same project components that differ only by being scaled for the level of visitor increase attained at the end of the implementation time period. As such, every action alternative includes:

- Parking lot expansion*
- New Welcome Center*
- Glacier spur road trailheads*
- Lakeshore trail*
- Public use cabins*
- Nugget Falls trail expansion.*
- Steep Creek Habitat restoration*
- West glacier trails*
- Changes to the management unit boundaries*
- Changes to trail capacities and use*

These alternatives do not meet the requirement in 40 CFR 1502.14 to “rigorously explore and objectively evaluate all reasonable alternatives,” since clearly there are reasonable alternatives that would not include one or more of these items (particularly those that have received numerous negative comments throughout the process) and would have a more reasonable balance between commercial and non-commercial use.

The FS has failed to include alternatives as required by 42 USC 4332(1)(E) to “study, develop, and describe in appropriate detail alternatives to the recommended course of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” The large number of comments on all drafts of the EIS highlight a very high level of discontent with the ratio of commercial to noncommercial use anticipated in the development of action alternatives. The FS failed to implement trail monitoring required as mitigation in the 2015 FONSI and has used the lack of information on local trail use and displacement to ignore the interests of large numbers of public comments opposed to the increased commercialization of the area. Alternatives 5 and 6 which were ostensibly developed in response to concerns about local use of the MGRA do not address concerns regarding commercial allocation.

¹⁸ <https://juneau.org/engineering-public-works/recycleworks-2/faq>

¹⁹ Miller SDEIS comments, 21 February 2023

²⁰ Resources Ltd. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1993)

Suggested remedy: Addressing the deficiency in the number of alternatives would require the FS to first address the errors and misrepresentations in Issue 1 of this objection. If that could be achieved, the FS could issue a supplemental analysis with additional alternatives included.

4. The FS failed to implement required mitigation for the 2015 ROD that allowed a finding of no significant impact and avoiding an EIS²¹.

NEPA requires that the information presented to the public in an EIS be “of high quality” and must allow for “accurate scientific analysis²².” When information “relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives,” the CEQ regulations require that the agency either: (1) determine that the cost of obtaining such information is “exorbitant or the means to obtain it are not known,” or (2) obtain the information and include it in the EIS²³.” Let us start, then, with the FS’ failure to comply with the mitigation requirements of the 2015 FONSI to:

The Forest Service will implement a trail use monitoring plancontact the Forestry Sciences Lab in Juneau to ascertain monitoring options (questions, design, and assessment tools) to better understand displacement of local residents who wish to recreate in the MGRA.

The inclusion of mitigation in the record of decision for an EA allows the agency to come to a finding of no significant impact (FONSI) and avoid the need to prepare an EIS. If the mitigation is not implemented, a FONSI has not been achieved²⁴. Records provided through a Freedom of Information Act request indicate the FS did contact the Forestry Sciences Lab but chose not to implement any of the recommendations provided²⁵. In fact, the FS decided not to evaluate “displacement” at all and instead just count trail users even though determining displacement in the face of continuous increases in commercialization was the objective of the mitigation²⁶. Although the wording of the mitigation does not specify an action that the FS was required to take, the implication is that sufficient information would be generated to be useful in a future decision process, such as this one. A hollow commitment that just involved a phone call with no follow through would not be acceptable mitigation under any interpretation of the word.

The FOIA record shows that the FS abandoned the monitoring plan that it started to develop once it became clear that issuing such a plan would call attention to the fact that the FS had dropped its commitment to evaluate displacement as agreed. The draft management plan had called for weekly monitoring of the trails at random times and on random days with each trail “monitored approximately

²¹ Miller SDEIS comments, 21 February 2023, Miller DEIS comments, 9 May 2022

²² 40 CFR 1500.1(b)

²³ 40 CFR 1502.22

²⁴ “Where an EA with a mitigated FONSI was predicated on the implementation of the mitigation, failure of that mitigation calls into question the basis for the FONSI because impacts were not reduced to below the level of significance in the manner anticipated.” Final Guidance for Federal Dept. and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. Jan 21, 2011, 3843

²⁵ Miller Mitigation FOIA Request, Record 20160420emlFSLLindaKrugerToRanger.pdf: “I recommend commissioning a baseline study of the use of the area that goes beyond encounters to explore overall experience quality.”

²⁶ Miller Mitigation FOIA Request, Record 20160510emlDraftCommentsV2.pdf, comment BJ-7: “I thought we concluded that we don’t have the resources to study various aspects of displacement...that this monitoring will focus on encounters.”

three times per day” throughout the commercial operating season²⁷. Based on the data provided in the trail monitoring reports, the monitoring was not based on random sampling of the trails and there is only a single data entry for each day. In the response to comments on the SDEIS, the FS claimed that it also contacted the Forestry Science Lab in 2022, but there is no record in the FOIA documents of this occurring. The FS claims that the Forestry Lab recommended including a single question on the Juneau Tourism Survey that asked how affected people were by crowding that the glacier. This is a far cry from the analyses that the Forestry Lab recommended in 2015.

The FS defended its failure to fully implement the required mitigation in the response to comments:

Although a focused study has not been initiated, impacts to local displacement can be evaluated qualitatively from the hundreds of comment letters received on this project and from results of the CBJ Juneau Tourism Survey. The adaptive management plan in Appendix B of the FEIS includes monitoring methods to estimate local use at the MGRA.”

There is no evidence that the hundreds of comments letters received on this project were incorporated in any way into the analysis of impacts of the proposed action on displacement of non-commercial visitors. The results of the single question on the CBJ Tourism Survey indicated that more than 50% of respondents thought overcrowding is an issue, yet other than mentioning that fact there is no indication that it was analyzed or evaluated in any way. What is a new promise to monitor local use in the FEIS Adaptive Management Plan worth, especially once commercial recreational allocation has run away with the MGRA for the next 30 years?

Displacement of non-commercial users of the MGRA is relevant to foreseeable significant adverse impacts to those users from the proposed action. This issue has been nearly completely overlooked in the FEIS. This is in part because, not having implemented the mitigation it was required to complete, and the FS argues it does not have sufficient data on non-commercial use or an understanding of displacement. The FS had 5 years to collect these data. The FS failed to allocate the necessary funding to implement the mitigation it committed to but was able to obtain funding for numerous other studies²⁸, suggesting that lack of will rather than funding is the primary reason this information has not been collected. 40 CFR 1502.22 compels the FS to (1) determine that the cost of obtaining such information is “exorbitant or the means to obtain it are not known,” or (2) obtain the information and include it in the EIS.

Suggested Remedy: The CEQ guidance on mitigation and mitigated FONSI²⁹ assumes that failure to mitigate primarily results from the failure of a non-federal third party and inadequate monitoring of mitigation requirements. It does not appear to envision the current situation where the FS simply reneged on its commitment to mitigate. However, the CEQ guidance does provide guidance to remedy failure to undertake mitigation:

[T]he responsible agency should further consider whether it is necessary to prepare supplemental NEPA analysis and documentation..... Much will depend upon the agency's

²⁷ Miller Mitigation FOIA Request, Record 20160510 emlDraftCommentsV2.pdf: Trail Encounters Schedule

²⁸ i.e. MGRA Master Plan, MGRA Market Demand and Economic Analysis, Economic Analysis of Southeast Alaska.

²⁹ Memorandum for Heads of Federal Departments and Agencies, Executive Office of the President, Council on Environmental Quality, January 14, 2011: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact

determination as to what, if any, portions of the Federal action remain and what opportunities remain to address the effects of the mitigation failure. it would be appropriate for future NEPA analyses of similar proposed actions and relevant programs to address the potential for environmental consequences as a result of mitigation failure.

It is obvious that all of the federal action originally proposed to be mitigated in 2015 remains and is growing and opportunities to address the mitigation failure are clearly available. Since the failure to fully implement the required mitigation has nullified the FONSI from the 2015 EA, the FS must prepare a supplemental NEPA analysis for the 2015 capacity changes, or obtain the necessary information and include it in a revision to the FEIS.

5. The FS has incorrectly calculated the MGRA unit capacities resulting in an underestimation of the true commercial recreational allocation. The FS has also failed to implement the requirements of 40 CFR 1500.1(b) to conduct high quality, accurate scientific analysis regarding trail capacities and ROS designation³⁰s. The FEIS states that “[v]isitor capacity estimates are specific to the primary use season because commercial use is only permitted during the primary use season³¹” and capacity estimates for the action alternatives were “estimated based on a 2% growth in visitation³²” over different time frames. As discussed earlier in this letter, the 2% growth rate is the estimate growth rate of the of cruise ship tourism in Juneau. The FEIS further states that visitor use levels at the MGRA are primarily driven by the cruise ship industry³³ and that unguided recreation use is not expected to increase at rates higher than the general population growth (0.3%)³⁴.

Therefore, there are very clearly two different hypothesized growth rates: one at 2% per annum for commercial visitors, and one at 0.3% per annum for non-commercial visitors. Yet, the FS applies the 2% growth rate to the 2019 total capacities of the MGRA units, which include both commercial and noncommercial visitors. Thus, the projected number of noncommercial visitors is inflated beyond what the FEIS claims this growth will be and well beyond anything that it could actually occur in Juneau, AK. These inflated capacities are used to determine the proportion of commercial and noncommercial recreational allocation. However, because the capacity has been improperly inflated, the proportion of that capacity that is allocated to commercial allocation is artificially low while the proportion that would be noncommercial is artificially high.

Using Alternative 2 as an example:

The FS applies a 2% growth over 30 years to the total visitation to the Visitor Unit in 2019 (544,890)³⁵. This results in a total capacity for this unit of 999,000. The FS plans to allocate 87% of this total (869,130 visitor days) to commercial use and 15% of this total (149,840 visitor days) to noncommercial use.

³⁰ Miller DEIS comments, Miller SDEIS comments

³¹ FEIS, Vol II Capacity Analysis (p A-2)

³² FEIS, Vol ii Capacity Analysis (p A-3)

³³ FEIS, 3.7.5.3 (p 3-70)

³⁴ FEIS, 3.7.5.3 (p 3-70), supra note 4

³⁵ In the capacity analysis of the FEIS, the FS states that growth is projected using the total MGRA visitation in 2019 (559,138), the analysis actually uses the existing capacity limit for the MGRA from the 2019 Decision Memo (544,890).

However, if the capacity was appropriately estimated using the FS' projected growth for each visitor type and assuming that 95% of the total visitation in 2019 was commercial visitors³⁶, the total capacity would be 967,449, split between commercial (937,643) and noncommercial visitors (29,806) visitor days. It is easy to see that the original analysis overestimates the noncommercial capacity by 134%, and that the true commercial portion is 97% of the total.

This is not just a mathematical exercise or a difference in view. The FS is using its erroneous calculations to downplay a) the magnitude of the commercial allocation for each unit, and b) misrepresent the impacts of the proposed changes. For example, the FEIS disingenuously states that "Visitor Center Unit commercial use allocation would decrease from 95% of capacity to 87% of capacity under [Alternative 2],³⁷" when in fact if the analysis was done correctly the total allocation would increase to 97%. Similar analyses can be conducted for the remaining MGRA units and trails for each action alternative and the results would show the same bias and error in the analysis.

In response to this issue being raised in the comments on the SDEIS, the FS states:

Applying the 2% increase across all types of visitation (local, non-local, independent, etc.) to estimate capacity needs allows for leeway with growth percentages. As stated in Appendix A of the EIS, the average 2% growth rate was chosen to reflect times of higher growth (e.g., 14% increase from 2018 to 2019) mediated by times of lower or negative growth (e.g., 11% decrease from 2009 to 2010). The 2% annual growth is only an estimate, since there is inherent uncertainty with long-term planning horizons. However, it is consistent with tourism projections for the City and Borough of Juneau based on tourism and cruise ship trends, the projected growth of the tourism industry, projected size of cruise ships, and number of cruise ship berths available in Juneau.

This response does nothing to address the issue. The response specifically states that the 2% growth rate is based on growth in the tourism industry, particularly the cruise ship tourism industry. The FEIS specifically states that non-cruise tourism and local visitation are not expected to grow. If leeway is needed for growth percentages, the FS should use a percentage other than 2% to apply to the sector that is growing. The FS cannot use one metric when estimating capacity (2% for all visitation types) and another metric (unguided visitor use will remain relatively stable³⁸) when developing alternatives and evaluating the environmental consequences, nor can it ignore basic mathematical principals that extend from its own assertions regarding visitor sector growth.

The designation of trail capacities and ROS designations does not result from data and analyses in the FEIS, establishes capacity levels that are so implausible that they cannot be the result of agency

³⁶ FEIS, (p 2-13)

³⁷ FEIS, Vol II Capacity Analysis, Table 1, (p B-2)

³⁸ FEIS Section 3.7.5.3, p 3-70

expertise or decision making, and are undertaken primarily to mis-represent the extent of the commercial allocation^{39, 40}.

The FS has failed to comply with 40 CFR 1502.24 to “identify any methodologies used and make explicit reference to the scientific and other sources relied upon for conclusions” with regard to changing the ROS designations for trails in the FEIS. The capacity analysis in Appendix A of the FEIS does not analyze proposed changes in ROS designations for trails in the MGRA. These changes are also not evaluated in Section 3.7.4.3 of the FEIS where the results of trail monitoring as partial mitigation for the 2015 EA are summarized. 40 CFR 1502.23 requires federal agencies to “ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents..... make use of reliable *existing* data and resources⁴¹.” In addition to the trail monitoring from the 2015 mitigation, the FS has data going back to at least 2012 of actual commercial use for all trails and areas in the MGRA with commercial allocation. These data were used in determining trail capacities and ROS designations in the 2015 EA but were not included anywhere in the FEIS. If they had been analyzed, both sets of data would show that with the exception of the Moraine Ecology Trail and the Trail of Time **none** of the trails with existing commercial capacity have ever reached their assigned capacity levels. With a single exception in a single year, none of the monitored trails have exceeded allowable encounter levels for the existing ROS designation. Furthermore, Table 3-22 indicates that only one of the trails would exceed the allowable encounter levels for the existing ROS designation even if commercial recreational capacity increased. So, what information is the FS relying on for its decision to change ROS designations?

Section 3.7.5.1 outlines the method used to estimate encounters under new commercial capacities and claims that the methodology employed is “likely an overestimation” and that changes to the length of the commercial season would likely lead “to fewer social interactions than projected in this analysis⁴².” Since only the East Glacier Trail is predicted to exceed the allowable encounter rate under a higher capacity and would only do so by a very small amount, if the analysis overestimates the data, then there appears to be no way that the existing data used in the FEIS justifies the proposed changes.

Trail capacities are so implausible that they cannot be the result of a reasonable scientific process⁴³. The Tongass Forest Plan ROS descriptions are primarily based on the number of groups/parties encountered on a trail within a day. The number of people that comprise a group or party are only specified for the primitive ROS classes⁴⁴. For the FEIS, the FS has chosen to use 12 people as the group

³⁹ Miller SDEIS: It appears that the USFS is artificially keeping the percent of commercial allocation low by unrealistically inflating total capacities and increasing the season for everyone, not just commercial users whose season it is. This is essentially a shell game that disingenuously claims that commercial allocations remain unchanged for trails when the amount allocated to non-commercial use is well above any realistic use level for the flat growth in the Juneau resident population or unguided visitors.

⁴⁰ Miller DEIS comments: The purpose of [the 2015 mitigation for trail] monitoring was to provide the USFS with actual usage information on number of groups and people encountered at one time (PAOT) to adaptively manage, or right size, trail encounters and uses..... The USFS should set the groups size for determining trail capacity using the data it has collected for this purpose not an arbitrarily chosen number with no apparent relationship to site specific capacities and use.... Capacity remaining after commercial allocation, which is presumably available for use by residents and independent travelers exceeds the entire 2020 population of Juneau, AK by as much as 460%.

⁴¹ 40 CFR 1502.23

⁴² FEIS Section 3.7.5.1, p 3-69

⁴³ Miller SDEIS comments

⁴⁴ 2016 Tongass Land Management Plan, Appendix I, ROS Class Standards and Guidelines

size for this FEIS, instead of using actual group sizes from trail monitoring, or estimated encounter both existing and anticipated ⁴⁵. The reason for this decision is not discussed, but the FS would have us believe that, regardless of the length of the trail or the size of the area, every location in the Tongass National Forest within a specific ROS has a capacity that only differs by the length of the tourist season. So, the 3.5-mile East Glacier Trail or the 3.4 mile W Glacier trail has the same capacity as the 1.8 mile Powerline Trail. Response to comments questioning the choice of this number stated:

The Forest Plan ROS classes recognize three sizes of commercial recreation groups: 1) small - up to 12 people (including guides); 2) up to 20 people (including guides); and 3) 21-75 people (including guides). Since small groups are generally encountered on trails in the MGRA, a group size of 12 was used to calculate capacity based on realistic estimations of the largest group size that might be encountered while using the trail.

A search through the Forest Management Plan shows no such designation of group sizes. Furthermore, ROS outside of this does little to explain why a group size of 12 was chosen over the actual group sizes from trail monitoring (existing and available data) which clearly informed the statement that “small groups are generally encountered on trails in the MGRA.” In fact, actual group sizes from trail monitoring are far below 12 people for both commercial and noncommercial visitors⁴⁶.

The FS is in possession of data from the 2015 ROD trail monitoring mitigation that identifies commercial and non-commercial groups sizes for several monitored trails in the MGRA over a period of 5 years. The FS also has actual commercial use of trails with commercial capacity going back to 2012. From these data, the FS should know that the average group size of both commercial and non-commercial visitors for most trails is very small. Group size for most trails averages between 2 and 9 people, with the number of groups each day below 20 approximately 63% of the time from 2017 to 2020. However, instead of using existing data as required, the FS chose to use hypothetical maximum data for determining trail capacities. These hypothetical data assumed 20 parties of 12 people every day of the commercial season. For each trail this results in a very large number of people for trails of only a few miles. For example, the 3 mile long East Glacier Trail has a total capacity of 77,040 people. From this total capacity, the FS then allocated 15,400 people to commercial outfitters and guides, leaving approximately 62,000 people to be used by the non-commercial sector. The problem is that the non-commercial sector is very small, being limited to the population of Juneau (~30,000 people) and a relatively small number of independent travelers. The FS response to this issue is:

Trail capacity estimates approximate *upper limits* for an expected condition for a particular trail or recreation opportunity spectrum (ROS). *They do not estimate current use.*

They do not estimate current use, but it should estimate a realistic potential use, and they are being used to allocate actual commercial capacity. So, if commercial permit holders used their entire allocation, that would be actual commercial use. The trouble is that the overall capacity number has no meaning because the non-commercial allocation for a single trail exceeds the population of Juneau by over 100% and – and there are multiple trails with similar capacities in the MGRA. This is not a realistic scenario in any sense. The FS might as well pull a total capacity number out of a hat. The commercial allocation is the only real number in this analysis.

This method is not only scientifically flawed, but also deceptive. A total capacity beyond what is reasonable or even possible to achieve allows the FS to set a high commercial allocation that appears to

⁴⁵ FEIS Table 3-22, (p-79)

⁴⁶ Trail monitoring reports for 2017,2108, 2019, and 2020; Id.

be a much lower proportion of the capacity than it is. For example, if the FS wants to allocate 15,400 visitors to commercial operators, this represents only 20% of the overall capacity under the flawed capacity analysis approach. However, if instead of being 62,000 people, the non-commercial capacity was set at more realistic level of half of the total population of Juneau (15,000), the percent of commercial allocation rises to 51%. g

Suggested Remedy: In accordance with 40 CFR 1502.23, the FS should set the groups size for determining trail capacity **using the existing data it has collected for this purpose** not an arbitrarily chosen number with no apparent relationship to site specific capacities and use. There are several ways this could be done to allow a reasonable capacity increase. Since guided groups tend to be larger than the overall average of monitored groups, one method would be to evaluate the average size of guided and non-guided groups separately and apportion them to the calculation based on the ratio of guided to non-guided groups in the collected data. For the Roaded Natural ROS, this calculation would look like:

Guided: 10 people per guided group X max 20 parties X 153 days (80% of use time) X 0.8 (number of hours of use divided by 12 hours in a day) X 0.17 (the maximum proportion of guided groups)

Non-guided: 3 people per non guided group X 20 parties X 153 days (80% of use time) X 0.8 (number of hours of use divided by 12 hours in a day) x 0.83 (the proportion of non-guided groups)

Capacity = guided + non-guided = 10,257 for the Roaded Natural ROS.

The FS cannot simply ignore the data it has collected. There needs to be a scientific and analytical basis for doing so, and the FS has not presented anything approaching that. Scientific agencies like the FS are expected to do these types of simple analyses as the bare minimum in complying with the scientific integrity standards of 40 CFR 1500.1(b). There is not a single other capacity analysis within the Tongass that uses such a scientifically indefensible approach.

6. **The FS has made numerous conclusory statements based on vague and uncertain or absent analysis regarding the economic value of the proposed action to the tourism industry and Juneau that are insufficient to satisfy NEPA requirements⁴⁷.** The purpose and need statement of the FEIS states that the project is needed to “meet the demand of the visitor industry” without identifying what those demands are. Determining whether the scale of an alternative is appropriate requires a quantifiable metric against which it can be measured. The USFS has provided no such information regarding industry demand or needs. This information should be readily available in the form of 1) needs assessment (FSH 2709.14), 2) requests for additional commercial capacity for specific guiding activities, 3) data on actual commercial use in areas where commercial allocations exist, 4) requests for new or expanded access, 5) surveys or other data collected to assess demand for the MGRA in the context of other tourist activities.

The FS has not gone beyond mere assertions that its proposed action would substantially benefit the tourist industry, or that a lower level of commercial allocation would harm it. Under the No Action Alternative, the FS does not imply that cruise ships will stop coming to Juneau if additional cruise passengers cannot visit the MGRA, nor does the FS suggest that commercial tour operators will fail if additional capacity is not made at the MGRA. FEIS Section 3.12.4.2 describes the importance of tourism

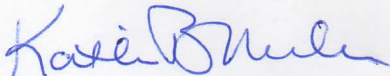
⁴⁷ Miller DEIS comment

for the Juneau economy but struggles to identify the MGRA contribution to that. The MGRA Market Demand and Economic Analysis indicates that most visits to the MGRA are packed with other tours, suggesting that an alternative would be supplied if the MGRA were unavailable or were available at a lower level. The FS is on record in the 2021 Directive limiting Ubers and taxis stating:

"The JEDC reported \$103,225,389 in leisure, hospitality, and transportation industry earnings (i.e. tourism revenue) for Juneau during 2019....Thus not doing business at the Visitor Center does not equate to not doing business in Juneau, for ether large or small entities."

There is insufficient information in the FEIS to compare between action alternatives in the FEIS, and those that should have been included, with respect to economic benefits. There is nothing in the FEIS to weigh the benefits to the commercial recreational use sector against competing uses. Agencies must "go beyond mere assertions and indicate the basis for them"⁴⁸ avoiding conclusory statements based on "vague and uncertain analysis" that are insufficient to satisfy NEPA's requirements⁴⁹.

Suggested Remedy: Economic considerations regarding commercial capacities are the strongest drivers for the proposed action, but they are not evaluated in relation to competing uses. Supplemental analysis should be conducted to provide a basis for the assertions made.



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⁴⁸ *Silva v. Lynn*, 482 F.2d 1282, 1284 n.2 (1st Cir. 1973)

⁴⁹ *Ocean Advocates*, 402 F.3d at 869