

BEFORE THE APPEAL DECIDING OFFICER
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Appellants,

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Ranger District; JERRI MARR,

District Ranger, Lake George Ranger

District,

Responsible Official.

NOTICE OF APPEAL

Record of Decision

and

Environmental Impact Statement

for

Access Designation in Restricted Areas

On the

Ocala National Forest

Lake, Marion and Putnam Counties,

Florida

Decision Date: December 27, 2005

NOTICE OF APPEAL

Pursuant to 36 C.F.R. Part 215, I hereby file this Notice of Appeal of District Rangers Rick Lint's and Jerri Marr's decision to implement the Access Designation in the Restricted Areas on the Ocala National Forest, on behalf of Save Our Big Scrub, Inc. and Wild South (collectively "Appellants"). This decision authorizes the implementation of Alternative D, as documented in the Final Environmental Impact Statement for the Access Designation on the Ocala National Forest ("EIS"). This decision is documented in a Record of Decision ("ROD") signed by District Ranger Rick Lint and District Ranger Jerri Marr on December 19, 2005.

CONTENTS

I.	Specific Changes in the Decision that the Appellants Seek	1
II.	Portions of the Decision with which the Appellants Disagree	1
III.	Why the Appellants believe the Responsible Officials’ Decision Failed to Consider the Substantive Comments.....	1
IV.	Rational, Explanations and How the Decision Specifically Violates Laws, Regulations or Policies.....	2
A.	The Access Plan Violates National Forest Management Act Because it is not in Compliance with the Forest Plan.....	2
1.	The Decision to Retain the Rodman Pit Violates Forestwide Access Standards (AC-2), Forestwide Goal 14 and Forestwide Objective 13 Which Do not Permit the Designation of OHV “Areas”.....	2
2.	The Decision Violates the Forestwide Recreation Standard for Trails (RE-4) Because Trails were not Designed to Avoid Gopher Tortoise Burrows.....	3
3.	The Decision Violates the Forestwide Infrastructure Standard for Road Management (IN-2).	4
B.	The Access Plan Decision Violates of the National Environmental Policy Act.....	5
1.	NEPA Requires the Consideration of a Reasonable Range of Alternatives.....	5
2.	NEPA Requires the Forest Service to Consider Cumulative and Indirect Impacts... ..	7
3.	NEPA Prohibits the Forest Service From Devising a “Purpose and Need” for the Proposal that is Unreasonably Narrow.	10
4.	NEPA Requires the Forest Service to Adequately Assess Site-Specific Impacts. ..	11
5.	NEPA Requires the Forest Service to Prepare the EIS and Conduct the NEPA Process in an Unbiased Manner.....	11
C.	The Access Plan Violates 36 C.F.R Part 212 and Executive Order 11644.	12
1.	The Access Plan Does not Adequately Protect Public Safety.	12
2.	The Access Plan Fails to Adequately Minimize Conflicts Between Motor Vehicle Use and Other Recreational Uses of National Forest System Lands.....	14
3.	The Access Plan Fails to Minimize Damage to Soil, Watershed, Vegetation and Other Forest Resources and Fails to Minimize Harassment of Wildlife and Significant Disruption of Wildlife Habitats.....	15
a.	The Access Plan fails to consider the minimization of impacts to a number of Forest resources.	16
b.	The lack of enforcement ensures that impacts to Forest resources will not be minimized.	17
c.	A permit or registration system would minimize impacts to Forest resources..	18
4.	The Access Plan Does Not Provide for Adequate Monitoring.....	19
D.	The Access Plan Violates Forest Service Policy.	20
1.	Designation of the Rodman Pit as a Concentrated Use Area Violates Established Forest Service Policy Regarding the Restoration of the Ocklawaha River.	20
2.	The Access Plan’s Trails Definitions Violate Forest Service Trails Guidelines	20
3.	The Access Plan Violations Forest Service Policies Regarding Noxious Weed Management.....	21
E.	Violations of the Administrative Procedure Act.....	21
Conclusion	22

Pursuant to 36 C.F.R. Part 215.14(b), the Appellant provides the following:

I. SPECIFIC CHANGES IN THE DECISION THAT THE APPELLANTS SEEK

- Eliminate the “Rodman Pit” OHV day use area;
- Not designate trails within 50 feet of gopher tortoise burrow entrances;
- Not designate unclassified mixed use roads that are not needed for resource activities;
- Set forth a plan to adequately enforce the restrictions articulated in the plan;
- Set forth a plan to adequately monitor the impacts from motorized access;
- Minimize conflicts between motorized and non-motorized recreational uses;
- Minimize harassment to wildlife and habitats;
- Minimize impacts to soils, watersheds and vegetation;
- Require users of unlicensed vehicles (motorcycles and ATVs) to register with or have permits from the Forest Service to operate motorized vehicles on Forest Service roads and trails; and,
- Designate OHV trails as one-way routes.

II. PORTIONS OF THE DECISION WITH WHICH THE APPELLANTS DISAGREE

- Designating the “Rodman Pit” as an OHV impact area;
- Designating trails that do not avoid gopher tortoise burrows;
- Designating unclassified mixed use roads that are not needed for resource activities;
- Designating OHV routes off Forest Service roads without ensuring adequate enforcement;
- Designating OHV routes off Forest Service roads without ensuring adequate monitoring;
- Not requiring a permit systems for unlicensed vehicles (motorcycles and ATVs);
- Not minimizing conflicts between motorized and non-motorized recreational uses;
- Not minimizing harassment to wildlife and habitats;
- Not minimizing impacts to soils, watersheds and vegetation;
- Restricting the Access Plan to the “Restricted” areas of the Forest and not analyzing the entire Forest, including the “Unrestricted” areas; and,
- Failure to analyze an actual “No Action” alternative representing the natural, baseline conditions of the Forest.

III. WHY THE APPELLANTS BELIEVE THE RESPONSIBLE OFFICIALS’ DECISION FAILED TO CONSIDER THE SUBSTANTIVE COMMENTS

Appellants would like to begin by expressing our deepest gratitude to the Responsible Officials and all the Forest Service personnel who worked on this Access Plan. The ROD and FEIS make it obvious that the Forest Service put a great amount of time, effort and thought into this analysis and decision. In fact, Appellants submitted a copy of the Draft EIS for the Access Plan as example of what National Forests need to be working towards when we submitted our comments on the proposed changes to the Forest Service’s Travel Management and Designated Routes and Areas for Motor Vehicle Use (36 C.F.R. Parts 212, 251, 261, and 295) in 2004.

Nonetheless, Appellants believe that a number of the issues and concerns we have expressed throughout this lengthy process were not adequately considered or addressed. See discussion *infra* Part IV. Furthermore, Appellants are disappointed by the addition of the Rodman Pit OHV impact area into the final version of the plan.

IV. RATIONAL, EXPLANATIONS AND HOW THE DECISION SPECIFICALLY VIOLATES LAWS, REGULATIONS OR POLICIES

A. THE ACCESS PLAN VIOLATES NATIONAL FOREST MANAGEMENT ACT BECAUSE IT IS NOT IN COMPLIANCE WITH THE FOREST PLAN.

The National Forest Management Act (“NFMA”) requires the Forest Service to create a comprehensive Land and Resource Management Plan, or Forest Plan, for each National Forest. See 16 U.S.C. § 1604(a), (e). Once a Forest Plan is adopted for a specific National Forest, “NFMA prohibits any site-specific activities that are inconsistent with the Forest Plan.” *Lands Council v. Forester of Region One of the United States Forest Serv.*, 395 F.3d 1019, 1032-1033 (9th Cir. 2005) *citing Inland Empire Pub. Lands Council*, 88 F.3d 754, 757 (9th Cir. 1996) (“Site-specific projects must be consistent with the stage-one, forest-wide plan.”). See also 16 U.S.C. § 1604(i) (“Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”); *Sierra Club v. Espy*, 38 F.3d 792, 795(5th Cir. 1994) (“Site specific analysis... must be consistent with the LRMP.”); The National Forests in Florida, which includes the Apalachicola, Ocala and Osceola National Forests, adopted its Revised Land and Resource Management Plan (“LRMP”) on March 29, 1999. This Revised LRMP has been amended three times since 1999.

1. The Decision to Retain the Rodman Pit Violates Forestwide Access Standards (AC-2), Forestwide Goal 14 and Forestwide Objective 13 Which Do not Permit the Designation of OHV “Areas”.

The LRMP’s standards and guidelines provide management direction for making decisions that help achieve the National Forests in Florida’s desired future conditions (“DFCs”), goals, and objectives. Included among the Forest Plan’s Forestwide Standards are those related to Access. These Access Standards identify three categories of areas where bicycle and motorized vehicle use vary:

1. Areas where motorized vehicles and bicycles are prohibited.
2. Areas where motorized vehicles and bicycles are restricted to open classified roads and designated trails specified for their use.
3. Areas where motorized vehicles and bicycles are permitted to travel on open classified roads, designated trail specified for their use, and unclassified roads.

LRMP at 3-2 (AC-2); *see also* Decision Notice and FONSI for Revised Land and Resource Management Plan Amendment 2.¹ Forestwide Goal 14 is to “[p]rovide a system of marked recreational trails and support facilities that will promote a variety of experiences for both motorized and nonmotorized trail users.” LRMP at 2-4. Forestwide Objective 13, as amended by Forest Plan Amendment #2, provides that the Forest Service desires to

[d]esignate a system of trails and marked, numbered open, classified roads in areas where motorized vehicles and bicycles are restricted (*see* Access Maps, Appendix A). This process will incorporate existing travelways as much as possible and include public participation and collaboration with local user groups.

LRMP at 2-6; *see also* DN and FONSI for LRMP Amendment 2 at 11.

The decision at hand affects the second category identified in AC-2, or the “restricted” areas, of the Ocala National Forest. As such, “motorized vehicles and bicycles are restricted to open classified roads and designated trails.” *Id.* The Rodman Pit is being designated as “a 37 acre OHV day use *area*.” ROD at 8; FEIS at 2-5 (emphasis added). While the “perimeter of the area will be fenced and marked,” FEIS at 2-5, there are no specific designated trails within this area. As such, designating the Rodman Pit as an OHV area violates the Forest Plan.

The Forest Service’s Administration of the Forest Transportation System regulations found at 36 C.F.R. Part 212 Subpart A defines an “area” as “[a] discrete, specifically delineated space that is smaller, and in most cases much smaller, than a Ranger District.” 36 C.F.R. § 212.1. A “trail” is defined as “[a] route 50 inches or less in width or a route over 50 inches wide that is identified and managed as a trail.” *Id.* In general, these regulations “provide[] for a system of National Forest System *roads*, National Forest System *trails*, *and areas* on National Forest System lands that are designated for motor vehicle use.” 36 C.F.R. § 212.50(a) (emphasis added). In the “restricted” areas of the National Forests in Florida, however, the Forest Plan is more restrictive than these regulations in that motor vehicle use may only be permitted on “open classified *roads* and designated *trails* specified for their use.” LRMP at 3-2 (AC-2). Similarly, Forestwide Goal 14 and Forestwide Objective 13 only speak of providing or designating a system of marked trails, not concentrated use areas. Thus, the Forest Plan does not allow the designation of OHV areas. Therefore, the Rodman Pit 37 acre OHV day use area must be removed from the Access Plan.

2. The Decision Violates the Forestwide Recreation Standard for Trails (RE-4) Because Trails were not Designed to Avoid Gopher Tortoise Burrows.

The Forest Plan requires the Forest Service to “[d]esign new trails to avoid gopher tortoise burrows. In general, keep the trail at least 50 feet away from the burrow entrance.” LRMP at 3-14 (RE-4). There is no indication in the ROD or FEIS that gopher tortoise burrows were ever considered in the designation of any of the trails. The gopher tortoise (*Gopherus polyphemus*) is a Forest Service Sensitive species. Threatened, Endangered and Sensitive

¹ Forest Plan Amendment 2 replaced the terms “marked, numbered roads” with “classified roads” and “unmarked travelways” with “unclassified roads.” It also removed reference to the two year implementation deadline for the Access Plan in the restricted areas of the Forest.

Species were identified in the EIS as significant issues. Species included in the indicators for measuring this significant issue consisted of red-cockaded woodpeckers (“RCWs”), bald eagles, wood storks, T&E plants. FEIS at 1-15, 2-12. Miles and density of roads and motorized trails by species habitat type was another indicator. *Id.* The gopher tortoise was only discussed in the FEIS in regards to which Terrestrial Habitat Associations with which the species is associated, and that the Determination of Effect (“DOE”) of the Biological Evaluation (“BE”) was May Impact Individuals but Not Likely to Cause a Trend to Federal Listing or a Loss of Viability. *See* FEIS at 3-13–14, 4-41. The BE in turn does not discuss specific locations of gopher tortoises or burrows, and only discusses the impacts to gopher tortoise in terms of the amount of unclassified roads designated in potentially suitable habitat for the gopher tortoise, longleaf pine and flatwoods and young scrub habitat. FEIS App. D (BE at 25).

The evidence that the location of gopher tortoise burrows were not considered in the design of these new trails is not limited to the FEIS and BE. The ROD, which lists Forest Plan goals, objective and standards with which this action is consistent, does not include RE-4. ROD at 6. Furthermore, the “Guidelines to Identify, Avoid and Mitigate Effects of ATV/OHV Use on T&E and Rare Species” used by the Forest Service in developing this Access Plan did not include the gopher tortoise among the identified species. *See* [Exhibit 1](#). As such, it is clear gopher tortoise burrows were not given adequate consideration in the design of this Access Plan. Thus, it is inconceivable that the new trails designated as part of this Access Plan were designed to avoid gopher tortoise burrows, let alone kept at least 50 feet away from burrow entrances. As such, this decision violates Forestwide Standard RE-4.

3. The Decision Violates the Forestwide Infrastructure Standard for Road Management (IN-2).

The Forest Plan requires the Forest Service to “[c]lose and return to resource production all existing roads, whether temporary or system roads, that are not needed for resource activities.” LRMP at 3-7 (IN-2). The Access Plan violates this Forestwide Standard in two ways: (1) by allowing roads not needed for resource activities to remain open as mixed-use roads and (2) by not actively restoring or returning to resource production unclassified roads that are not designated and not needed for resource activities.

Alternative E would implement the access system of roads identified during the 1998 Roads Analysis Process (“RAP”). “The RAP was developed by an ID team to provide adequate access for resource management.” FEIS at 2-6. Thus, roads not identified in the RAP/Alternative E are not needed for resource activities and may not be designated. The proposed Access Plan violates the Forest Plan by designating a number of roads not identified in the RAP as mixed use roads. *Compare* FEIS Vol. 2 Alternative E Map *with* FEIS Vol. 2 Alternative D Map. While the Forest Plan permits the designation of OHV trails and the designation of roads identified in the RAP as mixed use roads, it does not permit the designation of roads that are not needed for resource activities, i.e., those identified in the RAP. In other words, any mixed used roads that were not identified in the RAP (Alternative E) cannot be designated without violating the Forest Plan.

Forestwide Standard IN-2 also requires the active restoration of roads that are not needed for resource activities. Further, one of the main Forestwide Goals of the National Forests in Florida's Forest Plan is to

Maintain or, *where necessary, restore* ecosystem composition, structure, and function within the natural range of variability in *all ecosystems*, with emphasis on *longleaf pine-wiregrass, sand pine-oak scrub, pine flatwoods, hardwood/cypress, oak hammock ecosystems, and other imperiled specialized communities.*

LRMP at 2-3 (Goal #6) (emphasis added).

The Access Plan makes no commitment to even close, let alone restore, the unclassified roads and areas that have been impacted by OHV use. The proposal closes at least 1,558 miles of unclassified roads and 60 OHV concentrated use areas. FEIS at 2-13, 2-4. The FEIS states, "Once closed, these areas will have the *potential* to revert to vegetated conditions, which will reduce many of the adverse effects related to roads and trails." FEIS at 4-85 (emphasis added). However, this "potential" is thwarted by the lack of enforcement in the Access Plan. See discussion *infra* Part IV.C.3.b. As the U.S. Environmental Protection Agency ("EPA") stated, "EPA's concern is that there is no explicit commitment... to either close, decommission, or monitor extensively the remaining unclassified roads to ensure that unregulated public travel will not continue on these roads and trails." FEIS App. F Letters at 21.

B. THE ACCESS PLAN DECISION VIOLATES OF THE NATIONAL ENVIRONMENTAL POLICY ACT.

1. NEPA Requires the Consideration of a Reasonable Range of Alternatives.

The Council on Environmental Quality ("CEQ") describes the alternatives section as "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. The CEQ's National Environmental Policy Act ("NEPA") regulations describe what shall be included in this section:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.14.

As stated in *Idaho Conservation League v. Mumma*, 956 F. 2d 1508 (9th Cir. 1992), “the existence of a single viable but unexamined alternative renders an environmental impact analysis inadequate.” 956 F.2d at 1519 *quoting Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985). *See also Resources Limited v. Robertson*, 8 F. 3d 1394 (9th Cir. 1993).

Further, the Forest Service’s planning regulations provide the following:

The primary goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements.

36 C.F.R. § 219.12(f) (1982). These regulations further state:

Alternatives shall be distributed between the minimum resource potential and the maximum resource potential to reflect to the extent practicable the full range of major commodity and environmental resource uses and values that could be produced from the forest.

Id. at § 219.12(f)(1).

In comments submitted on the Draft EIS for this proposal, Appellants identified at least five reasonable alternatives that were dismissed without detailed study. The Forest Service was able to eliminate four of these alternatives – (1) expanding the proposal to include the entire Forest, (2) prohibiting ORVs from the Forest, (3) registering or permitting unlicensed vehicles, and (4) placing restrictions on vehicle equipment – by limiting the purpose and need of the EIS. *See discussion infra* Part IV.B.3. In fact, for three of these alternatives – including the entire forest, registering or permitting vehicles and vehicle equipment restrictions – the Forest Service admits and/or recognizes that such restrictions or limitations may indeed be required in the future. FEIS at 2-8–10.

In addition, an alternative expanding the proposal to include the entire Forest was eliminated because the restricted areas were those designated in the Forest Plan. However, the Forest Plan originally required restrictions on motorized access to be implemented within 2 years after Forest Plan approval. LRMP at 2-6, 3-2. It has been nearly seven years since the Forest Plan was approved. Seven years. That is almost equal to half the lifetime of the Forest Plan. Appellants have raised the issue of considering the entire forest several years ago. Further, under existing regulations, trails must be designated on the entire Forest. *See* 36 C.F.R. § 212.51(a). Exclusion of this alternative also means the Forest Service did not adequately analyze the cumulative impacts of this proposal. *See discussion infra* Part IV.B.2.

The dismissal of the alternative prohibiting ORV use on the Forest, or at least the restricted areas, was based on at least three additional faulty presumptions. First, Executive

Order 11644 and the Forest Service Manual (“FSM”) 2311.1 do not require that all areas of the National Forest provide motorized recreation. Neither policy contains such a mandate. Further, even if motorized vehicle use off open, classified roads were prohibited, the entire “unrestricted” area of the Forest – approximately 140,000 acres or one-third of the Forest – remains open to ORV use off classified roads. Second, this alternative was made less relevant by one over-riding presumption: that there will be 100 percent compliance with the Access Plan. *See* FEIS at 1-16 (“it is assumed that public education and enforcement of regulations will successfully limit public travel to designated routes.”). Thus, the FEIS is based on the false presumption that impacts from ORVs will be limited to 50-inch width of designated trails. Based on the past history of ORV use on the Forest, *see, e.g., Exhibits 3, 4*, there is little reason to believe that will be the case. And finally, this alternative was based on presumption that it would need to be implemented. In fact, the most important aspect of analyzing this alternative is simply for its analysis. Without such an alternative, it is impossible for the Forest Service to have an accurate baseline condition upon which to measure the cumulative impacts of the Access Plan. *See* discussion *infra* Part IV.B.2. One of the purposes of NEPA is to inform the decision-making process. Appellants believe that the inclusion of this alternative would have led to a more informed decision.

The Forest Service should have also analyzed at least two additional alternatives. One alternative could have designated a significant portion of the unclassified roads as hiking or equestrian trails. While the Forest Plan permits cross-country travel on foot and by horseback, marked trails would have provided additional non-motorized access to those less adventuresome individual who are uncomfortable creating their own routes across the Forest. Another alternative that should have been analyzed is one respectful of science-based core-buffer design principles. Such an alternative would have created the greatest trail density, especially motorized trail density, around the Forest periphery and minimal trail density in the Forest interior.

2. NEPA Requires the Forest Service to Consider Cumulative and Indirect Impacts.

In conducting its NEPA analysis, the Forest Service must consider “[w]hether 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.” 40 CFR § 1508.27(b)(7). A cumulative impact is defined as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

In *City of Carmel-by-the-Sea v. U.S. Dep't of Trans.*, 123 F.3d 1142, 1160 (9th Cir. 1997), the Ninth Circuit held that an NEPA document must “catalogue adequately the relevant past projects in the area.” It must also include a “useful analysis of the cumulative impacts of past, present, and future projects [which] requires a discussion of how [future] projects together with the proposed... project will affect the environment.” *Id.* The NEPA document must analyze the combined effects of the actions in sufficient detail to be “useful to the decision-maker in deciding whether, or how, to alter the program to lessen cumulative impacts.” *Id.* Detail is therefore required in describing the cumulative effects of a proposed action with other proposed actions. *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d at 1379 (9th Cir. 1998); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998).

The FEIS contains very little information on past ORV damage to forest resources. Furthermore, it does not include a discussion of “reasonably foreseeable future actions,” i.e., discussion of restrictions in the unrestricted Areas. Since the Forest Service is obviously aware that such restrictions are now required, the impacts of those actions must be analyzed. As such, the exclusion of the unrestricted areas of the Forest in this analysis is not logical because without including that area the cumulative impacts of this project cannot be adequately addressed. Furthermore, the FEIS is disingenuous in stating that “[t]here may be a need to do an in-depth analysis in the unrestricted area in the future,” FEIS at 2-8, when in fact such analysis is required by existing Forest Service regulations.

In the FEIS, there is little to no discussion of ORV use on adjacent State or private lands. Furthermore, Forest Service policy requires you to

Coordinate off-road vehicle use with adjacent National Forests; Federal, State, and local agencies; and interested individuals and groups to increase user understanding and compliance with off-road vehicle rules and regulations when moving between jurisdictional areas and to improve the user’s experience by providing a range of compatible off-road vehicle use opportunities between jurisdictions, recognizing some types of activities are not appropriate on National Forests.

FSM 2355.15. This coordination can not be effectively analyzed without a complete discussion of the cumulative impacts of this access plan.

The Forest Service’s travel management regulations now apply to the entire Forest, not just the restricted areas as identified in the Forest Plan. Furthermore, Appellants understand that the Southern Region Office has informed the National Forests in Florida to begin addressing access in the Unrestricted Areas as soon as possible. As such, restrictions on the unrestricted areas are immediate “reasonably foreseeable future actions” and must be analyzed in this EA in order to comply with NEPA. It is especially important for these restrictions to be analyzed together because, as the Forest Service recognizes: “Local residents and forest users who are accustomed to using non-street legal vehicles on the forest would be frustrated by the limited access, and this frustration may lead to a greater level of non-compliance.” FEIS at 4-65.

Appellants asked the Forest Service to consider an alternative without any motorized access not because Appellants expected, or even desired, the Forest Service to implement such an alternative but because the lack of including a no motorized access alternative makes it impossible to comply with the requirements of NEPA. In *Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002), the FAA considered the environmental baseline of the “No Action Alternative” as the existing use from the airport. The plaintiffs sought to have the FAA to compare the airport expansion project to an environmental baseline of natural quiet and to consider the total impact of aircraft noise on Zion National Park. The Court held that without a natural baseline against which to compare the expansion project, “there is no analysis of cumulative noise impact on the Park against which the additional noise impact of the replacement airport can be evaluated.” 290 F.3d at 347.

The Ninth Circuit has stated that “without establishing... baseline conditions... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Furthermore, according to CEQ, “[t]he concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process.” CEQ, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (available on-line (visited Sept. 27, 2004) <<http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm>>). In this instance, the Forest Service has no such baseline against which to compare effects of the proposed action. Instead, you are comparing every alternative to the currently existing condition, which is virtually unrestricted access. As such, any reduction or restriction on motorized access is an improvement on the current situation. Thus, the entire FEIS is biased by the fact that everything proposed is an improvement on existing conditions and does not consider the cumulative impacts of motorized access on the Forest.

The CEQ defines “indirect impacts” as those effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. §1508.8(b). The FEIS fails to consider indirect effects because it is based on the assumption that compliance, education and enforcement will be 100 percent effective, *see* FEIS at 1-16. Thus, the FEIS assumes that impacts will be limited to the 50” trails and does not consider the indirect impacts that will occur when OHV users stray from the designated routes. The basis of this assumption is questionable at best. The intentional or reckless disregard for the designated routes is likely to occur, and is more likely to occur than full compliance. This fact has been expressed by a number of ATV users. *See, e.g.,* ATVFLOIDA.COM, *Message Forums & Classifieds: General => Open Discussion => Official Ocala Nat’l. Forest Decision Announced => Topic started on January 12, 2006* <<http://www.atvflorida.com/forum/index.php/topic,10391.0.html>> (attached hereto as Exhibit 2 at 2 (“Always lived by there rules. Now they want to take it away from us ? Catch me if you can.”), 9 (“i dont see the State hiring a 100 or more people to patrol everyday”), 12 (“The forest is far too large to control. Yes you might get caught for runnig on a numbered road but rarely will you get in trouble...think about it. We go out in the side trails and take off...almost never see anyone else. You think a patrol or trail closure is goona effect that?...doubtful.”).

Furthermore, innocent non-compliance is guaranteed to occur as riders adjust to the new rules. At a minimum, trails will be unintentionally widened beyond the 50” impact. Some ATV

riders assume the trail will be twice that width. See Exhibit 2 at 12 (“ok so pretty much its gonna be say an 8 foot wide trail or so”).

The Forest Service apparently did not consider the indirect impacts of non-compliance because “[m]easurement of this issue would be speculative due to the unpredictable nature of the issue.” FEIS at 1-15. However, it would not be speculative to state that some of the more heavily used routes will see continued use after they have been closed. This is especially true of areas in remote portions of the Forest and routes leading to and from the 61 existing concentrated use areas.

The Forest Service also should know from experience that previous closure orders on the Forest have been far from effective. See Exhibits 3-4. NEPA analysis should not be based on wishful thinking. The Forest Service could have used available information on the issuance of warnings and citations to help compile a more reasonable outlook on the amount of non-compliance, as the EPA suggested. FEIS App. F Letters at 21 (“What is the trend in issuance of warnings and violations related to OHV use? Where are the majority of violations occurring?”).

3. NEPA Prohibits the Forest Service From Devising a “Purpose and Need” for the Proposal that is Unreasonably Narrow.

The Forest Service’s discretion to determine the purpose and need of a project is not unfettered. Courts will scrutinize and reject a formulation of a project’s purpose and need that overly restricts the consideration of reasonable alternatives. In *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 n.7 (9th Cir. 1999), the court explained that the agency’s proposed interpretation of its purpose and need was too narrow to satisfy NEPA, because it restricted the scope of reasonable alternatives too tightly, down to one or two choices. Similarly, in *City of Carmel by the Sea v. U.S. Dept. of Trans.*, 123 F.3d 1142, 1155 (9th Cir. 1997), the court noted: “The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms.” See also *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991).

Since consideration of alternatives is “the heart of the environmental impact statement,” 40 C.F.R. 1502.14, courts scrutinize the purpose and need to ensure that agencies do not avoid NEPA’s requirements by defining a project’s purpose so narrowly as to preclude consideration of reasonable alternatives. *Simmons v. United States Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997); *City of New York v. United States Dept of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983), cert. denied, 456 U.S. 1005 (1984); *Citizens Against Burlington*, 938 F.2d at 196. This is exactly the situation with this proposal. See discussion *supra* Part IV.B.1.

The Seventh Circuit Court of Appeals explained the fundamental importance of ensuring that agencies do not avoid NEPA’s requirements by unreasonably restricting the statement of purpose:

One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of

consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).

Simmons, 120 F.3d at 666. *See also City of New York*, 715 F.2d at 743 ("an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered"); *Citizens Against Burlington*, 938 F.2d at 196 ("an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action").

4. NEPA Requires the Forest Service to Adequately Assess Site-Specific Impacts.

NEPA requires the Forest Service to identify and consider direct, indirect, and cumulative impacts. At the site-specific level, NEPA requires you to give a "hard look" to the potential significant impacts to the environment. The Forest Service cannot satisfy this "hard look" requirement without knowing what actually exists in the area the agency is supposed to be assessing. For example, the designation of the Rodman Pit as a concentrated use area was not discussed in the BE's for plants or wildlife. As such, the DOE for the Forest Service Sensitive Species did not anticipate any impacts from in that area.

5. NEPA Requires the Forest Service to Prepare the EIS and Conduct the NEPA Process in an Unbiased Manner.

When the NEPA outcome is pre-ordained, the EA "might be subject to at least a subtle bias" and thus must be discarded. *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000). A pre-existing outcome "eliminate[s] the opportunity to choose among alternatives." *Id.* at 1143. *See also American Wildlands v. U.S. Forest Service*, CV-97-160-M-DWM (D. Montana 1999)(holding that normal deference to agency decision making is inapplicable "if the objectivity of the agency decision making is questionable" and that "[o]therwise, there would be no check on the ability of an agency to circumvent environmental laws by simply going through the motions and conducting environmental assessments on the basis of predetermined or presupposed findings"). *See also Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 730 (9th Cir. 1995) (finding that the Forest Service "took into account other needs and uses only to the extent that they permitted contract requirements to be met," and holding that the contract affected the range of alternatives considered").

The Ninth Circuit has recently stated that "the comprehensive 'hard look' mandated by Congress and required by the statute [NEPA] must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf*, 214 F.3d 135 (remanding EA done after agency "had committed in writing to support" the decision allegedly under review). *See also American Wildlands v. United States Forest Service*, CV 97-160-M-DWM (D. Mont April 16, 1999).

In this case, it is evident that the Forest Service had already committed to designating motorized trails in the restricted area of the Forest, even though analysis might have shown that was not the best course of action. This commitment was demonstrated by the Forest Service's dismissal of the alternative prohibiting ORV use and the treatment of Alternatives C and E throughout the FEIS. For example, the descriptions of these alternatives, the FEIS states: "Under this alternative the Forest Plan Forest Wide Goal 14 and Forest Wide Objective 13 would have to be amended to allow for a non-trail motorized only experience within the restricted areas." FEIS at 2-4, 6. Forestwide Goal 14 is to "[p]rovide a system of marked recreational trails and support facilities that will promote a variety of experiences for both motorized and nonmotorized trail users." LRMP at 2-4. There is no reference to restricted or unrestricted areas in Forestwide Goal 14. Thus, the Forest Plan would not have to be amended to accompany either of these alternatives because the entire restricted area of the Forest – approximately 140,000 acres – could be used to provide motorized trails. Forestwide Objective 13, as amended by Forest Plan Amendment #2, provides that the Forest Service desires to

[d]esignate a system of trails and marked, numbered open, classified roads in areas where motorized vehicles and bicycles are restricted (*see* Access Maps, Appendix A). This process will incorporate existing travelways as much as possible and include public participation and collaboration with local user groups.

LRMP at 2-6; *see also* DN and FONSI for LRMP Amendment 2 at 11. However, the Forest Service could have not designated any motorized trails in the restricted areas of the Ocala National Forest and still been able to designate trails in the other restricted areas of the National Forests in Florida without resulting in the need to amend the Forest Plan.

C. THE ACCESS PLAN VIOLATES 36 C.F.R PART 212 AND EXECUTIVE ORDER 11644.

The Forest Service's framework for motorized travel management has been set forth in 36 C.F.R. Part 212. These regulations implement Executive Order ("E.O.") 11644 (February 8, 1972), "Use of Off-Road Vehicles on the Public Lands," as amended by E.O. 11989 (May 24, 1977). These Executive orders direct the Forest Service and other federal agencies to ensure that the use of ORVs on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands.

1. The Access Plan Does not Adequately Protect Public Safety.

In designating roads and trails for ORV use on National Forest System Lands, one of the issues the Responsible Officials must consider is the effects such designations will have on public safety. 36 C.F.R. § 212.51(a). This Access Plan, particularly in designating the Rodman Pit as an OHV day-use area, fails to adequately consider and protect public safety. The Draft and Final EISs recognize the inherent dangers of concentrated use areas. These documents describe the use of the 61 existing concentrated use areas as follows:

The currently utilized concentrated use areas would remain open and use would continue. Use of these areas is high on the weekends and holidays due to the fact

that the Forest Service is the only public agency that has land where this type of recreation occurs locally. ***Thus the potential for accidents in these areas would remain high due to the crowded conditions.***

DEIS at 4-48; FEIS at 4-50 (emphasis added).

Although not discussed in the DEIS, the FEIS briefly describes the impacts of visitor safety of designating the Rodman Pit as a concentrated use area.

This area is currently utilized by motorized enthusiasts and on peak weekends can include as many as 200 users. The previous access policy created conflicts with neighboring land owners from noise, expansion of routes into the surrounding area and problems with trash. To reduce these conflicts, use would be limited to the pit area, which would be fenced to eliminate expansion. In addition, non-designated trails leading to the area would be treated to discourage unauthorized use. Use of the area would be partially limited by available parking at the trailhead (approximately 40 vehicles at any given time) although additional users could access the area from designated trails.

FEIS at 4-65.

However, there is no discussion of the anticipated use of this area as a result of closing the other 60 concentrated use areas throughout the Forest. While the Forest Service may believe that use of the area will be partially limited by available parking, this ignores the fact that the Rodman Pit is accessible from the designed mixed-use roads and there is nothing prohibiting riders from parking their trucks and trailers along the side of any Forest Road in the area. Moreover, there is no discussion about the maximum number of users that can safely use this 37-acre at one time or how to effectively limit access to the area to that number. A permit or registration system was also not discussed, which could be an effect way to control access to the area and thus promote visitor safety. *See discussion infra* Part IV.C.3.c.

The decision also does not adequately consider or protect public safety on the designated trails. For example, there is no indication of whether or not any of the OHV trails will allow for one-way or two-way travel. The level of danger of using these narrow trails is obviously dramatically different depending on whether the direction of travel on the trails is designated. As one user of the Forest noted, "I called the ranger district this morning and the ranger said the trails will be "non-directional", not one directional- meaning 2 way traffic." Exhibit 2 at 13. Another ATV user stated: "I have not read anything that mentions One-Way trails. If these trails are not 1way, I will not be riding. Restricting that many quads to that few 2way trails can only lead to disaster." *Id.* at 4. Another ATV rider put it as follows:

I mean come on a 2 way trail and its the only one you can ride. Hmmm you get someone haulin it in say 3rd or 4th gear come along then you get some drunk redneck no helmet on a ute with the 12 pack on the rack haulin the opposite direction.....hmmm you fill in the blanks. Sorry but i dont think i will ride it because i DONT want to become a STATISTIC.

Id. at 10. Still another ATV rider had this to say: “Two way trail’s are gonna be a bit dangerous for the little ones, with the three baller WFO club blazing around every corner. If we start killing each other due to overcrowding that would suck.” *Id.* at 16.

Furthermore, the Access Plan does not discuss requiring riders to use any safety equipment while riding in the Forest. Although the State of Florida might not require the use of helmets, the Forest Service could. This would greatly increase the safety to ORV users and was not even mentioned in the FEIS. It is also somewhat ironic that the FEIS fails to mention that the Regional Office considers ATVs too dangerous for trained USFS staff to use for critical resource management work. Yet, the Forest Service is allowing any person to ride on the Forest without even requiring completion of an ATV safety course.

2. The Access Plan Fails to Adequately Minimize Conflicts Between Motor Vehicle Use and Other Recreational Uses of National Forest System Lands.

Forest Service regulations provide that “the responsible official shall consider effects... with the objective of minimizing... [c]onflicts between motor vehicle use and existing or proposed recreational uses of National Forest System lands or neighboring Federal lands.” 36 C.F.R. § 212.55(b)(3). Similarly, E.O. 11644 provides that “[a]reas and trails shall be located to *minimize* conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands.” E.O. 11644 § 3(3) (emphasis added). Unfortunately, this Access Plan fails to adequately address these user conflicts.

For example, there are still 124 motorized intersections with non-motorized trails. FEIS at 2-11 (Table 2-1). Further, the newly designated OHV trails intersect the Florida National Scenic Trail (“FNST”) six (6) times, bicycle trails four (4) times and horse trails and other hiking trails one (1) time each. FEIS at 4-60 (Table 4-45b). While Appellants appreciate the Responsible Officials efforts in significantly reducing these intersections of motorized and non-motorized uses, there is still a significant problem in and around the Lake Delancy Campground area. In fact, the Florida Trail Association believes that the FNST may in fact need to be rerouted in this area to avoid the conflicts with the newly designated OHV routes. *See* FEIS App. F Letters at 3. These conflicts could have been minimized in the Access Plan by rerouting part of the FNST and maintaining a connector to the Lake Delancy Campground or by closing a few limited sections of the new OHV trails.

Moreover, the conflicts between motorized and non-motorized uses of the Forest are not limited to direct interactions. Noise and the disruption of non-motorized recreational activities is an increasing concern for OHV use on public lands. The FEIS contains a good analysis on the effects and measurement of motorized noise impacts. *See* FEIS at 4-56–58. Unfortunately, the Access Plan fails to adequately implement a noise protection plan. For example, the FEIS notes that there are 29.3 miles of OHV trails and mixed-use roads within audible distance (1 mile) of the FNST and 6.6 miles within 1 mile of developed recreational sites. FEIS at 4-56 (Table 4-43b). However, the FEIS does not discuss how many miles of the FNST and other non-motorized trails are within the audible distance of OHV trails and mixed-use roads. The number of recreational sites impacted by noise from OHV use is also not mentioned.

Furthermore, the Forest Service failed to consider any limits on sound emissions from OHVs. Setting and enforcing reasonable limits on sound emissions was even recommended by the Florida Division of Forestry. *See* FEIS App. F Letters at 24. A permit or registration system would have provided an easy opportunity to ensure that OHVs used on the Forest would meet these limits on sound emissions.

The Access Plan's definition of trails also creates confusion and conflicts. An "Equestrian Trail" is defined as having "[o]ther allowable uses [that] include ATVs, motorcycles, bicycling and hiking." FEIS at 1-6. The Forest Service could not create more user conflict for horse riders than allowing ATV's, motorcycles and bicycles to share designated equestrian trails. Moreover, this is completely contradictory to the Forest Service's Trails Management Handbook, FSH 2309.18. *See* discussion *infra* Part IV.D.2. Allowing noisy and dangerous motorized vehicles on trails that are designated for gentler and more sensitive users, like horseback riders, has the effect of driving the intended users out and converting trails supposedly designed for them into de facto OHV trails. This situation has already played out in the Paisley Woods area of the Forest, where trails used by horseback riders were taken over by mountain bikers and motorcyclists then ATV users. *See* DEFENDERS OF WILDLIFE, OUT OF CONTROL: THE IMPACTS OF OFF-ROAD VEHICLES AND ROADS ON WILDLIFE AND HABITAT IN FLORIDA'S NATIONAL FORESTS at 5 (Dec. 2002) (a true and correct copy of which was included on a CD-ROM attached to Appellant's comments on the Draft EIS).

An unexpected encounter with any type of OHV may frighten a horse and cause a serious accident. Most horseback riders therefore find it too nerve-wracking to ride in places where there is much ORV activity... Horseback riders also complain that ORV use of sandy Ocala National Forest trails leaves the trail surface so deep and loose that it is excessively tiring for horses.

Id. at 66. Thus, the Forest Service will find that much of the 33 miles of equestrian trails in the restricted areas of the Forest will not be utilized for its intended purpose.

Furthermore, if the 33 miles of equestrian trails in the Access Plan are indeed open to OHV use, such use was not discussed in the NEPA analyses. As such, the decision to permit motorized use of equestrian trails violates NEPA. *See* discussion *supra* Part IV.B.4.

3. The Access Plan Fails to Minimize Damage to Soil, Watershed, Vegetation and Other Forest Resources and Fails to Minimize Harassment of Wildlife and Significant Disruption of Wildlife Habitats.

When designating trails, Forest Service regulations provide the following:

the responsible official shall consider effects on the following, with the objective of minimizing:

- (1) Damage to soil, watershed, vegetation, and other forest resources;

(2) Harassment of wildlife and significant disruption of wildlife habitats.

36 C.F.R. § 212.55(b)(1)-(2). Similarly, E.O. 11644 provides that:

(1) Areas and trails shall be located to *minimize* damage to soil, watershed, vegetation, or other resources of the public lands.

(2) Areas and trails shall be located to *minimize* harassment of wildlife or significant disruption of wildlife habitats.

E.O. 11644 § 3(1)-(2) (emphasis added).

a. The Access Plan fails to consider the minimization of impacts to a number of Forest resources.

The Access Plan obviously reduces the impacts and disruptions because any reduction in the current level of use or increase in restrictions is an improvement of the existing conditions. This is one of the problems with how the Access Plan was put together. Instead of looking at the natural forest and analyzing the impacts upon that, a top-down approach was used where impacts were assessed based on removing roads and user-created routes from the existing condition. Thus, although the impacts to soils, vegetation and wildlife will be reduced, the Access Plan did not have as its object the minimization of the impacts to these resources.

The following are examples how the Access Plan fails to minimize damage to soil, watershed, vegetation and other forest resources and harassment of wildlife and significant disruption of wildlife habitats:

- The Access Plan leaves the Forest significantly fragmented. With an average road density of 3.3 miles of roads and trails per mile, FEIS at 4-16 (Table 4-8), the Access Plan fails to adequately protect both plants and animal species from the negative effects associated with habitat fragmentation.
- The Access Plan does not protect Forest resources from noxious weeds, or non-native, invasive plant species. There are only three (3) known occurrence of noxious weeds within 10 feet and eight (8) within 50 feet of designated unclassified roads. FEIS at 4-20 (Tables 4-10, 4-11). Because of this small number, it would have been easy for the Forest Service to treat these areas and eradicate the exotics prior to implementation. The Forest Service should have also provided wash stations at OHV trailheads to avoid the spread of exotic plant species.
- The Access Plan does not adequately protect listed and sensitive plant species. Not including *Bonamia grandiflora* (Florida bonamia), there are only one occurrence each of *Eriogonum longifolium* var. *gnaph* (scrub buckwheat) and *Polygala lewtonii* (Lewton's milkwort) within 200 feet of designated unclassified roads. FEIS at 4-26 (Table 4-18). These designated routes could have been eliminated or relocated to further avoid impacts to these species.
- The Access Plan needlessly impacts red-cockaded woodpecker ("RCW") clusters and habitat. The three RCW Habitat Management Areas each have road densities of 4

- miles per square mile or greater. FEIS at 4-36 (Table 4-36). The motorized trails and mixed-use roads in Paisley Woods and Riverside Island could have been relocated, eliminated, or closed during the RCW nesting and fledging season. *See, e.g.*, FEIS App. F Letters at 13. This would have reduced the impacts to RCWs and yet permitted hunters to access this area during the hunting season.
- The Access Plan permits too great an impact on the Florida scrub-jay due to harassment and potential for strike by motorized vehicle. Suitable scrub-jay habitat has road densities of 3.6 miles per square mile impacting 43 potential breeding pairs of scrub-jays. FEIS at 4-39 (Tables 4-29, 4-30).
 - The Access Plan permits too great an impact on the Florida black bear. The Access Plan has too high a road density throughout the bear's suitable habitat and does not having enough large, core areas a significant distance from a motorized route. *See* FEIS at 4-61 (Tables 4-46a, 4-46b).

Other than not minimizing damage and harassment of these resources, the Access Plan further fails to meet the requirements of the Forest Service's regulations by failing to (1) ensure adequate enforcement and (2) require a permit or registration system.

b. The lack of enforcement ensures that impacts to Forest resources will not be minimized.

The overriding theme of the Access Plan is that "it is assumed that public education and enforcement of regulations will successfully limit public travel to designated routes." FEIS at 1-16, 2-8. However, the FEIS recognizes that "[s]uccessful limitation of vehicle use to legal activities is paramount in avoiding adverse impacts to forest resources such as wildlife, wetland areas, prairies, longleaf pine wiregrass systems, and other ecologically sensitive areas." *Id.*

Nonetheless, the Ocala National Forest currently has only two fully qualified Law Enforcement Officers ("LEOs") assigned to the Forest. FEIS at 3-24. There are also six additional Forest Protection Officers ("FPOs") who are authorized to write warnings and citations for non-compliance with the Access designations. *Id.* Even under the existing situation, "[c]ompliance personnel are currently not able to effectively patrol all roads, trails and areas on the forest." FEIS at 4-71.

The Access Plan assumes that the new designations are "more enforceable... because there are fewer total trail miles for law enforcement to patrol." ROD at 12. In reality, however, there are not any fewer roads to patrol. This statement assumes that only the classified roads and newly designated unclassified roads need to be patrolled. However, this statement indicates that the Forest Service has no intention of patrolling the areas where unclassified roads have been designated as closed under the Access Plan. This is potentially one of the biggest problems – users riding on undesignated routes. The EPA also expressed this concern, stating: "EPA has one primary concern related to the overall designation process – what will keep the motorized users from accessing existing unclassified roads similar to what is currently occurring and is described in Alternative B?" FEIS App. F Letters at 20-21.

The designation of the Rodman Pit as a concentrated use area further compounds the enforcement problem. Locating the only concentrated use area in one of the most remote parts

of the Forest will require enforcement personnel to spend a disproportionate amount of time going to and from the Rodman Pit. This is not a wise use of limited enforcement personnel.

Further, the FEIS recognizes that “the number of violation notices that Forest Officers write will likely continue as at present until such time that forest visitors adjust to the new access policy.” FEIS at 4-71. One of the ways to have effectively dealt with this problem would have been to temporarily close the entire restricted area of the Forest to OHVs while the newly designated trail system is being properly marked. The FEIS recognizes that “[t]he identified system of roads and trails would need to be clearly marked on the ground in order to be effectively enforced.” *Id.* Yet, implementation of the Access Plan gives no indication of when the trails and mixed-use roads will be marked on the ground. *See* ROD at 18. If the Access Plan is to be implemented in phases, allowing existing uses to continue as the trails are marked on the ground, it will be all the more difficult to enforce in the beginning, thus lengthening the time the Forest Service is permitting resource damage to continue.

c. A permit or registration system would minimize impacts to Forest resources.

Like increased enforcement, a permit or registration system would allow the Forest Service to better manage OHV use in the Forest and thus reduced the impacts of the Access Plan. Forest Service policy allows the Forest Supervisor to “[a]uthorize, in writing or *through the permit process*, vehicle entry into closed or restricted areas or trails.” FSM 2355.04d(5) (emphasis added). This would allow the Forest Service to determine a carrying capacity for OHVs and issue a maximum number of permits. Furthermore, it would likely prevent the limited irresponsible OHV users that cause most of the damage to forest resources. A permit or registration system requiring authorized vehicles to be clearly marked with the license number in letters no smaller than 3 inches would also assist in enforcement efforts. Volunteer observers could clearly photograph and identify specific vehicles that may be in violation of exiting rules and report them, without the need to confront user. Forest Service enforcement personnel could do the same in order to issue violation notices without actually stopping the vehicle. Moreover, vehicles without permits would be easy to spot.

In addition to assisting with enforcement, a permit or registration system would serve a number of additional goals. First and foremost, it would provide an opportunity for the Forest Service to educate OHV users on the new policies. This is especially important since it is “it is assumed that *public education* and enforcement of regulations will successfully limit public travel to designated routes.” FEIS at 1-16 (emphasis added). Users would also be given maps, so ignorance or rules and trails could not be used as a defense. User satisfaction surveys and comment forms could be handed out. Vehicles could be checked for safety equipment and noise problems. Permittees could also then be required to wash vehicles before entering National Forest Land to prevent the spread of exotic plant species. *See, e.g.*, FSM 2080.44(10), 2081.03(4). A permit system would also provide the Forest Service with an opportunity to impose perhaps the most effective penalty – revoking a permit for non-compliance with the Access Plan. Moreover, a small registration or permit fee could be used to help pay for the costs of monitoring, enforcement and trail maintenance.

4. The Access Plan Does Not Provide for Adequate Monitoring.

The Forest Service “shall monitor the effects of motor vehicle use on designated roads and trails and in designated areas... consistent with the applicable land management plan, as appropriate and feasible.” 36 C.F.R. § 212.57. While the Access Monitoring articulated in Appendix G at first appears fairly detailed, it is simply perfunctory and not objective oriented. Monitoring should not measure whether the Forest Service did what they said they would do, but whether the Forest Service *accomplished* what it intended to accomplish. In other words, simply going through the motions and monitoring because monitoring is required by Forest Service regulations and the Forest Plan should not be the objective of monitoring. The objective must be figuring out how, why, when and where OHVs are affecting the Forest.

These shortcomings are illustrated by the following monitoring questions in the Access Monitoring Plan, FEIS Appendix G, and how these questions should be treated in an objective-oriented monitoring plan:

Q1. “Are all designated trails and mixed use roads posted or marked on the ground?”

Signage success should be measured by testing the routes with users unfamiliar with the area and seeing if the vast majority of them can find their way and behave as intended, not by documenting the number of signs posted.

Q2. “Are signs or posts being vandalized or removed?”

How quickly signs are replaced should be included.

Q3. “How many OHV volunteer hours were contributed each month or quarter?”

The number of volunteer hours is meaningless, whereas the number of objectives fulfilled or completed by volunteers might be helpful.

Q4. “Are users staying on designated routes?”

Recording the number and location of all new unauthorized trails is inadequate, especially since there are at least 1,558 miles of existing unclassified routes that users should be avoiding. It will also do nothing to document or prevent the creation of multiple-lane or braided trails. This question must be measured in terms of any evidence of vehicles leaving a trail of a specified width.

Q6. “How many violations or warnings were written for access non-compliance each year?”

While this information is important, the real questions are whether the law enforcement effort was sufficient to address the problem and whether the number of violations is decreasing.

Q9. “Which non-designated routes show evidence of continued motorized use?”

This question, as well as questions 11-12, must differentiate between recreational motorized and other uses.

Q12-14. Recovery of Non-designated Roads and Trails

These questions should be monitored by a botanist and recovery should be measured in terms of appropriate native species composition. A Trail Manager or Recreation Manager assessments of recovery may be a good first step, but that is all.

Q14. “Are impacted wetland areas recovering?”

Selecting impacted wetlands or ponds and locating permanent photo points is a method of documenting recovery, but five photo points is not enough to be adequate.

Q16. “Are invasive species spreading along designated roads and trails?”

The table of species intended for surveying is woefully inadequate. The Forest Service should be looking for new invasions of all species likely to be spread by vehicles in the region, not just the few species that are already a major problem on the Forest. OHVs will never be a significant dispersal agent for air potato or climbing fern. Aerial-observation GIS is also an inadequate measure, as botanical surveys on the ground are necessary.

The Monitoring Plan should also include an index of user conflicts and a log of complaints to a well-publicized, 24-hour hotline and e-mail address set up for the purpose of receiving public reports of objectionable ORV activity.

D. THE ACCESS PLAN VIOLATES FOREST SERVICE POLICY.

1. Designation of the Rodman Pit as a Concentrated Use Area Violates Established Forest Service Policy Regarding the Restoration of the Ocklawaha River.

The Forest Service recognizes that the Rodman Pit “will be used as a disposal site when the Ocklawaha River is restored and the dam removed.” FEIS at 2-5. Utilizing the Rodman Pit in the restoration of the Ocklawaha River is a course of action to which the Forest Service has previously committed. *See* ROD and FEIS for the Occupancy and Use of National Forest Lands and Ocklawaha River Restoration, National Forests in Florida (Dec. 17, 2001). Designating the Rodman Pit as a concentrated use area conflicts with this policy. The Forest Service must currently deal with a host of circumstances and incentives that have made the restoration of the Ocklawaha difficult to say the least. Appellants cannot comprehend why the Forest Service would intentionally create another situation that puts another barrier in the way of restoration. OHV users will see this as the only designated “pit” for them to ride in the Forest. In effect, the Forest Service is creating a whole new class of people who will oppose restoration of the Ocklawaha.

2. The Access Plan’s Trails Definitions Violate Forest Service Trails Guidelines

The Trail Construction and Maintenance Guides (FSH 2309.18, 2) is broken into three sections: Nonmotorized Trails (2.31), Motorized Trails (2.32) and Special Trails (2.33). The “Pack and Saddle Trail Guide” falls under the Nonmotorized Trails section, 2.31b. Pack and Saddle Trails are supposed to “accommodate[] a wide variety of pack and saddle animals,

including horses, mules, donkeys, burros, and others.” FSH 2309.18, 2.31b(1). Nowhere in the description is the inclusion of motorized vehicles. The Trails Management Handbook requires the Forest Service to

Give special consideration to the care and safety of live-stock and their riders when locating pack and saddle trails... Avoid locations near campgrounds or other concentrated-use areas where dogs or loud noises could startle pack animals. If the trail must cross highways or railroads, select sites with adequate sight distance.

Id. By defining “Equestrian Trails” as having “[o]ther allowable uses [that] include ATVs, motorcycles, bicycling and hiking,” FEIS at 1-6, the Access Plan violates these guidelines.

3. The Access Plan Violations Forest Service Policies Regarding Noxious Weed Management

The Forest Service’s Noxious Weed Management guidance (FSM 2080) sets forth an objective “[t]o use an integrated weed management approach to control and contain the spread of noxious weeds on National Forest System lands and from National Forest System lands to adjacent lands.” FSM 2080.2. Under this guidance, the Forest Service is required to “determine the risk of introducing or spreading noxious weeds associated with the proposed action,” when proposing any ground disturbing activity or action. FSM 2081.03. Further, the Forest Service is to “[u]se contract and permit clauses to prevent the introduction or spread of noxious weeds by contractors and permittees. For example, where determined to be appropriate, use clauses requiring contractors or permittees *to clean their equipment prior to entering National Forest System lands.*” FSM 2081.03(4) (emphasis added). Thus, the Access Plan should have required such steps as providing washing stations at trail heads or required vehicles to be washed before entering the Forest.

E. VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-59, 701-06, governs the process of making regulations and allows greater public accessibility and participation in federal agency processes. The APA also grants the right of judicial review to “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.” 5 U.S.C. § 702. When reviewing an agency decision, the court must “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). Because of the various violations of the NFMA, NEPA and the ESA discussed above, the decision to implement this proposal is arbitrary and capricious, in violation of the APA.

CONCLUSION

For the above stated reasons, Appellants ask that the Forest Supervisor reverse the decision to implement this project and remand the project back to the District Ranger with orders that he prepare an comply fully with NFMA, NEPA, ESA and the APA.

Dated this 27th day of February, 2006.

Respectfully submitted,



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