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August 18, 2021

Attn: Roads & Trails Planning Team  
United States Department of the Interior  
National Park Service  
Ozark National Scenic Riverways  
PO Box 490  
Van Burn, Missouri 63965

***Re: Public Comments on the National Park Service's Draft Environmental Assessment for the Roads and Trails Management Plan for the Ozark National Scenic Riverways***

Dear Sir or Madam:

On behalf of Missouri Confluence Waterkeeper ("MCW"), Great Rivers Environmental Law Center ("Great Rivers") provides the following comments on the National Park Service's ("NPS") Draft Environmental Assessment ("EA") for the Roads and Trails Management Plan ("RTMP") for the Ozark National Scenic Riverways ("ONSR" or "Riverways").

MCW is a nonprofit organization focused solely on clean water with the goal of providing drinkable, fishable, and swimmable water to all residents of the State of Missouri. MCW is a member of the Waterkeeper Alliance which is an international nonprofit organization that serves and protects waters by connecting local Waterkeeper Organizations and Affiliates worldwide with the goal of drinkable, fishable, swimmable water everywhere.

MCW's extended jurisdiction includes the Current River and Jacks Fork River within the ONSR. MCW is particularly interested in water quality and attendant wildlife impacts within ONSR, and the potential threats to both clean water and wildlife from improper road and trail management within the park. MCW supports recreation in, on, and around ONSR's waterways,

but believes that protection of the water resource (and the species that rely on clean water) must be the first priority in any management plan related to ONSR so that future generations may enjoy this wonderful water public resource. To that end, MCW provides the following comments and recommendations regarding NPS's Draft EA for the ONSR RTMP.

### **Introduction**

In the words of the United States Court of Appeals for the Eighth Circuit:

NEPA made it our “national policy ... to promote efforts which will prevent or eliminate damage to the environment and ... to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321... [W]e believe this policy “is surely implicated when the environment that may be damaged is one that Congress has specially designated for federal protection.” *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 186–87 (4th Cir.2005). Congress expressly recognized the need to “protect [ ] the special qualities of the [Boundary Waters Canoe Area Wilderness (“BWCAW”)] as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation.” BWCAW Act § 1, Pub.L. 95–495, 92 Stat. 1649 (1978). The guiding policy of NEPA thus requires that the Forest Service's assessment in this case include an evaluation of how the alternatives proposed in the FEIS “will affect the unique biological features of this congressionally protected area.” *Nat'l Audubon Soc'y*, 422 F.3d at 187.

*Sierra Club v. Kimbell*, 623 F.3d 549, 560 (8th Cir. 2010). The same is true of NPS's obligations under NEPA regarding the ONSR, which is specially designated for federal protection under the ONSR Enabling Act (PL 88-495) (1964), which states that the purpose of providing Congressional protection to the ONSR is for “conserving and interpreting unique scenic and other natural values and objects of historic interest, including preservation of portions of the Current River and the Jacks Fork River in Missouri as free-flowing streams, preservation of springs and caves, management of wildlife, and provisions for use and enjoyment of the outdoor recreation resources.”<sup>1</sup>

Despite this Congressional and court-mandated review, NPS avoids taking the requisite “hard look” at the environmental impacts of the RTMP on the ONSR, especially related to water quality impacts and the biota that rely on these waters. Likewise, the purpose and need of the project improperly balances resource protection and recreation, favoring the latter, rather than the former, in violation of its legal obligations. Finally, in an attempt to justify authorization of increased visitor access under the proposed action alternatives, NPS intentionally confuses the issue of the no-action alternative under the GMP with currently unenforced management obligations and resulting degraded conditions at the park to support its decision that the proposed action alternative of increased authorized visitor access will somehow improve on-the-ground conditions within ONSR.

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<sup>1</sup> PL-88-492 (1964).

## I. Dismissing Water Quality Impacts Without Full Analysis Renders the EA Arbitrary and Capricious and in Violation of NEPA

NEPA requires “that the agency take a ‘hard look’ at the environmental consequences before taking a major action.” *Sierra Club v. Kimbell*, at 559 (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)). The agency must make “a good faith effort to consider the values NEPA seeks to protect,” and must not “merely catalog environmental facts, but also explain fully its course of inquiry, analysis and reasoning.” *Id.*, quoting *Minn. Pub. Interest Research Grp. v. Butz*, 541 F.2d 1292, 1299 (8th Cir.1976). “General statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). Additionally, under new CEQ NEPA regulation 40 CFR 1051.3(b)(2)(ii), the agency must take a hard look at both beneficial and adverse effects from the proposed action. Instead, the Draft EA dismisses impacts to water quality in three measly paragraphs, to-wit:

**Water Quality.** The Jacks Fork and Current Rivers in the park are designated as Outstanding National Resource Waters because of their exceptional water quality. These waters have national recreational and ecological significance and receive special protection against degradation. In Missouri’s water quality standards, ONRWs are classified as Tier Three Waters, which stipulates that no degradation of water quality is allowed. This stringent standard continues to protect the overall high water quality of these two rivers (NPS 2007). Water quality would likely remain high under current management practices and may improve slightly under the proposed action.

While water quality is generally very good in the park’s rivers and springs, the current volume of use and location of road and trail crossings in the Current and Jacks Fork Rivers **can stress sensitive water resources** such as seeps, springs, and other wetland areas, particularly in areas where **unauthorized equestrian and land-based motorized vehicle use occurs on visitor-created roads, trails, and river crossings**. Impacts from equestrian and land-based motorized vehicle uses in these areas, as well as general public recreation uses in and along the rivers (when not managed properly) **may cause localized erosion and slightly higher levels of turbidity**.

Water quality has been dismissed as an impact topic because none of the actions proposed in the action alternatives would have **more than slight impacts** on the park’s water quality. Many of the actions proposed to manage visitor use in this plan would **ultimately benefit water quality** by reducing potential erosion and sedimentation impacts by visitors (through closure and rehabilitation of unauthorized river crossings). Additionally, some of the management strategies included in this plan are designed to rehabilitate and restore vegetation in the vicinity of undesignated roads, trails and river crossings, and to avoid water crossing locations that could add contaminants to habitat and affect wildlife species that are sensitive to water quality conditions such as the Ozark hellbender.<sup>2</sup> (emphases added).

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<sup>2</sup> Draft EA, Section 1.6.2, Page 9.

This superficial qualitative description of water quality impacts from past and proposed management practices is arbitrary and capricious. There can be no “hard look” at water quality impacts when such impacts are expressly admitted to be dismissed from fully analysis with a cursory review while expressly admitted to be occurring. No effort is made in the Draft EA or elsewhere to quantify water quality impacts to the ONSR from the no action alternative versus the proposed action alternatives. For example, there is no discussion of impacts to human health-based water quality standards such as E. coli caused by horse manure in and around the riverways. Any discussion of aquatic-life-based water quality standards such as from sediment are extremely superficial and constitute general statements, not a hard look.

Similarly, NPS must consider the cumulative impacts (the past, present, and reasonably foreseeable future private and governmental actions) on water quality in the ONSR—which it completely fails to do.<sup>3</sup> There is no discussion of sources of non-point source pollution in and around ONSR. There is no discussion of the water quality impacts of nearby timber operations, sand and gravel mining, or any other past, present or reasonably foreseeable private, state or federal action regarding ONSR’s water quality and how those impacts relate to the proposed impacts under the RTMP caused by increased horse crossing, increased ATV use, and increased visitor access.

NPS cannot claim that water quality impacts will not occur, be minimal, or be beneficial just because the agency believes its management practices under the RTMP will result in better water quality in the long term than current conditions. This conclusion is arbitrary and capricious in light of the fact that the preferred alternative (and other alternatives) will be authorizing several previously-unauthorized horse crossings (7 in Alternative B and 9 in Alternative C), cars and camping on gravel bars, and new trails to be authorized and constructed (101 miles in Alternative A to 152 miles in Alternative B and 162 in Alternative C). Congress passed the ONSR Act to protect these rivers because of their national significance. Not to analyze these water quality impacts flagrantly flies in the face of Congressional mandates in both the ONSR Act and NEPA which require a hard look and full analysis of water quality impacts of roads and trails on the Jacks Fork and Current Rivers.

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<sup>3</sup> To the extent NPS relies on the 2020 amendments to CEQ NEPA regulations to avoid consideration of indirect and cumulative impacts on water quality from the proposed action, NPS violates NEPA. 42 U.S.C. § 4332(2)(C) requires an evaluation of “any adverse environmental effects which cannot be avoided should the proposal be implemented,” which must examine “the environmental impact of the proposed action” “to the fullest extent possible”) (emphasis added); 42 U.S.C. § 4332(2)(F) (requiring agencies to consider the “worldwide and long-range character of environmental problems”); *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (noting that Congress’s mandate that agencies use “all practicable means” to “assure consideration of the environmental impact of their actions in decisionmaking,” requires consideration of cumulative effects) (citations omitted); *City of Davis v. Coleman*, 521 F.2d 661, 676–77 (9th Cir. 1975) (outlining the statutory obligation to consider the indirect effects of agency actions).

## **II. The Purpose and Need for the RTMP in the EA Favors Visitor Access and Use over Natural Resource Protection in Violation of the ONSR Enabling Act (PL 88-495), the NPS Organic Act, the General Authorities Act, and the Redwoods Act.**

NPS states that the purpose of the EA is “to improve the system of park roads and trails to ensure that it provides access to a variety of locations and experiences while also protecting the park’s fundamental resources and values.”<sup>4</sup> The purpose and need identified in the Draft EA favors visitor access and use over natural resource protection in violation of the ONSR Enabling Act, the NPS Organic Act, the General Authorities Act, and the Redwoods Act.

NPS defined the purpose and need of the 1991 Roads and Trails Study as an effort “to develop ways for people to see, understand, and enjoy the features that make the riverways unique while fulfilling the primary purpose of protecting park values. The primary natural resource at Ozark NSR is the Current River and its major tributary the Jacks Fork River. *Protection and preservation of this resource while providing for the use and enjoyment of visitors is the principal mandated responsibility of the NPS.*”<sup>5</sup> (emphasis added). More than 25 years later, it appears that NPS has turned this stated responsibility on its head by designating a primary purpose of providing for the use and enjoyment of visitors while secondarily protecting and preserving the resource.

During the Public Scoping process, NPS stated that “[t]he development of a roads and trails plan is critical to the protection of key resources and visitor experiences in the park.”<sup>6</sup> NPS stated that the RTMP was needed to “help the Riverways better manage and protect the park through identification of an authorized system of roads, trails, and river access points, as well as authorized uses for those assets and appropriate levels of maintenance.”<sup>7</sup> Note that these pronouncements place protection of the park before visitor access and use.

Since these initial pronouncements by NPS of the purpose and need for the RTMP in the Public Scoping process, the language used to define the purpose and need of the plan has shifted to focusing primarily on visitor access and use at the expense of natural resource protection. Currently, the purpose and need for the RTMP is now geared to visitor access and use considerations.

NPS’s current purpose and need for the RTMP is in conflict the ONSR’s Enabling Act which sets forth the purposes for the establishment of the Riverways as “conserving and interpreting unique scenic and other natural values and objects of historic interest, including preservation of portions of the Current River and the Jacks Fork River in Missouri as free-flowing streams, preservation of springs and caves, management of wildlife, and provisions for

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<sup>4</sup> Draft EA Section 1.1, Page 1.

<sup>5</sup> Roads and Trails Study and Environmental Assessment, at Page 13 (1991).

<sup>6</sup> NPS Public Scoping Newsletter, Fall 2015.

<sup>7</sup> *Id.*

use and enjoyment of the outdoor recreation resources.”<sup>8</sup> Furthermore, the current purpose and need is in conflict with the NPS Organic Act,<sup>9</sup> the General Authorities Act,<sup>10</sup> and the Redwood Act.<sup>11</sup>

According to NPS, “these acts direct the agency to conserve the scenery, the natural and historic objects, and the wildlife, and to provide for the enjoyment of those resources in such a manner as to leave them unimpaired for future generations...[T]he National Park Service may not allow degradation of the values and purposes for which the various areas were established unless authorized by Congress...[I]f a conflict occurs between visitor use and protection of resources, the intent of Congress is to favor resource protection.”<sup>12</sup> The Draft EA sets forth a purpose and need that favors visitor access and use over resource protection without authorization from Congress in violation of the aforementioned Acts.

NPS must set a purpose and need for the RTMP that explicitly recognizes the principal purpose of protection of park resources as mandated in the PL 88-492, the NPS Organic Act, the General Authorities Act, and the Redwood Act. The commenters request that NPS further define the purpose and need as requiring an explicit limitation on visitor access and use if those activities are not protective of natural resources on which the demand for visitors to the park relies to ensure compliance with the aforementioned Acts.

### **III. NPS Arbitrarily and Capriciously Relies on Inconsistencies in the No-Action Alternative Regarding Management As Legally Required in the GMP Versus Management As Unenforced and Unimplemented in Reality to Justify its Preferred Alternative**

Throughout the draft EA, NPS arbitrarily and capriciously relies on inconsistencies with what it describes as Alternative A- No Action (Current Management) and the actual on the ground conditions at ONSR. On one hand, NPS describes the no-action alternative as management as it should legally be enforced and implemented under the GMP. On the other hand, NPS often discounts the no-action alternative because of NPS’s failure to enforce and implement the GMP. For example, when discussing user conflict between water recreationists and horse riders caused by an increase in authorized horse crossings in Alternative B and C compared to Alternative A, NPS states:

This increased number of designated equestrian river crossings, when compared to alternative A, could adversely impact those boating and floating the river. Boaters, floaters, and hikers would now be more likely to encounter equestrian riders at these locations, with

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<sup>8</sup> PL-88-492 (1964).

<sup>9</sup> 16 USC 1, 2-4.

<sup>10</sup> 16 USC 1a-8.

<sup>11</sup> 16 USC 1a-1 (1978).

<sup>12</sup> NPS ONSR GMP/EIS, Chapter 1, at Page 19.

increased opportunity for conflict among users. **However, due to the significant use of undesignated river crossings that currently takes place, this may not be the case.**<sup>13</sup>

Basically, NPS attempts to discount Alternative A by relying on its own failure to implement and enforce Alternative A as justification that Alternative B or C would be better than Alternative A regarding an increase in authorized horse crossings. This conclusion is disingenuous, duplicitous, contradictory and fails to adequately consider impacts from alternatives as required by NEPA.

This logical fallacy is rampant throughout the EA. When discussing impacts to vegetation and soils, Alternative A is discounted as follows:

The continuation of current management for roads and trails would have ongoing and lasting adverse impacts—particularly on vegetation and soils in vulnerable areas such as steep banks, direct drainage paths, and where intensive equestrian use occurs.<sup>14</sup>

This is only true if referring to NPS's failure to implement and enforce the GMP, not the management that NPS is legally bound to do under the GMP, which is supposed to be the basis for the no action alternative. Case in point, in the following paragraph, after discounting Alternative A, NPS states:

Under current management practices in alternative A, undesignated trails would be restored to natural conditions, which, over time, would have beneficial effects to vegetation and soils.<sup>15</sup>

These two statements are irreconcilable.

Additionally, when discussing impacts to wildlife, NPS states that:

The continuation of current management of roads and trails could have both beneficial and adverse impacts on fish and wildlife depending on various factors. The continued use of undesignated river access and crossing points by horses and motorized vehicles, for example, would continue to have adverse, localized impacts on fish and wildlife habitats.<sup>16</sup>

Then, in the next paragraph, NPS states that:

The fulfillment of the 2014 GMP mandates of restoring undesignated trails to natural conditions would, in the long-term, have benefits to fish and wildlife habitat and ecosystem functionality. The level of overall benefit would depend on the NPS ability to keep undesignated trails from being created, and managing existing trails and recreation sites.<sup>17</sup>

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<sup>13</sup> Draft EA, Section 3.2.4, Page 33.

<sup>14</sup> *Id.*, Section 3.3.3, Page 41.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, Section 3.4.2, Page 47.

<sup>17</sup> *Id.*, Page 48.

Again, these statements are irreconcilable. But in this statement, NPS concludes that the efficacy of management under the GMP is wholly dependent on funding to be implemented and enforced and is therefore inferior to Alternative B and Alternative C. But, both of the action alternatives are subject to the same funding issue and constraints as admitted throughout the EA. By doing this, NPS sweeps under the rug the fact that it is authorizing more horse crossings, more trails, more facilities, and more gravel bar access without consideration of whether there will be any different result on the ground from Alternative A to Alternative B to Alternative C.

NPS's logic throughout the EA can be summarized as follows: Alternative A, which allows less visitor use and impacts, but which we never implemented and enforced because of funding issues and has led to poor conditions at ONSR, is an inferior option to protecting the park's resources than Alternative B, which will authorize greater visitor use and impacts even though it requires us to implement and enforce management that is subject to funding constraints as Alternative A. This rationale is by definition arbitrary and capricious.

The only conclusion regarding this legerdemain is that NPS is trying to justify its decision to increase visitor access at the expense of natural resource protection, which is expressly stated in the purpose and need as discussed above in Section II. This can only be accomplished by hiding the fact that Alternatives B and C will likely suffer the same fate as Alternative A—the former with NPS's blessing and the latter without. Fortunately, NEPA requires a full and straightforward analysis of the alternatives being considered, and NPS has failed to do so in the draft EA.

#### **IV. The Impacts Discussed and Dismissed in the EA Demonstrate that the RTMP is a Significant Federal Action That Requires the Preparation of a full Environmental Impact Statement (EIS)**

NEPA requires all federal agencies to prepare a “detailed statement” for any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement—the environmental impact statement (EIS)—must describe the environmental impacts of the proposed action. *Id.* § 4332(2)(C)(i), (ii). The EIS is an “action-forcing device” that ensures NEPA’s goals “are infused into the ongoing programs and actions” of the federal government. 40 C.F.R. § 1502.1. To determine whether a proposed action significantly affects the environment, and whether an EIS is required, the lead federal agency may first prepare an environmental assessment (EA). *Id.* §§ 1501.5. The lead agency must take a hard look at the relevant environmental concerns and alternatives to the proposed action, and must consider short and long term effects, both beneficial and adverse effects, effects on public health and safety, and effects that would violate Federal, State, Tribal, or local law protecting the environment. 40 C.F.R. § 1501.3.

If the agency determines, after preparing the EA, that the proposed action does not require preparation of an EIS, it must then prepare a finding of no significant impact (FONSI) detailing why the action “will not have a significant effect on the human environment.” 40 C.F.R. § 1501.6; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (describing procedure). If the EA indicates that the federal action “may”

significantly affect the quality of the human environment, the agency must prepare an EIS. See, e.g., *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004). In making the determination of whether to prepare an EIS, the agency must “consider every significant aspect of the environmental impact of a proposed action.” *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). “A determination that significant effects on the human environment will in fact occur is not essential. If substantial questions are raised whether a project may have a significant effect upon the human environment, an EIS must be prepared.” *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982) (internal citation omitted).

Given the Congressionally protected status of ONSR, the water quality impacts to that protected resource that have been dismissed from full analysis, and other impacts from increased visitor use discussed above, the only conclusion is that the RTMP may significantly affect the environment. NEPA requires NPS to perform a full EIS rather than issuing a FONSI for the RTMP.

## V. Where Did the Roads Go?

The Preliminary Alternatives identified the following road alternatives:

	<b>Alternative A</b>	<b>Alternative B</b>	<b>Alternative C</b>
Total Roads	226.1	189	201
NPS Designated	56.5	36	48
County/State	153	153	153

The Draft EA now identifies the following road alternative:

	<b>Alternative A</b>	<b>Alternative B</b>	<b>Alternative C</b>
Total Roads	230	218	219
NPS Designated	72	60	61
County/State	158	158	158

There is no discussion in the EA on why or how these numbers changed. Was it bad math? Was it concessions to Shannon County? Especially unexplained is the fact that somehow Alternative A, which is supposed to represent the current baseline, has shifted from 153 miles of County/State roads to 158 miles of County/State roads in the EA. The explanation in Appendix I regarding negotiations with Shannon County fails to adequately explain these discrepancies instead vaguely alluding to “negotiations” and “accomodat[i]ons.”<sup>18</sup> Similarly, there is no discussion in the EA about why certain decisions were made on the various maps identified in Appendix D or listed in Appendices K, L, and M to keep or close certain roads. Perhaps the NPS took a hard look at these issues, but clearly, that analysis is glaringly missing from the public’s purview in the EA.

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<sup>18</sup> Id., Appendix I, Page I-6.

## **VI. Conclusion**

NPS has failed to comply with NEPA to produce an Environmental Assessment that fully analyzes the impacts from various management alternatives, especially related to water quality. The purpose and need for the RTMP does not comport with the various laws under which the ONSR was established and those laws that apply to NPS, all of which dictate that the natural resources which comprise the ONSR must be given priority and preserved for future generations. Impacts to natural resources must be fully analyzed before selecting a management alternative, and any management decision must meet the purpose and need to protect the park's resources to comply with NEPA and the Administrative Procedure Act. Thus far in the NEPA planning process, NPS has put forth alternatives that arbitrarily and capriciously increase visitor access and use without adequate analysis on whether those alternatives protect the park's natural resources. Because the RTMP may significantly impact the human environment, NPS must conduct an EIS rather than issuing a FONSI. In this EIS, NPS must fully analyze water quality impacts, must redefine the purpose and need, and must consider the no-action alternative in a straightforward manner.

Sincerely,



Bob Menees,  
Staff Attorney