

August 4, 2014

Mr. Joseph Adamson
Recreation, Heritage, and Volunteer Resources Staff
U.S. Forest Service
1400 Independence Avenue SW., Stop 1125
Washington, DC 20250- 1125

Via the Federal eRulemaking portal at <http://www.regulations.gov>

Dear Mr. Adamson:

The undersigned organizations submit these comments on the Forest Service's proposed rule governing use by over-snow vehicles (OSVs). We are encouraged that the Forest Service is finally taking steps to regulate snowmobiles and other OSVs on National Forests. However, we believe the regulation, as proposed, does not sufficiently protect forest resources from the impacts of motorized winter recreation, nor does it comply with Executive Order 11644, as amended.

1. The Final Regulation Must Protect Resources, Promote the Safety of All Users, and Minimize Conflicts Among the Various Uses in Order to Comply with Executive Order 11644, as Amended

As detailed in this section, the impacts from OSVs are significant. Requiring regulation of OSVs on units that have sufficient snow for such use is long overdue. We are pleased that the Forest Service proposes to require regulation of winter motorized use, filling a big hole in the 2005 Travel Management Rule (70 Fed Reg 68264 et seq., November 9, 2005). However, the proposed rule is inadequate. It does not offer a framework that requires units to responsibly manage OSVs in a manner that would minimize impacts and does not require responsible officials to thoroughly consider the impacts when designating trails and areas for OSV use. We offer a brief overview of the impacts from OSVs on forest resources and other forest users to emphasize the importance of establishing an acceptable rule that would minimize these impacts.

a. Ecological Impacts

Impacts of OSV use include the degradation of both air and water quality, affecting both humans and the environment. Two-stroke engines, which represent the vast majority of OSV use on National Forest land, are particularly onerous. A two-stroke snowmobile can emit as many hydrocarbons and nitrogen oxides as 100 cars and create up to 1,000 times more carbon monoxide (EPA, 2002). In addition, snowmobiles, like other combustion engines, emit significant amounts of carbon dioxide (USDI, 2000), which is classified as an air pollutant under section 302(g) of the Clean Air Act and is well-documented to contribute to climate change.

Two-stroke engines emit many carcinogens and pose a danger to human health (Eriksson et al., 2003; Reimann et al., 2009). Two-stroke engines emit dangerous levels of airborne toxins

including nitrogen oxides, carbon monoxide, ozone, aldehydes, butadiene, benzenes, and extremely persistent polycyclic aromatic hydrocarbons (PAH). Several of these compounds are listed as "known" or "probable" human carcinogens by the EPA. Benzene, for instance, is a "known" human carcinogen and several aldehydes including butadiene are classified as "probable human carcinogens." All are believed to cause deleterious health effects in humans and animals well short of fatal doses (EPA, 1993). In addition, two-stroke engines also discharge 25-30 percent of their fuel mixture unburned directly into the environment (Blue Water Network, 2002). Unburned fuel contains many toxic compounds including benzene, toluene, xylene and the extremely persistent suspected human carcinogen Methyl Tertiary Butyl Ether (MTBE). Winter recreationists are especially at risk because the concentration of these emissions increases with elevation and cold (Janssen and Schettler, 2003).

In a study on the Medicine-Bow National Forest, Musselman and Korfmancher (2007) documented a decline in air quality with increased snowmobile activity. They measured higher ambient concentrations of CO₂, NO_x, NO, and NO₂ at a snowmobile staging site and found significantly higher concentrations of these air pollutants on days with significantly more snowmobile activity. The researchers concluded that snowmobile exhaust was degrading air quality.

Not only do snowmobiles increase air pollution – quite significantly in areas where many machines are concentrated – this pollution settles into the snowpack and affects snow chemistry. Musselman and Kormacher (2007) found many changes to snow chemistry on snowmobile trails when compared to untracked powder. These changes included elevated numbers of cations and some anions and a significant drop in pH. Other studies have shown that snowpack concentrations of ammonium and sulfate positively correlate with snowmobile activity (Ingersoll, 1998). Concentrations of toluene and xylene in the snow are also positively correlated with snowmobile traffic (Ingersoll, 1998). Likewise, snowpack concentrations of benzene are higher in areas with heavy snowmobile use (Ingersoll, 1998). When the snow melts, these pollutants, which are stored in the snowpack throughout the winter, are released in a concentrated pulse and can seep into groundwater or enter surface water. However, the effects of this pollution are not well documented.

Air and water pollution are not the only natural disturbances that inevitably result from OSV activity. Silence is a valuable and fragile resource that can easily be shattered by snowmobiles (Vittersø et al., 2004). Natural soundscapes are intrinsic elements of the environment, are necessary for natural ecological functioning (Burson, 2008), and an integral piece of the human-powered winter experience. Noise from snowmobiles severely affects the winter soundscape and impacts both wildlife and other visitors. Animals exposed to high-intensity sounds suffer both anatomical and physiological damage, including both auditory and non-auditory damage (Brattstrom and Bondello, 1983). In addition, in a strictly controlled study in Norway researchers documented that noise was the single most significant variable to negatively affect a cross country skier's recreational experience (Vittersø et al., 2004).

Sounds can occur in both a continuous and intermittent manner. At high intensities, sounds can have a deleterious impact on human hearing if sustained for certain lengths of time (Brattstrom and Bondello, 1983). Intermittent sounds or startle noises have been shown to have many effects on humans including annoyance, disruption of activity, increase in heart rate, vasoconstriction, increase in blood pressure, stomach spasms, headaches, stress, fetal convulsions, ulcers, and

coronary disease (Baldwin and Stoddard, 1973; Brattstrom and Bondello, 1983). However, the larger, more sophisticated, better protected human ear is capable of withstanding high intensity sounds which easily damage smaller, more simplistic ears of many species of wildlife (Brattstrom and Bondello, 1983) and thus animals may be more affected by noise compared to humans. Thus, a vehicle noise limit acceptable in urban areas may be capable of severely damaging the hearing of exposed wildlife populations (Brattstrom and Bondello, 1983).

Indirectly, the noise generated by OSVs can adversely impact animals by impairing feeding, breeding, courting, social behaviors, territory establishment and maintenance, increasing stress, and/or by making animals or their young more susceptible to predation (Luckenbach, 1975; Wilshire et. al., 1977; EPA, 1971; Bury, 1980; Vos et. al., 1985; Baldwin, 1970). According to the Environmental Protection Agency, noise acts as a physiological stressor producing changes similar to those brought about by exposure to extreme heat, cold, pain, etc. (EPA, 1971).

A noise study from Yellowstone involving four-stroke machines, which are much quieter than two-stroke snowmobiles, found that under a “best case scenario” (upwind, no temperature inversion, soft snow) snowmobiles were audible at distances of up to a half mile (NPS, 2000). When there was a temperature inversion or firm snow, or for those downwind of a snowmobile, the machines could be heard more than two miles away (NPS, 2000). At Yellowstone’s Shoshone Geyser Basin, four-stroke snowmobiles were audible from 8 miles away (Burson, 2008).

OSVs can cause mortality, habitat loss, and harassment of wildlife (Boyle and Samson, 1985; Oliff et al., 1999). While most animals are well adapted to survival in winter conditions, the season creates added stress to wildlife due to harsher climate and limited foraging opportunities (Reinhart, 1999). Deep snow can increase the metabolic cost of winter movements in ungulates up to five times normal levels (Parker et al., 1984) at a time when ungulates are particularly stressed by forage scarcity and high metabolic demands. Disturbance and stress to wildlife from snowmobile activities during this highly vulnerable time is dire. Studies of observable wildlife responses to snowmobiles have documented elevated heart rates, elevated glucocorticoid stress levels, increased flight distance, habitat fragmentation as well as community and population disturbance (Baker and Bithmann, 2005).

In many instances, snowmobiles induce animal flight, causing increased energy expenditures. In Yellowstone National Park, for example, evasive maneuvers in response to snowmobiles have been documented in a number of species, including elk and mule deer. These maneuvers result in increased energy expenditures for the affected wildlife. For example, Aune (1981) reported flight distances of 33.8 meters for elk and 28.6 meters for mule deer in response to snowmobiles in Yellowstone. The energy cost estimates calculated for these impacts were 4.9 to 36.0 kcal in elk and 2.0 to 14.7 kcal in mule deer per disturbance (Parker et. al., 1984). These energy expenditures are roughly equivalent to the necessary additional consumption of 4.3 - 31.7 grams of dry forage matter by elk and 1.8 - 12.9 grams by mule deer each time a disturbance occurs. Severinghaus and Tullar (1978) theorize that for white-tailed deer, during a 20-week winter with snowmobile harassment each weekend, “food enough for 40 days of normal living would be wasted just escaping from snowmobiles.”

Wolverine

Dispersed recreational activities, especially winter motorized recreational activities, have the potential to negatively impact wolverine, disrupting and limiting use of natal denning areas. (Carroll et al. 2001, Rowland et al. 2003, May et al. 2006, Copeland et al. 2007, Krebs et al. 2007). Since 94 percent of the currently occupied wolverine habitat in the contiguous United States is in Federal ownership, with most on National Forest land, management of National Forest lands in occupied wolverine habitat is extremely important. Any planning for OSV must evaluate and disclose the effects of dispersed recreation on wolverines and, where necessary, minimize the harm from such activities.

Heinemeyer et al. (1999), for example, refers to the rapid increases in winter recreational activities—in particular the advancements in the power and technology of snowmobile machines—as being a new, potential impact to natal denning habitats. Heinemeyer (1999) discusses a “growing body of evidence” suggesting that “female wolverines are prone to disturbance at den sites, particularly at the natal dens where birthing occurs.” Peak winter recreation activity in central Idaho, measured as the number of recreationists passing infrared trail-use counters, occurs in February, coinciding with the time female wolverines are selecting and entering dens (Heinemeyer et al. 2010). “As snowmobiling and backcountry skiing continue to grow in popularity, there is increasing concern that reproductive habitats may become limiting to populations due to human disturbance. Protection of reproductive denning habitat may be critical for the persistence of wolverine. A clear association between wolverine presence and refugia (e.g., Wilderness Areas) may be strongly linked to a lack of available reproductive denning habitat outside protected areas.” Heinemeyer (1999). Krebs et al. (2007) found that females tended to avoid areas with heli-skiing and backcountry skiing areas, and Copeland (1996) noted den abandonment after human disturbance.

Notably, in Heinemeyer (2001), the researchers “located wolverine tracks throughout the Targhee Creek SU but never within areas of high snowmobile activity. This may indicate that not only are wolverine sensitive to recreational use near denning sites, but also need secure areas for foraging activities.” *Id.* “[I]t appears that snowmobile activity may be forcing [a wolverine] to resort to possibly atypical behavior or risky behaviors to meet winter food requirements.” *Id.*

Noise from OSVs is a likely disturbance factor associated with human activity that may result in harassment and habitat disruption for wolverine. Oliff et al. (1999) studied the effects of winter recreation on wildlife in the Greater Yellowstone area and found that, for mid-size carnivores like wolverine, “...foraging behavior in forested areas may be disrupted along groomed trails and other travel corridors. Displacement or avoidance may occur due to noise of snowmachines or to human presence . . .” Oliff et al. (1999) at 67. A “significant effect on carnivores from winter recreational activities is displacement from or avoidance of high recreational use areas (i.e., groomed trails, marked trails, destination areas, and play areas). Human use will increase where high recreational use areas exist or are provided.” *Id.* at 68.

In the 2009 Beaverhead-Deerlodge Revised Forest Plan FEIS, the Forest Service notes that: (1) wildlife species that inhabit the Forest, including but not limited to elk, wolverine, lynx and mountain goats, experience displacement in winter from snowmobile intrusions into their habitat at the time when demands on their energy reserves are highest (p. 509); (2) female wolverines may be negatively impacted by snowmobiles near their den sites (p. 513); (3) advances in snowmobile technology enable snowmobilers to ride many of the steep slopes and high basins used by wolverines during the February-April birthing and whelping period and there is

“increasing evidence” that females may be harmed by such disturbance near their den sites (p. 513); (4) snowmobile disturbances may have adverse effects on the survival of young wolverine; and (5) increased cross-country snowmobile use can displace wolverines from big-game winter range where they can forage on winter-killed elk and deer. (p. 48, App. B).

Current winter recreation research in Idaho and Wyoming performed by Heinemeyer and Squires indicated that wolverines near human disturbance are likely changing their behavior and activity level in response to human activities (2013). Wolverines in the study areas are apparently changing their activity level at time periods and days of higher recreational use, shifting their activity to avoid the most heavily used areas within their home ranges. As evidenced in numerous studies on different species (Creel et al. 2002), these behavioral changes can negatively affect individuals’ physiological stress levels and reproductive capacity. Those high disturbance study areas may act as a population sink for wolverines.

Lynx

It has long been considered that snow-packed trails created by snowmobiles and other sources might serve as travel routes for potential competitors and predators of lynx, especially coyotes (Bider 1962, Ozoga and Harger 1966, Murray and Boutin 1991, Koehler and Aubry 1994, Murray et al. 1995, Buskirk et al. 2000a; Bunnell, Flinders, and Wolfe 2006). Morphological differences between coyotes and lynx typically appear to spatially segregate these species, as coyotes are disadvantaged in deep, soft snow due to their high foot-load, while lynx are better able to move across those snow conditions (Murray and Boutin 1991, Litvaitis 1992). This natural spatial segregation of lynx and coyotes in winter may break down where human modifications to the environment such as snow-packed trails from snowmobiles allow coyotes to access deep snow areas (Buskirk et al. 2000a). Bunnell et al. (2006) observed more coyote activity along trails compacted by snowmobiles than those that were not. Burghardt-Dowd (2010) applied methods used by Kolbe et al. (2007) in western Wyoming and similarly found that coyotes selected shallower snow when off compacted trails than randomly expected. As both coyotes and lynx prey on snowshoe hares, this increased access of coyotes may lead to competition for prey and thus negatively impact lynx.

Grizzly Bears

Grizzly bears can be susceptible to disturbance at their den sites and can be easily awakened. Research has indicated that disturbance from human activities outside of den sites can negatively impact grizzly bears, particularly in the spring when females and cubs of the year are still present (Mace and Waller 1997). Where grizzly bears occur in the West, they typically den from October or November, with females and cubs emerging from their dens early April to early May. Snowmobiling is often still permitted to occur during these sensitive time periods and can be detrimental to grizzly bear security.

Additional information about the effects of OSVs on wildlife can be found in the 2014 Winter Wildlands Alliance report “Environmental Impacts of Snowmobiles” (WWA, 2014). The new regulation must take into consideration the special needs of wildlife during winter and ensure that designations of areas for snowmobile use minimize impacts.

b. Nonmotorized Recreation Needs

In the background and need section of the proposed Rule the Forest Service rightly states that many types of recreational activities are increasing on National Forest lands.¹ However, the Forest Service blatantly fails to mention non-motorized winter recreational activities – such as backcountry and cross-country skiing, and snowshoeing – in this discussion. Human-powered skiing and snowshoeing predate almost every other winter use on National Forest lands. Across the country there are longstanding traditions of experiencing the quiet and solitude of a winter’s landscape on foot. In addition, human-powered winter snowsports are evolving. Participation in backcountry skiing and snowboarding – either on telemark skis, alpine-touring skis, or splitboards – has become mainstream in the snowsports world and is growing exponentially (Winter Wildlands Alliance 2014 report “Trends and Economic Impacts of Human Powered Recreation”). As these are the activities most likely to be impacted by OSV use, it is important that the Forest Service address them in the background and need section for the final rule when it is published in the federal register.

Human-powered snowsports are disproportionately, and negatively, impacted in encounters with OSVs. While a skier or snowshoer may be, if anything, an annoyance for a motorized user to encounter, the opposite does not hold true. Tracks from just one snowmobile can render an entire slope unsuitable for skiing or destroy a groomed Nordic trail. A small party of snowmobiles can track up an entire basin in the time it takes the same number of skiers to even reach the basin from the trailhead. Breathing in snowmobile exhaust while exercising is unpleasant, unhealthy, and painful. Noise from snowmobiles carries great distances and can intrude on solitude even miles away.

These negative impacts must be disclosed and discussed in detail in the background and need section for the final rule, and forests must be required to address them when making decisions to allow winter motorized use. Failure to do so is arbitrary and capricious and a violation of Executive Order 11644, as amended. We more thoroughly explore these impacts below.

c. User Conflict

In addition to the environmental impacts described above, OSVs can impact both the safety and enjoyment of human-powered recreationists. Paramount among safety concerns are speed and avalanche risk. Modern OSVs can reach speeds well over 60 miles per hour but, unlike wheeled vehicles, they are not confined to roads where their movement patterns are predictable and avoidable. Given that one does not need to have any sort of training in order to operate an OSV, it can be very unsafe for them to share trails with non-motorized users, and skiers and snowshoers are justly concerned about having OSVs racing past or bearing down upon them.

Avalanches are another major safety concern when motorized and non-motorized recreationists try to share an area. Many of our members have experienced snowmobiles high-marking above them when they are skinning uphill or have stopped to assess avalanche danger. This is extremely unsettling and dangerous for skiers and snowboarders, not to mention inconsiderate even in the rare absence of avalanche danger. Untracked snow is among the most valuable resources for winter recreationists – skiers and snowmobilers alike. By high-marking above, or otherwise traveling on the same slope as a skier, snowmobiles track up the snow before skiers

¹ Use by Over-Snow Vehicles (Travel Management Rule), 79 Fed. Reg. 34678 (proposed June 18, 2014) (to be codified at 36 C.F.R. pts. 212 and 261). Background and need section is found at 79 Fed. Reg. 34678 – 34679.

have a chance to enjoy it – even when it is clear that skiers are on a slope and are intending to ski it.

High-marking above a skier who is working their way uphill is not the only way in which OSVs can eliminate recreational opportunities for non-motorized users – it is simply the most dangerous way. If operated on a groomed Nordic ski trail, OSVs can completely destroy the ski track. Likewise, snowmobile tracks create deep ruts in the snow that are incompatible with downhill skiing. These ruts are a safety concern as well because hitting a snowmobile track while skiing down at a high speed can cause a skier to lose control. Given that snowmobiles usually traverse across an entire slope, it is impossible for a skier to avoid these ruts. In addition, a skier may be unaware of ruts and unprepared to avoid them. As skiers generally try to avoid skiing slopes that have been tracked by snowmobiles, they may choose an untracked slope and begin skiing uphill, only to have snowmobiles come through and track up the slope before they have had a chance to ski down. If the mountain is big enough or there are thick trees, it is likely that the skier will not see the snowmobiles below and be unaware of the tracks until they ski into them.

Noise is another major driver of non-motorized/motorized conflict in the backcountry. As mentioned above, snowmobile noise can travel extremely far, particularly in an otherwise quiet soundscape. Skiers and snowmobilers alike head into the backcountry for solitude and silence. However, while a snowmobiler has control over the noise they experience – they can turn off their sled when they want to sit and appreciate the silence of a frozen world – skiers and snowshoers are at the mercy of motorized users. Even when skiing in Wilderness areas far removed from OSVs, the distant whine of engines is often a constant companion. This problem will only get worse as snow-bikes, which are much louder than snowmobiles, continue to grow in popularity. While no amount of zoning can completely protect natural soundscapes, limiting OSVs to restricted areas and taking sound travel patterns into consideration when designating motorized trails and areas will help. Winter travel planning, if done right, can offer non-motorized users opportunities to protect and experience a quiet winter world.

Given these impacts, it is clear that the new OSV Rule must require units to complete a thorough and comprehensive environmental effects analysis of OSVs as part of travel planning. While it is true that OSVs have *different* impacts than ORVs, this does not mean they have *no* impacts. Even when operating over several feet of snow, OSVs still significantly impact the environment and others who may be trying to enjoy it. By taking a comprehensive view of the landscape to determine where OSVs are and are not appropriate, travel planning is an opportunity to reduce user conflict and protect sensitive winter ecosystems. The final rule will serve as a framework for units to follow as they undergo winter planning; this rule must ensure that units protect resources, ensure all users recreate safely, and minimize conflicts between user groups in winter travel plans.

2. Minimization Criteria Will Not Be Appropriately Applied to Trails Designated Within Areas

OSV trails have a different, and negative, impact on the environment that must be evaluated before they are designated as open for use. This remains true even when these trails are located within a larger area where cross-country travel is permitted. The new regulation fails to require forests to complete an analysis of the specific impacts of OSV trails. By not clearly requiring the

analysis of trails within areas, the proposed rule ignores the legal obligation to show that those routes will not have a negative impact on the environment or other users. Thus, there is no way to ensure that the minimization criteria outlined in Executive Order 11644 is applied to trails designated within motorized areas.

Under Executive Order 11644 and 36 CFR § 212.55(a), the Forest Service is obligated to consider the effects of roads, trails, and motorized areas on cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of National Forest lands, and the need for and availability of resources for maintenance and administration of motorized routes and areas. In addition, Executive Order 11644 and 36 CFR § 212.55(b) specify that the Forest Service must consider, and minimize, effects from motorized routes and areas on forest resources, wildlife and their habitats, conflicts with other uses or different types of motor vehicles, and compatibility of motor vehicle use with existing conditions in populated areas. All of these criteria, which apply to wheeled motorized vehicles and must be considered upon designating routes and areas for wheeled motorized use, also apply to OSVs and must be considered and minimized when designating routes for OSV use. The EOs require designation of "specific areas and trails" that are permitted for use, and not just designation of "areas" that are not permitted for use. Designation of areas AND trails must occur when authorizing the use of OSVs, and the Forest Service cannot simply rely on broad area designations to satisfy this requirement.

We are especially concerned about the proposed lack of analysis for trails within OSV areas given that the proposed rule expands the definition of an "area." The expanded definition could conceivably mean a forest could declare an entire ranger district to be an "area" and an analysis of OSV impacts at such a large scale would be next to impossible. We strongly disagree with this expanded definition, and will go into more detail on this point below, but we want to emphasize that the existing definition of "area" in the 2005 TMR is sufficient to allow for continued cross-country OSV use and the Forest Service has provided no rational explanation as to why that definition should be changed for OSV management. The existing definition of "area" already allows for OSV use areas to be larger than ORV use areas. Larger open areas make it essential to analyze impacts from OSV trails within these areas. To do otherwise would not meet the requirements of 36 CFR § 212.55 and would violate Executive Order 11644.

Scientific evidence suggests that popular winter trails can fragment habitat and wildlife populations. Winter trails through surrounding wilderness areas or other core areas create more "edge effect" and thereby marginalize the vitality of some species (Baker and Bithmann, 2005). OSV trails can also facilitate competition between wildlife species by allowing species that are less well-adapted for over-snow travel to move into habitat that would be inaccessible to them in the absence of a compacted trail. For example, OSV trails may enable coyotes to utilize lynx habitat that is not normally accessible to them (Koehler and Aubry, 1994; Buskirk, 2000; Bunnell et.al., 2006). Coyotes aggressively compete with, or prey upon, a number of different vertebrate species, including Canada lynx, that are adapted and limited to deep snow (Buskirk et. al., 2000). Given the potential for OSV trails to impact wildlife habitat use, it is imperative that such trails be properly analyzed prior to being incorporated into an official winter travel plan.

Official trail systems attract and concentrate use above and beyond that found in dispersed-use areas, and grooming programs come with their own set of impacts. While we are not opposed to all OSV trails – groomed or otherwise – it is important that the Forest Service analyze the

impacts of increased use and consider what effect a motorized trail system may have on non-motorized users and the environment prior to authorizing continued OSV use of these trails. Through thoughtful analysis and with public input the Forest Service can plan out appropriate routes for OSV trails and minimize conflicts with other uses, natural resources, and wildlife.

Many OSV trails follow existing Forest Service roads. These snow-covered roads are an important recreation amenity for non-motorized users as well as motorized users. Single-track trails are often difficult to follow in the winter and many skiers and snowshoers, particularly families or less-experienced users, utilize snow-covered roads for winter outings. The safety and enjoyment of visiting National Forests lands for these individuals is considerably diminished in the presence of OSVs because of the speed at which many OSVs travel and the air and noise pollution that they cause. Therefore, most skiers and snowshoers avoid using roads that are also used by OSVs. Proper analysis is required to ensure that there is equal opportunity for everybody to utilize these routes and to determine which roads are best suited for OSVs and which provide valuable non-motorized opportunities. While it is appropriate to designate many Forest Service roads as OSV routes, some provide valuable non-motorized opportunities in the winter and non-motorized designations for these routes may be appropriate.

In addition to considering the impacts of designating existing roads for OSV use, it is imperative that the Forest Service always undertake careful analysis prior to designating OSV trail systems. Unanalyzed trail systems have led to increased user conflict in the past (see Winter Wildlands Alliance's 2014 report "Winter Recreation Planning" for a case study on the Eldorado National Forest²). Again, we emphasize that while providing OSV trail systems is itself not problematic, the Forest Service must analyze how these trails affect existing uses in an area. Much of the conflict between skiers and OSVs is the result of increased OSV traffic displacing skiers from areas they have historically used. As trails attract users, designating OSV trails in areas with established ski use will almost certainly displace skiers. By undertaking a thorough analysis before designating trails, even when those trails are located within areas open to cross country travel, the Forest Service can avoid or reduce conflict by locating trails away from important backcountry ski areas or create new opportunities by also designating non-motorized trails and areas.

Prior to designating OSV trails, regardless of whether cross-country use already exists, it is critical that the Forest Service analyze how such a trail system will impact natural resources (trails bring increased air/water/noise pollution due to increased use, produce negative effects on wildlife, etc.), other uses in the area (concentrated or increased motorized use may crowd out quiet users), and user safety (snowmobiles move markedly faster on groomed trails than through powder). The wording in the draft rule does not indicate whether impacts of trails would need be analyzed at all. Nor is it clear whether trail grooming plans would fall under travel management planning or some other process.

Recommendation

We request that the Forest Service clarify in the final rule the need to apply the minimization criteria to designated trails within areas. Failure to evaluate trail designations using the minimization criteria would leave units in violation of Executive Order 11644, as amended. We

² Available online: <http://winterwildlands.org/wp-content/uploads/2014/06/Winter-Recreation-Planning1.pdf>.

urge the Forest Service to change the language in the preamble to the final rule to require that *all* OSV trails undergo thorough analysis through travel planning, including those within areas open to cross-country OSV use. Specifically, we request that the Forest Service strike language as shown below from the preamble of the rule found on page 34679, and replace it with the underscored language:

Section-by-Section Analysis of the Proposed Rule

Part 212, Subpart A

Section 212.1 Definitions

Current § 212.1 of the TMR defines an area as a discrete, specifically delineated space that is smaller, and in most cases much smaller, than a Ranger District. The definition for an area in the proposed rule would recognize that cross-country OSV use may occur across a broader landscape. ~~As with evaluation of an area for other types of motor vehicle use using the designation criteria in § 212.55, evaluation of an area for OSV use using the designation criteria in § 212.55 may be holistic and need not address each route within the area, as OSVs will be able to travel cross-country within it. Designated and mapped OSV trails, no matter the overall management status of the surrounding area, have~~ increased impacts on wildlife, other users, and forest resources that should be analyzed independently from the impacts of broader designated areas available for cross-country travel.

3. The Draft Rule's Definition for Area Designations as Applied to OSVs Should Be Rewritten

We are concerned that the proposed rule would continue to allow cross-country travel over extremely large areas by defining the term “area” as a space “. . . that is smaller, and, **except for over-snow vehicle use**, in most cases much smaller, than a Ranger District.” Section 212.1 at page 34681 (emphasis added). As is stated above, the Forest Service has provided no rational reason to differentiate between areas open to summer and winter motorized uses in the final rule governing OSV use. This proposed definition violates the ORV Executive Orders, is arbitrary and capricious, requires the agency to complete an Environmental Impact Statement (EIS) to analyze the impacts under the National Environmental Policy Act (NEPA), will result in problems and potential conflict for forest and district staff in terms of implementation and, simply put, will result in bad land management.

At a minimum, the Forest Service should clarify in any final rule that its intention is to effectively limit areas available for cross-country travel to areas much smaller than any ranger district. Finally, the Service should also make clear that an area available for cross-country travel does not need to be established on each National Forest or Ranger District.

a. The Draft Rule's definition for Area designations as applied to OSVs violates Executive Order 11644

Executive Orders 11644 and 11989 require that the designation of areas and trails shall be located to minimize:

- (1) damage to soil, watershed, vegetation, or other resources of the public lands.

(2) harassment of wildlife or significant disruption of wildlife habitats.

(3) conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

The current definition of an 'area' designation under the Travel Management Rule reads:

Area. A discrete, specifically delineated space that is smaller, and in most cases much smaller, than a Ranger District.

36 C.F.R. § 212.1. The draft OSV rule proposes to change the definition of 'area' as applied to OSVs as follows:

Area. A discrete, specifically delineated space that is smaller, and, **except for over-snow vehicle use**, in most cases much smaller, than a Ranger District.

Use by Over-Snow Vehicles (Travel Management Rule), 79 Fed. Reg. 34678 (proposed June 18, 2014) (to be codified at 36 C.F.R. pts. 212 and 261) (emphasis added).

A literal interpretation of the draft rule's definition would allow units to designate areas for snowmobiles that are smaller, but not much smaller, than a Ranger District. Ranger Districts vary in size from 50,000 acres to more than a million acres. It is common in western National Forests for districts to be 300,000 acres and larger. Open area designations could, therefore, be hundreds of thousands of acres under the proposed rule. With snowmobiles becoming increasingly powerful, hard to reach backcountry areas are becoming easier to access. The proposed rule's approach for managing OSVs is essentially: if you can get there, you can go. The agency's proposed definition is so lenient that it is conceivable that many units will take a status quo approach for OSV management (i.e. designate most of the forest as open to OSVs) whereby very little will actually change on the ground. Impacts and conflicts associated with the current management paradigm are documented in the preamble for the proposed rule³ and discussed in section 1 of this letter. The effects from unmanaged OSVs will continue unabated under the agency's proposal to allow units to designate enormous open areas, which is essentially choosing "hands off" management of OSVs. This approach certainly will not minimize and could even exacerbate these impacts.

Large open area designations as big as ranger districts do not comply with the language or intent of the Executive Order, as amended. The Executive Order is clear based on its language and purpose that "open" designations must be site-specific and cannot be large blanket designations that cover huge areas. First, the purpose of the Executive Order is to ensure that use of off-road vehicles, including OSVs, on public lands will be "controlled and directed" so as to protect resources, promote safety, and minimize conflicts. Executive Order 11644, Sec. 1. It is impossible to control and direct use of OSVs if open areas are hundreds of thousands of acres. Second, the Executive Order says that the Forest Service must identify "zones of use" by designating "specific areas and trails" where use may be permitted, and "areas" where use may not be permitted. Executive Order 11644, Sec. 3. Designation of "such areas and trails" must

³ Use by Over-Snow Vehicles (Travel Management Rule), 79 Fed. Reg. 34678 (proposed June 18, 2014) (to be codified at 36 C.F.R. pts. 212 and 261).

protect resources, promote safety, and minimize conflicts. Thus, it is clear that the Forest Service must designate "specific" areas as open or designate "areas" as closed. Using the word "specific" to characterize open areas but not closed areas shows the intent to make smaller site-specific designations of open areas or make larger closure designations that do not have to be as site-specific. Furthermore, units must apply the minimization criteria such that "areas and trails shall be located" to minimize damage to resources, harassment of wildlife, and conflicts with other users. Again, this indicates that "areas" are site-specific designations that are specifically "located" to avoid harm. Blanket open areas that cover most of a ranger district are not consistent with the Executive Order language and intent that open designations are "specific" areas that are "located" by the agency in certain places.

The Forest Service entirely avoids analysis of the environmental effects of establishing a rule that would allow the agency to designate hundreds of thousands of acres for OSV use. Allowing units to designate motorized cross-country travel areas that are hundreds of thousands of acres is irresponsible and will cause tremendous impacts on forest resources and other uses. This lack of review violates the letter and intent of NEPA.⁴ If the agency continues on its path to change the area definition, the significance of the impacts associated with the change will require the agency to develop an EIS.

We strongly urge the Forest Service to refrain from changing the current area definition. We agree that open area designations make sense for OSVs in many situations, but the proposed change in the definition is unnecessary, outrageous, irresponsible, will result in significant environmental impacts, and is not compliant with the ORV Executive Orders.

b. The Draft Rule's definition for area designations is arbitrary and capricious

The Supreme Court has found that an agency must provide some justification when making a decision. "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "The agency must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962). The Forest Service did not adequately explain why it needs to change the area definition.

⁴ A NEPA analysis is required for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c)(1970); see *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004). Case law is unambiguous on whether NEPA is required for planning rules. "The Planning Rules constituted a major federal action, defined by the regulations to include adoption of official policy such as rules, regulations, and interpretations and formal documents establishing an agency's policies which will result in or substantially alter agency programs." *Citizens for Better Forestry v. USDA*, 497 F.Supp.2d 1062, 1074 (N.D.Cal. 2007) (*internal citations omitted*), *overruled in part by Citizens for Better Forestry v. USDA*, 567 F.3d 1128 (9th Cir. 2009). It is important to note that not all rulemakings require a NEPA analysis. The touchstone for determining whether a rule requires NEPA is the nature of the rule. A rule can significantly affect the quality of the human environment directly or indirectly. *Id.* Most relevant to rulemaking, indirect effects are "caused by the action and are later in time or farther removed in distance, but are still readily foreseeable." *Id.* This proposed rule does not, in and of itself, affect the ground. However, *actual* physical effect is not a prerequisite of NEPA. The OSV rule will establish the framework that all units will follow when undergoing winter travel planning. Changing the area designation in the manner proposed in the draft rule will have significant indirect effects on millions of acres of National Forest.

We argue that the existing definition is sufficient. That a few units successfully underwent dual summer and winter motorized travel planning under the 2005 Travel Management Rule using the existing area definition demonstrates that there is not a problem with the existing area definition. It is arbitrary and capricious for the agency to change the definition without an adequate explanation as to why the existing definition is not sufficient.

c. The Draft Rule’s definition for area designations will be difficult, if not impossible, for forest and district staff to effectively implement when embarking on winter travel planning

i. NEPA compliance will be extremely onerous for individual forest units

Decisions to authorize cross-country travel in any area must be predicated on site-specific analysis and public participation under NEPA. The analysis required to comply with NEPA when designating large open areas would be extremely onerous. Units will need to do a site-specific analysis for all resources within an area designation. This would require the standard “hard look” under NEPA analyzing direct, indirect, and cumulative impacts.

For instance, the agency will need to analyze the site specific impacts, including the impacts from noise pollution, to threatened, endangered or sensitive wildlife species, Management Indicator Species, important game species, non-motorized recreational users, places that are protected or proposed for protection such as Recommended Wilderness Areas, and roadless character from allowing this cross-country travel provision. The agency will need to analyze impacts on water and air quality as well. This is just a short list of the site specific environmental impacts that must be analyzed. A generic environmental review will not be adequate. The requisite environmental analysis of the impacts from designating hundreds of thousands of acres for OSV use is far beyond the capability of any individual forest unit.

ii. Executive Order compliance will be difficult or impossible for units

All National Forest land that would be impacted by an open area designation must be evaluated using the minimization criteria from the Executive Orders. Two recent U.S. District Court decisions regarding the minimization criteria for travel management planning provide clarification about what is required when evaluating the criteria: *Idaho Conservation League (ICL) v. Guzman*, 2011 WL 447456 (D. Idaho Feb. 4, 2011), and *Center for Sierra Nevada Conservation et al., v. United States Forest Service* (Eldorado National Forest), case # S-09-2523 (E.D. CA. May 26, 2011). In *ICL v. Guzman*, the court held that the Forest Service must not only *consider* the minimizing criteria found in Executive Order 11644, but must also demonstrate how the agency *applied* those minimization criteria. The *Eldorado* decision affirmed this requirement.

If a unit’s NEPA documentation for a winter travel management plan does not adequately reflect how the Forest Service *applied* the minimization criteria in the Travel Management Plan designations, the agency’s decision is in violation of the Travel Management Rule. It is not enough to simply consider the minimization criteria with respect to area designations; the agency must also demonstrate how the minimization criteria were then implemented or applied in the designation decision process, consistent with the objective of minimizing impacts.

These cases are consistent with the 2009 decision from the Northern District of California in which the court held that the Bureau of Land Management must comply with the same Executive Orders by placing “routes specifically to minimize ‘damage’ to public resources, ‘harassment’ and ‘disruption’ of wildlife and its habitat and minimize ‘conflicts’ of uses.” *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, ---F.Supp.2d---, 2009 WL 7036134 (Sept. 28, 2009).

If the proposed definition is codified, many units will propose area designations nearly the size of entire ranger districts. At this scale, it will be difficult, if not impossible, for the agency to demonstrate and document that it applied the criteria in its area designations, consistent with the objective of minimizing impacts. It will be easier for the agency to comply with the minimization criteria if area designations are smaller in size. To this end, the current area definition should not be changed.

The Executive Orders also state that federal agencies:

shall ensure that areas and trails where off-road vehicle use is permitted are well marked....

Exec. Order No. 11,644, Section 5, 37 Fed. Reg. 2877 (Feb. 8, 1972) as amended by Exec. Order No. 11989, 42 Fed. Reg. 26959 (May 24, 1977). Even with the publication of winter MVUMs, it is imperative that the Forest Service post signs and demarcate where OSVs are allowed. On-the-ground signage remains an important education tool to ensure compliance with winter plans. The proposed rule allows units to designate extremely large areas in their winter planning process. If the Forest Service retains this language in the final rule, the agency should anticipate excessively large area designations that are hundreds of thousands of acres. The Forest Service must comply with Section 5 of the Executive Orders, which could be extremely difficult – if not impossible – if landscape level area designation do not have clear physical boundaries. Units may find themselves in violation of the Executive Orders’ requirement to ensure open areas are well marked if they follow the draft rule’s approach for area designations.

d. The Draft Rule’s definition for Area could result in conflict at the unit level

Across the West unregulated motorized winter recreation has degraded the quality and safety of many places for non-motorized recreation. Historically, steeper roadless slopes, ridges, cirques, couloirs and bowls were places where non-motorized users could naturally separate and recreate without the need of designated non-motorized areas. However, modern snowmobiles can negotiate terrain previously inaccessible to them. These advances in snowmobile technology have eroded the natural separation that previously limited conflict between motorized and non-motorized recreationists. The proposed area definition does not offer an adequate solution to this conflict and, in fact, will only exacerbate the problem.

For example, at Togwotee Pass, which straddles the Bridger-Teton and Shoshone National Forests, snowmobiles are unregulated and can travel anywhere outside of the wilderness boundary. As a result, non-motorized users have been squeezed into tight places between trees where snowmobiles cannot go or forced into the nearby wilderness areas - which are too far away for many skiers and snowshoers to reach in a day trip. Those skiers and snowshoers who utilize areas accessible to snowmobiles and outside of the wilderness must contend with heavily tracked snow, noise and air pollution, large speeding vehicles, and general disregard for their

activity. This conflict could be alleviated by limiting where OSVs can drive and managing part of Togwotee Pass where skiing historically occurred as non-motorized. However, the Forest Service has repeatedly refused to do so because the agency has thus far had no requirement to manage snowmobiles in a manner that addresses their impact on other users or the environment. The cross-country travel allowance on the Togwotee Pass offers a glimpse into how the proposed change in the area definition could unfold. Units may choose to utilize the proposed definition in place of true winter planning by designating massive open areas, which offers little in terms of a solution to resolve conflict.

The agency's proposed area definition will allow units to designate open areas that are hundreds of thousands of acres. As explained above, if a unit does fully utilize this lenient area designation, impacts and conflicts could continue unabated. Should this happen, the only recourse for non-motorized recreationists, citizens and organizations concerned about user-conflict and the conservation of forest resources may be to object and possibly litigate irresponsible decisions. We, therefore, urge the Forest Service to retain the original definition of an area as written in the 2005 Travel Management Rule. Doing so will establish a responsible framework for units to follow, foster smarter planning, and will help ensure that winter planning is not unnecessarily mired in conflict.

e. Large area designations are not enforceable and will lead to bad land management

The proposed area designation will make entire landscapes available to OSVs. This means law enforcement officers (LEOs) will be responsible for patrolling more land to ensure public safety and compliance. Much of the land swept up in large area designations will be in the backcountry, in hard to reach places that are time consuming for LEOs to access. Significant budget cuts have resulted in fewer LEOs available for patrols, which only exacerbates the burden on the agency's law enforcement program. It is therefore reasonable to assume that, if nearly an entire ranger district is designated as open to OSV use, monitoring and enforcement will likely not occur for most places. In fact, it is worth noting that this is already the case. The proposed definition will allow this problem to continue unabated and will create a management situation the agency is simply unprepared to handle.

The existing definition gives units significant discretion when making area designations. With this discretion, it is not necessary to differentiate OSVs from wheeled ORVs. By making such a differentiation with the proposed change, the agency indicates that units should use large areas for OSV designations, which actually limits discretion and pushes managers to use the open unless closed policy. Instead of the rule pushing in one direction, it should leave this determination up to local managers by keeping the existing definition in place.

It is reasonable to expect many units to take the easiest approach when undergoing winter planning. The proposed area definition will enable units to simply blanket an entire district as open to OSVs without taking into account on-the-ground knowledge and observation. For example, we are concerned that units will attempt to overlay area designations across entire districts ignoring physical conditions, rider preferences (e.g., areas that are most/least popular, access to developed facilities; problem areas, and so forth), presence of private property, destinations popular with quiet recreationists, occurrence of winter wildlife and water.

It is important that the Forest Service create enforceable and responsible winter plans. To this end, the agency should:

- Designate routes and open areas based on on-the-ground knowledge and observation.
- Create buffers around residential areas and ecologically sensitive zones such as streams. For example: In the Oregon Dunes National Recreation Area, there is a sound buffer between designated off-road vehicle (ORV) routes and residential areas.
- Limit motorized staging areas to a few points that law enforcement officers can quickly access and reliably find violators as they return to their passenger vehicles.
- Create routes within contained areas (e.g., between ridgetops or within small watersheds). This makes enforcement easier, contains noise, and discourages illegal incursions into areas off-limits to motorized use.
- Designate and manage separate areas for motorized and nonmotorized recreation. For example, on the Sawtooth National Forest, winter recreation areas in the Wood River Valley are delineated by ridgelines. Some are designated for motorized or nonmotorized use only, and some are left open for shared use. Using natural features as boundaries is critical in winter, when other landmarks may be covered with snow.

Conditions vary widely across the landscape, and management prescriptions, like those offered above, should vary with site-specific conditions to account for site-specific impacts; the proposed area definition is simply too blunt an instrument to adequately address this need.

Recommendation

The proposed definition for an area designation is not compliant with the Executive Orders' minimization criteria, is arbitrary and capricious, and will require the Forest Service to develop an EIS because it could cause significant impacts. The Forest Service should narrow the area definition to ensure that impacts are minimized per the Executive Orders. To this end, we urge the Forest Service to refrain from changing the existing definition for area. Finally, the Forest Service should also make clear that an area available for cross-country travel does not *need* to be established on each National Forest.

4. Protecting Roadless Areas, including Agency Recommended Wilderness and Wilderness Study Areas

ORVs are as big a threat to roadless areas as logging and road building. Former Chief of the Forest Service, Dale Bosworth called "unmanaged recreation," including use of ORVs and snowmobiles, one of the "top four threats" to our National Forests. Increases in the volume of use, size of vehicles and advances in ORV and OSV technology are degrading the wilderness character of many Forest Service recommended wilderness areas and other roadless areas. In many instances, OSVs are accessing roadless areas and are creating a constituency that feels entitled to continue their use in these places. This use is causing significant impacts to the roadless area's character and forest resources. For example, despite a long-standing recommendation for wilderness designation, the Forest Service continued to allow winter motorized recreation throughout additions to the Hoover Wilderness on the Bridgeport Ranger

District of the Humboldt-Toiyabe National Forest in California. (Photo below taken in 2006.) As a result, Congress did not designate as Wilderness all of the areas recommended by the agency when it passed its omnibus public lands legislation early in March 2009. Rather, those portions where the Forest Service allowed snowmobile use inside recommended wilderness were designated as a winter recreation area, which is intended for use primarily for winter motorized vehicle recreation. The agency's management of its recommended wilderness directly reduced the potential for wilderness designation.



Recommendation

Clearly, roadless areas, the last vestiges of non-wilderness peace and quiet, must be protected from ORV and OSV use. We support the Forest Service policy for managing non-conforming uses in Recommended Wilderness and Wilderness Study Areas in Region 1 and encourage the Forest Service to codify this policy nationally in the final rule. To this end, we request that the Forest Service amend 36 CFR § 212.55(e), Congressionally designated wilderness areas and primitive areas of the rule, to read as follows:

(e) Wilderness areas, ~~and primitive areas,~~ Inventoried Roadless Areas, agency recommended wilderness areas, and wilderness study areas. National Forest System roads, National Forest System trails, and areas on National Forest System lands in

wilderness areas, ~~or~~ primitive areas, Inventoried Roadless Areas, areas recommended for wilderness in land and resource management plans, or wilderness study areas shall not be designated for motor vehicle use pursuant to this section, unless, in the case of wilderness areas, motor vehicle use is authorized by the applicable enabling legislation for those areas.

5. The Draft Rule's Provision that Forests can Manage Snowmobile Use as Open Unless Closed/Closed Unless Open is Arbitrary and Capricious and Must be Rewritten

The Forest Service has not provided adequate rationale to support its decision to allow snowmobile areas to be managed as either "allowed unless prohibited" or "prohibited unless allowed." This dual designation scheme, combined with the fact that snowmobile management decisions can be made at the district or smaller level, will create confusion between neighboring districts and neighboring forests. The possibility of one district/forest designating their management area under one regimen, and another choosing the opposite, is very possible. This is particularly likely given that forests that have already undergone winter travel management planning processes have chosen to manage snowmobiles as "closed unless designated open."

Furthermore, the Forest Service ignores one of the main rationales noted in the 2005 proposed and final Travel Management Rule: the need for a consistent policy that applies across all forests. *See, e.g.*, 70 Fed. Reg. 68264, 68266 (Nov. 9, 2005). The Forest Service has provided no explanation as to why that rationale does not apply for OSV management.

The attempt to justify this decision by asserting that the impact of OSVs is different than the impact of wheeled vehicles fails. OSVs still have impacts on resources and create conflicts between forest users that would be better addressed with the prohibited unless allowed scheme. This clear failure to adequately explain its decision to not adopt the consistent and commonsense management scheme maintained for summer motorized vehicles where areas are closed, unless designated as open, becomes even more obvious when looking at the failure of past motor vehicle enforcement efforts. The Forest Service is not provided with sufficient funding to install adequate signs or replace those that are stolen or vandalized. The "allowed unless prohibited" policy creates an incentive for irresponsible motorized users to remove closure and boundary signs. When the management scheme places the burden on the land manager to maintain signs and barriers that indicate where closure boundaries exist, enforcement fails and the natural resources, wildlife, and other forest users face the consequences. The Forest Service clearly admitted to this problem in the Federal Register notice for the 2005 Travel Management Rule, and has provided no explanation here as to why it would be different under this proposed rule for winter motorized use. *See* 70 Fed. Reg. 68283.

This problem is exacerbated when the management system is not consistent, and so motorized users will not know whether an area is "allowed unless prohibited" or "prohibited unless allowed" without those signs as indicators. A clear message needs to be given to motorized users that their activity is allowed only in those places where the Forest Service has specifically verified that wildlife, such as lynx and wolverine, and other forest resources such as water, air, and forest soundscapes, will not suffer.

Instead, the Forest Service should adopt a regulation with a consistent management scheme that is more easily administered and understood by the general public. Furthermore the final regulation should provide for a clear enforcement mechanism when violations of closed areas occur. For summer use, the burden is on motorized users to know which areas and trails are legal for motorized travel, and by what type of vehicle. If they are on trails or in areas that are not displayed on a motor vehicle use map, they can be ticketed. The final rule should make it clear that the same enforcement mechanism will be used for OSV use. This would be more easily implemented with a “prohibited unless allowed” classification.

Executive Order 11644 required land management agencies to “establish policies and provide for procedures that will 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.” Creating a confusing and inconsistent management structure fails to adequately “control and direct” OSV use.

Furthermore, a designation practice of open unless closed presumes that OSVs are appropriate everywhere with sufficient snow, but that the Forest Service has the option to close areas where impacts are severe. Closed unless open is more consistent with the intent of the Executive Orders by requiring that, before motorized use is allowed, the Forest Service must show that impacts to resources have been minimized.

Recommendation

We recommend that the Forest Service adopt a regulation that requires OSVs be managed in a consistent manner under a prohibited unless allowed management structure. There is no rational reason to allow forests and ranger districts to adopt potentially inconsistent management regimens, which would only confuse forest visitors and make enforcement of closures more difficult, if not impossible.

6. Incorporation of Prior Decisions

The proposed rule does not adequately address several important considerations in carrying forward past decisions. There are three main problems with this proposal. First, incorporating decisions that only cover portions of a district or unit would create a piecemeal planning approach. Second, the absence of any time restriction on prior decisions that can be used to satisfy the new regulation could result in the agency carrying forward dated and ineffective inappropriate plans into the future. Finally, the lack of a clear requirement for forests to show how past decisions considered the minimization criteria is problematic. These issues bring up both pragmatic and legal considerations that we consider below, and which we feel must be remedied in the final rule and the directives that follow.

While it might be appropriate to not revisit some past decisions governing the management of OSVs, the regulation should place sideboards on whether past decisions qualify for incorporation into future management regimens. Decisions where stakeholders have already spent time providing input, Forest Service staff have analyzed impacts, and money has been spent on the development, enforcement and monitoring of these plans might be justified in being used for future OSV management. Where comprehensive plans exist that included robust public

participation, demonstrably meet the minimization criteria, and are still timely, those decisions should indeed be allowed to stand. Otherwise, the decisions should be revisited.

a. Partial Past Decisions

The draft language regarding public involvement and the incorporation of prior decisions governing OSV use over part of an administrative unit is confusing – allowing for multiple interpretations – and should be clarified in the final rule. It reads:

§ 212.81(b) of the proposed rule would provide that public notice with no further public involvement is sufficient if an administrative unit or Ranger District has made previous administrative decisions, under other authorities and including public involvement, that allow, restrict, or prohibit OSV use on NFS roads, on NFS trails, and in areas on NFS lands over the entire administrative unit or Ranger District, or parts of the administrative unit or Ranger District, where snowfall is adequate for OSV use to occur and no change is proposed to these previous decisions.

Where only a portion of an administrative unit or Ranger District receives adequate snowfall for OSV use, it makes sense to create a plan governing use over only that portion of the landscape. If an existing plan governs use over that entire snow-covered portion of a Ranger District or administrative unit – and it met public involvement requirements and minimization criteria analysis – that plan should not need to be revisited. But, prior decisions governing use on only a portion of a landscape that receives adequate snowfall for OSV use should not be allowed to carry forward.

Prior partial decisions form a starting point, but should be considered in an analysis that takes a landscape scale approach, rather than a piecemeal one that would result if prior decisions covering portions of a ranger district were allowed to carry forward without further analysis. Existing Forest Plan standards and guidelines, forest orders, or other decisions under 36 CFR § 295 are a good foundation for beginning comprehensive planning, but they are not comprehensive travel plans and should not be treated as such.

We are particularly concerned that pairing an “open unless closed” approach to travel planning with prior partial decisions would result in very little actual planning. For example, a small-scale winter plan that covers only a small portion of a district that was undertaken to deal with a “hot spot” of conflict between user groups could be used to serve as the winter plan for the whole district.

We are also concerned that the proposed definition for open “area” designations would enable units to carry forward prior decisions that were not specific in nature and may not have been intended for that purpose. For example, Recreation Opportunity Spectrum (ROS) designations made in a forest plan revision process could be repurposed to fulfill the agency’s OSV planning obligations. The draft rule’s “open unless closed” proposed management paradigm when combined with the provision that allows units to carry forward past decisions creates an enormous loophole wherein units could completely bypass real winter planning.

To understand the potential impacts of closing or opening a certain area, it is necessary to consider management of adjacent lands as well. This idea is nothing new to the Agency, as evidenced by cumulative effects analyses and the emphasis on an all-lands approach in the new

forest planning rule. We simply ask that the Rule is consistent with what the Forest Service does, and does well, for other resources and in other seasons.

b. Decision Longevity

Conditions across the National Forest System – in both the landscape of winter recreation, and the landscape itself – have undeniably changed over the past several decades. More people are recreating in the winter, and in different ways. Technological advances in snowmobiles and ski equipment have allowed more people to explore deeper into the backcountry. Species have been added to the endangered species list. Climate change is here, and we are already seeing impacts on our mountain snowpack. These changes on the National Forest System are not accounted for by the language allowing for the incorporation of prior decisions in the draft rule.

The Council on Environmental Quality has the following recommendation on the longevity of NEPA Analysis:

[Q] 32. **Supplements to Old EISs.** Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement. If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

Questions and Answers About the NEPA Regulations, Council on Environmental Quality, 46 Fed Reg 18026, 18027, March 23, 1981 (emphasis added).

Regulation of OSV use is certainly an ongoing program, with ever changing impacts as a result of climate change and changes in wildlife populations. Therefore, the above guidance applies to NEPA documentation for decisions on OSV regulation and the Forest Service must justify why prior decisions are still valid before blindly incorporating them indefinitely into the future.

When providing notice to the public that past decisions are being incorporated under 36 CFR § 212.81, the Forest Service must provide documentation demonstrating that prior decisions are still adequate for current conditions. Otherwise, carrying these decisions forward could be challenged as arbitrary and capricious and not in compliance with the laws that regulate motor vehicles on public lands.

c. Validity of Prior Decisions

Two issues about the incorporation of prior decisions have already been raised: there is no time restriction on prior decisions, so an administrative unit or Ranger District could rely on something that is woefully out of date and in need of revision; and, the draft appears to allow for prior decisions governing OSV use to parts of an administrative unit or Ranger District to

continue to apply with no further analysis, thereby using a piecemeal approach to planning. Further, with an “open unless closed” approach, a localized decision could stand-in for a comprehensive plan or a unit could repurpose a decision made in a forest plan revision that is loosely related to OSVs to satisfy its obligations under the new regulation.

Perhaps most concerning, is that there is no mention in the draft rule of the application of the minimization criteria as required by Executive Order 11644, and the Court Order. There is reference to other authorities, but no demonstration that those decisions must have been made by applying the minimization criteria of Executive Order 11644. The minimization criteria must be applied for any travel management decision to be valid – this is true whether the plan is old or new, partial or comprehensive.

As written, the draft rule falls short on this important point. If the Forest Service wants to carry forward a past decision, the agency must show in the record for the prior decision that it considered and applied the minimization criteria. All existing decisions concerning OSV regulation must be reviewed for compliance with the minimization criteria in the Travel Management Rule and with the applicable executive orders. The agency needs to avoid a confusing mishmash of different and possibly even conflicting rules for winter recreation. Therefore, all areas where OSV use occurs on each unit must be examined, including areas with rules already in place, and the results of that examination communicated to the public.

Recommendation

To address these concerns, the agency should eliminate the "open unless closed" management approach and not change the definition for area designations that is currently written in 36 CFR § 212.1. Fixing these problematic elements to the draft rule will, by extension, address some of our concern about carrying forward past decisions.

Next, the final rule should include language stating that, in order for any past decision to be carried forward, the unit must demonstrate how the Executive Orders' minimization criteria were applied in its NEPA-related documentation as part of the planning process.

Finally, only plans that were comprehensive (for the given landscape) and still adequately address current conditions should be carried forward without revision.

7. Timeline

The draft rule makes no mention of when winter travel planning should, or will, be completed. While requiring the designation of roads, trails, and areas for OSV use is a good first step, the Forest Service should provide a timeframe for implementation of this new Rule. If there is no deadline by which National Forests must complete winter travel planning there is very little incentive for this task to be completed and a Rule on its own is meaningless unless implemented.

The Forest Service has had great success in the past with travel planning – with most forests completing, or at least starting, wheeled vehicle travel planning within 5 years of the agency issuing the 2005 TMR. We strongly suggest that the Forest Service follow its own example and issue directives and internal incentives to complete winter travel planning within 5 years of finalizing this new Rule.

8. Conclusion

We thank you for this opportunity to provide comments on the draft OSV regulation, and look forward to seeing our concerns addressed in the final publication of the regulation. Feel free to contact us with any questions.

Sincerely,

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