



June 5, 2020

John Calhoun
Chief, Division of Jurisdiction, Regulations, and Special Park Uses
National Park Service

Re: Electric Bicycles – Proposed Rule; Docket ID: NPS-2020-0001; RIN: 1024-AE61

Dear Mr. Calhoun,

Public Employees for Environmental Responsibility (“PEER”) submit these comments on the above-referenced Proposed Rule (“the proposal”). PEER is a nonprofit organization incorporated in the District of Columbia and headquartered in Silver Spring, MD. It is a national alliance of local, state and federal resource professionals. PEER works nationwide with government scientists, land managers, environmental law enforcement agents, rangers, and other resource professionals committed to responsible management of America’s public resources, including National Parks and other public lands. We support the strongest protections for the Park System and visitor enjoyment, as well as protections for National Park Service (“NPS”) staff.

These comments are endorsed by: Wilderness Watch, Environmental Action Committee of West Marin, the Marin Conservation League, Save Our Seashore, Amy Meyer, Phyllis Koenig, and David Perel.

Comments:

- 1. The NPS should have granted—and still should grant—a 30-day extension for public comments on the Proposed Rule.**

PEER filed a well-supported formal request for a 30-day extension of the public comment period with you dated April 27, 2020 (the receipt of which you acknowledged). As stated in the PEER request:

President Donald Trump declared a “national health emergency” to address the pandemic, and governors around the country have instituted lockdown policies to protect the public. Citizens’ lives are at risk and virtually everyone’s lives have been greatly disrupted. Lockdowns and business closures have prevented many

potential commenters from accessing information that would otherwise be available to them. Potential commenters are overburdened with changed work obligations, caring for children now home from school, caring for extended family who are now dependent on them, and many other stresses. These impacts may drastically restrict public participation in agency rulemaking via public comments. A comment period extension should be granted in recognition of these impacts and to avoid any unintended effect of suppression of public involvement.

The NPS's delay in responding, which ignored PEER's specific entreaty for an expedited decision, has compelled us to perform non-essential work during the height of the COVID-19 pandemic. It was improper for the NPS not to grant the short extension in view of the extreme circumstances. It is not too late—the NPS still can and should grant the requested extra 30 days. This would allow an opportunity to comment to those who have been prevented from doing so by COVID-19 related restrictions and circumstances.

2. The NPS has already implemented the Smith Directive that de-regulated e-bikes, which reveals that this Proposed Rule rests on a false premise and is illegal under the Administrative Procedure Act (“APA”).

On August 30, 2019, then-Deputy NPS Director P. Daniel Smith announced a new directive in the form of Policy Memorandum 19-01 (the “Smith Directive”). Smith instructed all Park Superintendents to immediately treat motorized e-bikes the same as “bicycles” and to regulate them under the regulation on traditional bicycle use, 36 C.F.R. § 4.30. After citing that regulation, then the Smith Directive stated that he “requires that these provisions also govern the use of e-bikes so that the use of e-bikes and traditional bicycles are generally regulated in the same manner”. He stated the new NPS policy as: “E-bikes are allowed where traditional bicycles are allowed.” As a result, e-bikes are in fact allowed on National Park trails, despite having been previously prohibited because they were regulated as “motor vehicles” under NPS regulations.

The NPS must rescind the Smith Directive until this Proposed Rule is adopted in final. Unless the NPS does so, the rulemaking is redundant, purporting to propose an action that the agency already has taken. It is a fundamental premise of U.S. administrative law that rules of general application must first be published in the Federal Register and proceed through the formal APA rulemaking process in 5 U.S. Code § 552, which provides:

- (a) Each agency shall make available to the public information as follows:*
 - (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—...*
 - (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and*
 - (E) each amendment, revision, or repeal of the foregoing.*

The explicit terms, and the effect, of the Smith Directive was to amend 36 C.F.R. § 4.30, the general rule governing the use of “bicycles” in the Park System, which was adopted decades before

via normal APA rulemaking pursuant to publication in the Federal Register. This § 4.30 is the same substantive provision that the Proposed Rule now seeks to amend. As the APA's §552(a)(1)(E) mandates, amending an existing substantive rule, as the Smith Directive did, could have only been achieved through formal rulemaking.

Yet, the Smith Directive was allowed to take effect NPS-wide outside of APA rulemaking. As the NPS knows, it was obligated to follow 5 U.S. Code § 553 on rulemaking initially, not after the fact to "cover its tracks". The public comment process is a sham because the substantive action proposed already has occurred NPS-wide. The Proposed Rule directly admits this:

As of the date this proposed rule, more than 380 units of the National Park System have implemented the e-bike policy This means that for each of these NPS units, e-bikes are already allowed.

Only rescission of that Directive can clear the regulatory field so that the public is not forced to comment on an illusory "proposal" that, in reality, is a *fait accompli*. You should return to proper APA rulemaking requirements.

3. The NPS should wait for a judicial determination of the legality of the current situation.

The question of the illegality of the Smith Directive having actually already been implemented System-wide in 380 units prior to the issuance of this Proposed Rule is being tried currently in the Federal District Court in Washington, DC.¹ The Proposed Rule here is not a remedy to the legal violations inherent in the Smith Directive including, but not limited to, the fact that Mr. Smith was not properly "exercising the authority of the Director" when he issued it. To allow for a clarifying judicial ruling the NPS should not advance the Proposed Rule until the lawsuit is resolved.

4. The Proposed Rule misrepresents current NPS regulations.

In the Federal Register notice, at page 19712, 3rd column, the preamble to the Proposed Rule makes this crucial foundational statement: "An **e-bike is a bicycle** with a small electric motor that provides power to help move the bicycle." (emphasis added).

This ignores and contradicts the current NPS regulation at 36 C.F.R. § 1.4, which defines a "bicycle" as "...every device **propelled solely by human power** upon which a person or persons may ride on land, having one, two, or more wheels" (emphasis added). Thus, e-bikes are not bicycles as they are propelled by their motors, which may be supplemented with human pedaling, but plainly they are not solely propelled by human power.

The correct characterization of e-bikes under NPS regulations is as a "motor vehicle". NPS regulations provide that: "Motor vehicle means every vehicle that is self-propelled and every vehicle that is **propelled by electric power**, but not operated on rails or upon water, except a

¹ *PEER et al. v. NPS et al.*, U.S. District Court DC, Civil Action No. 19-3629.

snowmobile and a motorized wheelchair.” 36 C.F.R. § 1.4 (emphasis added). That definition plainly covers e-bikes. A vast amount of documentation produced to PEER via the Freedom of Information Act confirms that the NPS firmly considers e-bikes to be motor vehicles.

The agency’s misrepresentation in the Proposed Rule that an e-bike is a bicycle and not a motor vehicle infects the subsequent preamble and rulemaking with the rationalization that the impacts of e-bikes and bicycles can be equated, which is false (as is demonstrated below in this comment as well as in a large number of other comments already in the NPS docket on www.regulations.gov). Then, inconsistently, at page 19714, 1st column, the proposal reverses course and admits that:

...the definition of bicycle includes only those devices that are “solely human powered.” E-bikes are excluded from this definition because they have an electric motor that helps power the device.

It amounts to misrepresentation for this formal rulemaking to first label e-bikes as a form of “bicycles,” then to treat the impacts of the two as equivalent, and then to admit later that e-bikes are not bicycles. The NPS must re-write the proposal to correct this confusion.

5. The Proposed Rule misrepresents the facts regarding e-bikes and their environmental impacts.

E-bike motors may generate 100% of the power going to the wheels and they are capable of reaching 25 miles per hour or faster with minimal pedaling. The motors allow riders to travel faster than traditional bicycles, particularly uphill, and further with less exertion over time. The motors do not just provide a minor “assist”. According to one e-bike industry estimate, the motor typically provides up to four times the power of the human pedaling.²

E-bikes enable users to: climb more elevation without resting; maintain higher overall velocity; pass other trail users more frequently which, when executed improperly, as is frequently the case, disrupts single-track traffic and increases the risk of collision; carry more gear and penetrate deeper into the backcountry; all resulting in a greater cumulative impact to the natural environment and to other users. The variety of e-bike types is now extremely broad, covering machines with much greater weight and impact than traditional bicycles and that can pull trailers, an additional impact on the environment and trail safety that the NPS failed to consider (see, “The Mule,” video at https://www.bakcou.com/?gclid=CjwKCAjw-L2BRA_EiwAacX32RtlIbM56Kofv0tLFqRQpytrwDWHHdRxqmPpIMjAhZS0IQDzOnaNHxoCv0UQA_vD_BwE). It also includes “stealth” ultra-light e-bikes that are almost impossible for most people to tell they have motors, which raises major enforcement obstacles (see, the “Baby Maker” [sic], video at <https://www.youtube.com/watch?v=S9oAVFxaq64>). Nothing in the

² June 11, 2018, email from Morgan Lommele of People for Bikes, to Krista Sherwood, NPS, Conservation & Outdoor Recreation Programs, produced to PEER via Freedom of Information Act.

preamble to the proposal indicates the NPS has contemplated the effects on Parks from this huge variety.

Equestrians, backpackers, hikers, trail runners, and mountain bike riders deliberately seek out non-motorized trails in the National Park System to avoid fast-moving motorized vehicles found outside of Parks and to enjoy a quiet, natural environment. The use of e-bikes on otherwise non-motorized trails harms the ability of other Park visitors to enjoy these peaceful and safe surroundings.

The fact that e-bikes on non-motorized trails puts the other Park visitors at risk of higher-speed and more dangerous collisions causes them to avoid or reduce their use of Park trails that are newly-opened to e-bike use. E-bikes also pose other significant environmental impacts that harms the public's enjoyment including, but not necessarily limited to, disturbance of wildlife and trail damage. Additionally, their batteries are known in some cases to overheat and burn, which may add to fire danger in dry Park units.

It is generally recognized that mechanized recreation degrades the environment more than non-mechanized recreation, and that motorized recreation degrades the environment more than non-motorized recreation. The scientific literature supports this. Catherine Marina Pickering, Wendy Hill, David Newsome, and Yu-Fai Leung, "Comparing Hiking, Mountain Biking and Horse Riding Impacts on Vegetation and Soils in Australia and the United States," *Journal of Environmental Management*, 92 (2010), 551562; Michael J. Vandeman, "The Impacts of Mountain Biking on Wildlife and People: A Review of the Literature," *Culture Change* (July 03, 2004).

This Proposed Rule, which includes **not one supporting citation**, ignores this science and improperly misrepresents e-bikes' foreseeable impacts. It needs to be re-done and include reliable support for its assertions.

6. The Proposed Rule's attempt to distinguish Class 2 e-bikes would be unenforceable.

The NPS identifies the obvious problem of the infeasibility of enforcing its Proposed Rule against Class 2 e-bikes as a particular problem that it specifically is seeking public comment on, at page 19714, 2nd column. The proposal is not workable in terms of enforcement. It is completely unreasonable to expect enforcement personnel, many of whom are volunteers and will not be riding e-bikes themselves, to somehow stop and sanction a speeding Class 2 e-bike rider for moving "without pedaling". The Proposed Rule, at subsection (i)(3), basically asserts that all e-bikes must be pedaled at all times to be in compliance with the Rule, which is **absurd**. As every rider of any type of bike knows, they do not need to pedal on downhill slopes, and then on the flats and even on uphill slopes below such downhill slopes. That is, "freewheeling" and coasting where one can are very common and welcomed techniques. An enforcement officer on such a flat or uphill sections below downslopes will not be able to tell whether a non-pedaling e-bike rider is using his or her motor to move forward or not. The Proposed Rules' assertion that an enforceable regulatory distinction can be made in that situation when an observer cannot tell whether a rider is motoring or coasting is arbitrary and capricious.

However, the NPS appears to have internally decided that is an unenforceable requirement anyway, therefore its absurdity does not matter. E-bike riders will only rarely actually be in the view of a Park Ranger or other enforcement personnel; nor will they be able to be “pulled over” by enforcement personnel when riding on a trail. In short, the idea that the Rule would effectively prevent Class-2 e-bikers from using their motor without pedaling is patently wrong.

This problem that the NPS itself highlighted undercuts the enforceability of its entire proposal. Given the difficulty for enforcement staff to distinguish a Class 2 e-bike from a Class 1 or 3, as they look much the same, and the unworkability of enforcing the “no riding without pedaling” requirement, the whole proposal is ill-advised and worthy of scrapping.

7. The Proposed Rule misrepresents how e-bikes are treated under other U.S. law.

In order to promote its equating of e-bikes and traditional bicycles and to justify its prior *fait accompli* in the Smith Directive, the preamble, at page 19713, 1st column, asserts regarding the Smith Directive that its definition of e-bikes was:

...[C]onsistent with the definition of “low speed electric bicycle” in the Consumer Product Safety Act (15 U.S.C. 2085), currently the only federal statutory definition of e-bikes....

That is misleading because the Consumer Product Safety Act relates only to consumer protection and is unrelated to the NPS’s use regulations. Further, it is misleading to assert that the only pre-existing federal definition of e-bikes treats them as a form of “bicycle”. In December of 2019, the U.S. Customs and Border Protection (“CBP”) bureau ruled that “electric bicycles are in fact electric motorcycles, at least for importation purposes”. (Toll, M. 2020. US customs rules electric bicycles are motorcycles, granting tariff exclusion. *Electrek* Jan. 16; online at: <https://electrek.co/2020/01/16/us-customs-rules-electric-bicycles-are-motorcycles-granting-tariff-exclusion/>).³ Indeed, their treatment by the CBP as motorcycles aligns well with the NPS’s regulatory definitions that treats them as a type of motor vehicle. The Proposed Rule should be revised to correct its misrepresentation regarding U.S. law.

8. The Proposed Rule was based on a gross violation of the Federal Advisory Committee Act (“FACA”).

Beginning in late 2017 an advisory committee was convened by the Department of the Interior known as the “E-bike Partner & Agency Group” (the “Group”). The Group was hosted by the NPS and other Interior agencies in person at the Main Interior Building in Washington, D.C., and via conference call. It met at least quarterly during the time leading up to development of both the Smith Directive on e-bikes and the current Proposed Rule. The most recent known Group meeting

³ Note also that the article states: “While there are some companies that produce their electric bicycles in the US, they are a small minority of the market. The vast majority of electric bicycles sold in the US are still imported from China.”

was October 10, 2019. Participants included numerous Federal agency representatives and private industry representatives who advocated for e-bike deregulation. The private industry advocacy groups included, but were not limited to, People for Bikes (multiple representatives). Various other federal participants highlighted the FACA problems inherent in what the NPS was doing, but the agency marched ahead obliviously.

The E-bike Partner & Agency Group meetings were neither open to other participants nor announced in the Federal Register. The Group was not fairly representative of the range of private or public interests affected by e-bike use. The NPS itself hosted and repeatedly engaged with this non-FACA-compliant advisory committee, seeking policy recommendations from the participants. Records produced to PEER through the Freedom of Information Act show that it led to the issuance of the Smith Directive and to the current Proposed Rule. Had PEER and other interested parties actually known of this Group, through Federal Register notices as required under FACA, they would have been able to comment and likely could have changed the outcome of the Group's policy deliberations.

Because the NPS policy formulation was severely tainted by this FACA violation the appropriate remedy is to rescind the Proposed Rule and re-convene a public FACA-compliant Advisory Committee to advise the NPS on all issues related to e-bikes, not just the pro-e-bikes industry perspective. Then, the NPS could take the advice from that representative, unbiased, committee into account when considering the possibility of a new, revised e-bikes regulation.

9. The Proposed Rule fails to comply with the National Environmental Policy Act (“NEPA”).

NEPA requires, in pertinent part, that agencies “include in every . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on— (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332(C).

The Proposed Rule is a major NPS action with the potential for significant environmental impacts that triggers NEPA's compliance requirements. The NPS is required to prepare an Environmental Impact Statement (“EIS”) or Environmental Assessment (“EA”) before approving e-bike use in the National Park System, but is indicating it refuses to do so. The NPS has also not properly claimed a categorical exclusion from NEPA compliance (see point number 11, below). The proposal is a significant alteration of decades of NPS rules and policies regarding motorized vehicles in the Park System nationwide. This controversial action requires a hard look under NEPA.

10. The NPS should defer the rulemaking until it has prepared a programmatic NEPA review to evaluate potential adverse impacts of the rulemaking.⁴

The NEPA section of the preamble to the Proposed Rule states:

A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by a categorical exclusion... Many units of the National Park System already allow the use of e-bikes where traditional bicycles are allowed [under the respective superintendent's compendium]... The Policy Memorandum required those units to evaluate the environmental impacts of allowing e-bikes under NEPA... the impacts potentially caused by the implementation of the Policy Memorandum were limited only to those impacts from e-bikes that differ from the existing impacts of traditional bicycles. As a result, for most units a categorical exclusion (CE) has applied.

It is particularly disturbing that the NPS contends that because e-bike use is already occurring in many Parks on the basis of the 2019 Smith Directive it now somehow constitutes a pre-existing use that has already had an adequate NEPA review of its potential impacts.

A spot check of some of the Park compendiums adding e-bikes uses and CE's reveals that none have actually taken a hard look at the differences between traditional bicycles and e-bikes. There has been no comprehensive review of the abundant scientific literature related to e-bike use; no systematic analysis of potential user conflicts and safety concerns related to their use in a backcountry setting or on "shared use" (i.e., bicycle/pedestrian) trails; no mitigation measures to minimize those impacts; and no evaluation of human safety guidelines. By segmenting the NPS-wide implementation of its e-bike policy into literally hundreds of smaller actions unit-by-unit with instructions in the Smith Directive to treat such approvals as "minor changes" subject to a CE, rather than an EIS or EA, NPS has avoided conducting any of the necessary assessment of the potential impacts of introducing e-bike use onto existing Park bicycle trails, including safety impacts on shared trails.

E-bike use has been much more studied overseas than in North America. PEER briefly mentions some of the scientific literature here to illustrate that Parks, in their individual analyses if done at all, have not fully considered the foreseeable user conflicts and safety concerns.

Studies document that the average speed of a rider on an e-bike is faster than that of a traditional rider. For example, a 2019 Brigham Young University study of electric mountain bikes ("eMTB") found that "the average speed of travel [over a controlled loop course] on the eMTB was 4.1 mph (6.6 km/h) faster than on the conventional mountain bike."⁵ A 2014 Dutch study found that "[i]n simple traffic situations [such as on bike paths, rather than on bike lanes] elderly cyclists rode an

⁴ We draw our comments in this section from the comment filed by the Coalition to Protect America's National Parks, dated April 8, 2020.

⁵ Hall et al. 2019. Pedal-Assist Mountain Bikes: A Pilot Study Comparison of the Exercise Response, Perceptions, and Beliefs of Experienced Mountain Bikers, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6711045/> .

average 3.6 km/h [2.2 mph] faster on the e-bike than on the conventional bicycle.”⁶ The severity of accidents on e-bikes is more serious than accidents on conventional bicycles. The 2014 Dutch study found that “after controlling for age, gender and amount of bicycle use, electric bicycle users are more likely [than conventional bicycle users] to be involved in a crash that requires treatment at an emergency department due to a crash.” A 2015 Swedish study looked at the relative risks (i.e., the number of “conflicts” or accidents) involving e-bike use compared to conventional bicycle use in both roadside bike lanes as well as on shared use trails.⁷ The study found “the reason [for more frequent and serious conflicts involving e-bike use] may be the higher speed and lower maneuverability of electric bicycles, which may make any evasive maneuver more challenging. Electric bicycles may require wider bicycle lanes with a higher curve radius to facilitate safe interaction with other vulnerable road users.” Similarly, other studies suggest that accommodating the growing popularity of e-bike use may require significant infrastructure improvements, such as trail widening, to ensure the safety of mixed-trail users. There is no doubt that the high speed of e-bikes is the key factor in the many safety and infrastructure concerns.

Despite a large volume of literature related to e-bike impacts, there is no evidence that any Park units already allowing e-bike use ever considered any such studies or developed an appropriate mitigation strategy under NEPA to minimize the impacts. Suffice it to say that e-bikes allow riders to travel faster and farther with less effort, and that the increase speed will lead to user conflicts and safety problems unless e-bike use is properly managed and NPS limits such use to bike trail infrastructure designed for such use. **When injuries or mortality result, as is foreseeable, the fault will lie clearly with the NPS’s avoidance of doing an EIS or even an EA under NEPA.**

PEER, like other commenters such as the Coalition to Protect America's National Parks, from whom we draw our comments in this section, is particularly concerned about NPS allowing e-bike use on shared use trails without first evaluating the adequacy of current bicycle trail design to safely accommodate the new use. For example, in the various Park compendium analyses done there has been no mention of the American Association of State Highway and Transportation Officials (“AASHTO”) Guide for the Development of Bicycle Facilities⁸ or the American Trails Shared Use Path Design guidelines⁹, both of which recommend the paved tread on shared use paths should be at least 10 ft wide, with a graded shoulder at least two feet wide on either side of the path. On shared use paths with heavy volumes of users, tread width should be increased to a range from 12 to 14 feet. In addition, shared use paths should not exceed a grade of 5%. The NPS has failed to determine whether any of its bicycle trails actually meet these safety guidelines. Many NPS shared use paths, in fact, do not meet the widely accepted AASHTO design safety guidelines for bicycle facilities.

In light of the serious nature of the environmental impacts and safety risks described in this comment and other comments in the docket, it is shocking that the Smith Directive and the current Proposed Rule state that adding e-bikes is a “minor change” such that a CE is adequate NEPA

⁶ Schepers et al. 2014. The safety of electrically assisted bicycles compared to classic bicycles. <https://www.sciencedirect.com/science/article/abs/pii/S0001457514002668?via%3Dihub> .

⁷ Dozza et al. 2016. Using naturalistic data to assess e-cyclist behavior, <https://www.sciencedirect.com/science/article/pii/S1369847815000662?via%3Dihub#!> .

⁸ Guide. 2012, <https://njdotlocalaidrc.com/perch/resources/aashto-gbf-4-2012-bicycle.pdf> .

⁹ Chapter 14, <https://www.americantrails.org/images/documents/sharedpath14.pdf> .

compliance. Both documents advocated the CEs also should result at the level of the hundreds of Park units that are implementing this new regulatory action, which is a classic case of improper segmentation of the effects of the action under NEPA, that is, compliance avoidance. Any experienced NEPA compliance officer would find this pattern to be a serious error.

Now that the NPS is undertaking rulemaking to codify e-bike use System-wide, it is essential that it prepare an appropriate NEPA review before issuing a final rule, rather than treating e-biking as an existing use that has already been adequately studied.

The Proposed Rule, which would provide the general regulatory structure for hundreds of units in the System to allow e-bike use on existing mixed use trails, is particularly suited to a “programmatic NEPA review.” As described in Council on Environmental Quality (“CEQ”) guidance, “a programmatic review may be appropriate when...adopting official policy” such as “rulemaking at the national-level...The programmatic analysis for such as decision should include a road map for future agency actions with defined objectives, priorities, rules, or mechanisms to implement objectives.”¹⁰ The “road map” analogy fits particularly well here.

Coincident with rulemaking the NPS should prepare a programmatic NEPA review of the potential impacts of introducing e-bikes onto its existing bike trails. The review should include a thorough assessment of the literature related to e-bike use in circumstances comparable to existing NPS infrastructure. The review should also develop general guidance, such as design safety criteria and mitigation measures, which individual units can then incorporate into their respective local decision documents. Lacking such a programmatic NEPA review to tier from, it would be irresponsible of the agency to take the position in the proposal’s NEPA section that the hundreds of Park units would have the staff resources and expertise to conduct adequate analyses on their own.

11. The Categorical Exclusion analysis in the Proposed Rule is defective.

At the close of the NEPA analysis section in the proposal is this assertion: “The NPS has also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.” The proposal is defective for failing to fully and correctly document that decision. Below PEER provides the NEPA CE regulation language *verbatim* and after each section provides analysis showing that NPS’s determination was superficial and faulty, and should be corrected:

*§ 46.215 Categorical exclusions: Extraordinary circumstances.
Extraordinary circumstances (see paragraph 46.205(c)) exist for individual actions within categorical exclusions that may meet any of the criteria listed in paragraphs (a) through (l) of this section. Applicability of extraordinary circumstances to categorical exclusions is determined by the [Responsible Official](#).*

¹⁰ CEQ Memo, 2014.

https://obamawhitehouse.archives.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf

- (a) *Have significant impacts on public health or safety.*

PEER analysis: Significant safety impacts of e-bikes have been well-documented in this comment, including citation to numerous supporting studies. The NPS cannot ignore them.

- (b) *Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; **park**, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas.*

PEER analysis: Plainly “park” resources (emphasized above) are vulnerable here. The subsection indicates that a CE should not apply in view of the many potential impacts of e-bikes as shown in this comment. Several other of the vulnerable land categories listed in the CE regulation are found across the System as well.

- (c) *Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].*

PEER analysis: The subsection supports that no CE should apply in this highly controversial situation, which is easily sensed by reading the public comments already in the docket that express highly passionate viewpoints, pro and con, both sides with substantial and varied arguments. Numerous major stakeholders and NGOs are lined up on either side, fitting the definition of “highly controversial”.

- (d) *Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.*

PEER analysis: The subsection indicates that a CE should not apply in view of the unique risks that e-bikes present, as the first and only allowed motorized use in many Park backcountry areas, as well as now the fastest overall form of transportation allowed.

- (e) *Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.*

PEER analysis: On this topic see point number 17, below, on the “precedential importance” and “slippery slope” associated with approving e-bikes in Parks. The agency is opening the floodgates for numerous similar technological impacts.

- (f) *Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.*

PEER analysis: As discussed in comment # 10, above, this is a classic case of segmentation, in which a Programmatic EIS is needed first. The NEPA section of the preamble suggests that each Park unit will have insignificant impacts justifying CEs for each, whereas the cumulative impacts of 380 or more units approving e-bikes will be significant when considered nationwide.

- (g) *Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the [bureau](#).*

PEER analysis: Many Park units contain such current or potential historic places, indeed many units were established specifically to protect such places. In view of their special national importance, a CE for this System-wide approval is improper.

- (h) *Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.*

PEER analysis: On this topic, see point number 12, below, on the failure to comply with the ESA.

12. The Proposed Rule violates the Endangered Species Act (“ESA”).

Section 7(a)(2) of the ESA directs all Federal agencies to insure that the actions they authorize, fund, or carry out do not jeopardize the continued existence of endangered or threatened species or destroy or adversely modify critical habitat. The Proposed Rule is an NPS action and a vast number of ESA-listed species of plants and animals are found in Parks, yet the proposal provides no indication of compliance with Section 7(a)(2). In view of the potential for adverse effects from e-bike use this omission must be corrected.

13. The Proposed Rule fails to comply with Park Service carrying capacity assessment requirements, which will impact visitor and staff health.

The National Park and Recreation Act of 1978 established a statutory requirement, at 54 U.S.C. §100502(3), that Park unit general management plans include “identification of and implementation commitments for visitor carrying capacities for all areas of the System unit”.

Numerous important provisions in the *NPS Management Policies* apply here (at <https://www.nps.gov/policy/mp/policies.html>). Specifically, § 8.2 – *Visitor Use*; § 8.2.1 – *Visitor Carrying Capacity*; and § 8.2.2.1 – *Management of Recreational Use* all must be considered regarding this new use. Yet, the Proposed Rule includes zero discussion of the laws and policies regarding the carrying capacity of Parks to handle e-bikes.

If approved, e-bikes would be the fastest and **most intrusive and risky single backcountry Park use**, thus they obviously impact carrying capacity. The proposal should have specifically addressed how e-bikes will increase the maximum number of visitor encounters and the disturbance of backcountry campers who may seek to avoid the presence and noise of motorized devices, as required by the Management Policies cited above. In this new pandemic era of social distancing and Park closures for health reasons because of over-crowding and COVID-19 infection risks, it would be irresponsible for the NPS to fail to consider how e-bikes affect carrying capacities. This will not only affect enjoyment of the Parks but also foreseeably will impact visitor and staff health if capacities are exceeded. This must be corrected.

14. The Proposed Rule is a threat to human safety.

Human safety impacts should be assessed under NEPA, as explained above. However, safety concerns present a unique risk that the NPS should assess independently of other environmental impacts. The most obvious type of location where the human safety threat will exist is on narrow, winding, trails with steep exposure. The most alarming scenarios for such locations are: a) horseback riders who may be thrown when their mount is spooked by the faster, noisier e-bikes coming around a turn, and b) senior citizens who may be unable to move out of the way of the faster e-bikes. Several public comments in the docket speak to e-bike riders not slowing down for horses or mules and endangering both the animals and their riders, as well as senior citizens in other contexts.

Both of these scenarios foreseeably will cause injuries or even mortalities. Personal injury litigation foreseeably will increase, including liability claims against the NPS. The Proposed Rule fails to consider or assess such scenarios, which is irresponsible. They must be addressed.

15. The Proposed Rule fails to assess the impacts on law enforcement.

Many NPS enforcement staff are seasonal volunteers. They will be unable to enforce this new proposal especially because they typically will lack a vehicle fast enough to catch an e-bike on a trail. However, if they are outfitted with fast e-bikes themselves in order to enforce against e-bike violations, that will further exacerbate all of the impacts. As one experienced former Mount Rainer National Park guide states in his public comment in the docket (Dustin Balderach, May 4 comment):

I don't see how the Park Service will be able to enforce allowing certain classes of e-bikes and not others. How will you enforce allowing Class 1 e-bikes but not Class 2 or 3? What about people who make modifications to their Class 1 e-bikes? It's too slippery of a slope and I fear it will be a detriment to our already over-taxed Park System. There is already enough user conflicts and we don't need any more.

An Acadia National Park volunteer bicycle specialist highlights the impacts of e-bikes eloquently in her statement in the docket (Claire Daniel, April 26 comment):

I am an Acadia National Park Bike Patrol volunteer, so I am regularly riding on the carriage roads assisting riders and walkers with maps and directions, clarification of the rules (yes, that dog needs to be on leash, or yes, your child needs to wear that helmet), advice on routes, and general information.

I am against the possibility of allowing e-bikes to flood these carriage roads for two reasons: biker safety and enjoyment of the experience. Simply, crowded trails will not be peaceful nor safe for walkers or bikers. Even without them [e-bikes], the 47 miles of roads are already crowded with bikers and walkers seeking peace and quiet in the park's interior. Many children are riding long distance for the first time, sometimes struggling up the hills and then finding the reward of the downhill. I cringe when I think of the five and six year-olds that I see enjoying the park if there is increased traffic caused by the wholesale use of e-bikes in any classes. Simply, crowded trails will not be peaceful nor safe.

In addition, the park already has the challenge in regulating the rules we have. There aren't enough rangers to enforce the rules in place, so volunteers have to take the slack. We enjoy our job, but as it is now, despite the signage that states no e-bikes allowed, we have the challenge of discerning which riders are authorized to use class 1 e-bikes and those who are abusing the rule. Before the recent order to allow class 1 bikes, e-bike riders were regularly sneaking onto the carriage roads and many were speeding. As a volunteer, I shudder to think of how to regulate who is speeding and who is not. I can see so many accidents. For example, both children and adults regularly stop for water or rest and don't bother getting off the carriage road. (I often caution them against this.) As speeders come around curves, they will inevitably collide anyone in their path.

Further, expanding e-bikes to backcountry trails in Parks will obscure what are currently the three straightforward regulatory classifications: hikers, traditional bicyclists, and ATV riders, which are distinct user groups who follow different rules. This elegant simplicity makes the rules easy to follow and enforce in part because it is obvious when a hiker, bicyclist, or ATV rider is somewhere they should not be or otherwise breaking a rule that applies to their use-type. The proposal blurs the line between bicycles (defined as human-powered) and ATVs (defined as motorized) and this blurring will increase impacts in Parks due to enforcement difficulties. Further, as indicated above, any Park-specific rule that make distinctions between Classes 1, 2 and 3 e-bikes will be highly problematic because enforcement personnel will not be able to tell them apart without specialized training. The NPS must fully address all of these enforcement concerns before it can move forward.

16. The Proposed Rule fails to consider any alternatives.

In keeping with its violation of NEPA, which requires the consideration of alternative actions, the Proposed Rule fails to consider any alternatives. Alternatives to consider would include: 1) prohibiting e-bikes as they were prior to the Smith Directive; or 2) special rulemaking by each

Park unit similar to the special rulemaking done starting in 1987 for the use of traditional bicycles in various Parks (discussed below in point number 19).

The other alternative is for the Department of the Interior to focus e-bike use on the far more appropriate Bureau of Land Management lands. The proposal is devoid of any explanation as to why public motorized recreation is appropriate on NPS lands when a sister Interior land management agency has a multiple use mission that is far more accommodating of such recreation than the NPS's conservation-focused mission.

17. The Proposed Rule fails to consider its precedential importance and the associated commercialization of Parks.

The proposal is a technological “slippery slope”. As the batteries and other motor components become cheaper and lighter and provide more storage capacity, more impacts from e-bike use will occur. Ranges will steadily increase. They will become increasingly like light motorcycles with pedals and less like traditional bicycles. The proposal fails to address the speed, power, noise, and other implications of this foreseeable evolution. The impacts on other users, wildlife, and trails will thus be worse and will extend further into Park backcountries.

Further, if e-bikes are approved then no “bright line” can be drawn such that other electric-powered transport devices should not also be approved in Parks on the same trails as a matter of fairness to those riders. This will foreseeably include riders on Segways, electric skateboards and “Onewheels,” electric scooters and mopeds, hoverboards, three-wheelers, and electric snowmobiles, all of which also will become faster and have greater ranges. The proposal utterly fails to consider and assess how it creates a precedent that will eventually vastly degrade the Park system by opening the door to other off-road electric vehicles of a wide variety.

Further, increasing commercialization of Parks will be associated with renting and servicing e-bikes and those other electric vehicles must be addressed. The proposal fails to recognize that rental companies just outside Park boundaries appeal to youthful and inexperienced e-bikes riders. Their inexperience increases the risks to other Park users.

18. The Proposed Rule fails to consider its impact on the trail maintenance backlog.

The trail maintenance damage is particularly unacceptable because of the already massive backlog in NPS trail maintenance, estimated at more than \$500 million. Faster and longer-range e-bikes will worsen the short-term damage to, and long-term deterioration of, unpaved trails. The NPS proposal improperly fails to consider this foreseeable System-wide impact. Further, the proposal, if finalized, would require extensive additional signage, which would further subtract from the funds available to maintain existing trails and signs, as well as adding more “trail clutter”.

19. Special rulemaking by each Park unit is a preferable approach

PEER advocates that the NPS return to the approach in its 1987 regulation at 36 CFR § 4.30(b) that governs bicycles outside of developed areas. The former regulation required that “[E]xcept for routes designated in developed areas...routes designated for bicycle use shall be promulgated as a special regulation.” 36 CFR § 4.30(b). The NPS adopted this requirement because lands outside of developed areas “...are related more to preservation of natural resources and values...”. 51 Federal Register 21844. According to the NPS, the use of routes outside of developed areas “would have a much greater potential to result in adverse resource impacts or visitor use conflicts.” *Ibid.* This fact remains as true today as it was 33 years ago.

The 1987 Rule adopted “a much more stringent decision-making process...requiring that a bicycle route designated outside of developed areas...be accomplished through a formal rulemaking. Such a process will provide a thorough review of all environmental and visitor use considerations and assure a full opportunity for public participation in and review of a decision concerning any such proposed designation.” *Ibid.*

In sum, the NPS should withdraw the Proposed Rule and correct the numerous serious deficiencies detailed above. Please feel free to contact me if you have questions.

Sincerely,

/s/

Timothy Whitehouse, Executive Director