
SENT VIA ELECTRONIC MAIL AND REGULAR MAIL

April 1, 2005

North Shore Road Project
Great Smoky Mountains National Park
P.O. Box 30185
Raleigh, NC 27622

Re: Comments on Selection of Preferred Alternative

These comments on the North Shore Road Project are submitted on behalf of the Southern Environmental Law Center. The Southern Environmental Law Center is a regional non-profit organization working to conserve natural resources on public lands throughout the Southern Appalachians and in the Southeast generally.

The Southern Environmental Law Center supports selection of the Monetary Settlement alternative as NPS' preferred alternative for this project. Of the alternatives retained for detailed study, only the Monetary Settlement alternative satisfies the purpose and need for the project and complies with the Organic Act, National Park Service (NPS) Management Policies, the Great Smoky Mountains National Park (GSMNP) General Management Plan (GMP), and the screening criteria identified by NPS for this project. Accordingly, the Service must select the monetary settlement as its preferred alternative.

I. The NPS Must Select the Monetary Settlement As Its Preferred Alternative Because Only the Monetary Settlement Alternative Complies with the Prohibition Against Impairment of Park Resources, the NPS' Affirmative Duty to Conserve Park Resources, and NPS Policies.

Of the action alternatives retained for detailed study, only the Monetary Settlement Alternative satisfies the purpose and need of the project and is consistent with the NPS' stated goal of ensuring "that resources within GSMNP . . . are unimpaired for the enjoyment of future generations" as required by the NPS' Organic Act. Preliminary Alternatives Report (PAR) at 3; 16 U.S.C. § 1. The build alternatives would violate this legislative prohibition against impairment of park resources. Furthermore, only the Monetary Settlement alternative meets the NPS' goal of taking action that is "consistent with legislative and executive mandates and NPS policies." PAR at 3. Those mandates and policies impose an affirmative duty on NPS to select an alternative that will conserve scenic, natural and historic resources within the Park. NPS has already concluded in the Preliminary Alternatives Report that the full build and the partial build to Bushnell alternatives do not meet this standard. PAR at 13.

Prohibition Against Impairment. NPS must not select the full build alternative or partial build to Bushnell alternative as its preferred alternative because either alternative would impair park resources. The NPS Organic Act prohibits the service from taking any action in the Park that would not leave it “unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. NPS policy provides that an impact to a park resource is more likely to constitute impairment if it affects a resource that is necessary to fulfill specific purposes of the Park’s establishing legislation, key to the natural or cultural integrity of the Park, or identified as a goal in the Park’s General Management Plan. 2001 Management Policies (MP) at 1.4.5.¹ The full build alternative and partial build to Bushnell alternatives would constitute prohibited impairment under this standard both because of their cumulative impact to individual park resources and because of their adverse impact on the fundamental wilderness character of the Park.

Construction of the full build or partial build to Bushnell alternatives would undermine resources that are key to the natural and cultural integrity of the Park. The General Management Plan identifies the core significance of the Park as turning on “the extraordinary diversity and abundance of its plants and animals, the beauty of its mountain terrain and waterways, the quality of its remnants of pioneer culture, and the sanctuary it affords those resources and for its modern users.” GMP at 5. As defined by the General Management Plan, the fundamental purpose of the Park is to “preserve these exceptionally diverse resources and to provide for public benefit from and enjoyment of them in ways that will leave the resources – and the dynamic natural processes of which they are components – essentially unaltered.” GMP at 5 (emphasis added). Accordingly, a core management objective for the Park is to keep the “significant and diverse natural resources and ecosystems” found in the Park “as free as possible from the adverse influences of human intrusion.” GMP at 53. As described below, the full build and partial build to Bushnell alternatives would cause significant adverse alteration to each of these core resources including (1) threats to rare and unique species, (2) degradation of scenic vistas and water quality, and (3) taking of archeological and historical resources. The cumulative effect of these impacts to individual resources constitutes a prohibited impairment of the core nature and significance of the Park.

In addition, the full build alternative would significantly impair the backcountry and wilderness resource values that are fundamental to the Park’s character and purpose. The North Shore Corridor would segment one of the largest, unfragmented tracts of mountain terrain in the eastern United States. The General Management Plan recognizes the core nature of the GSMNP as a “sanctuary” from human intrusion and safeguards that element of the GSMNP from degradation. GMP at 5. NPS recognized in 1979 that a large segment of the Park, which included the North Shore Corridor, satisfies the standards for designation under the Wilderness Act. Existing Conditions Report (ECR) at 3.4.1.1. That conclusion reflects a finding that the area retains “its primeval character and

¹ Adherence to the 2001 NPS Management Policies is mandatory. See 2001 NPS Management Policies at Introduction. Furthermore, because these policies are intended to be binding and were published in the federal register for notice and comment, compliance is judicially enforceable under the Administrative Procedure Act. See e.g., Fund for Animals v. Norton, 294 F. Supp. 2d 92, 106 n.8 (D.D.C. 2003).

influence, without permanent improvements or human habitation.” 16 U.S.C. § 1131(c). NPS policy requires that backcountry, like the North Shore Corridor, that is “under study, proposed, or recommended for wilderness designation will be managed as wilderness.” MP at 8.2.2.4. Consistent with this policy, NPS manages the North Shore Corridor to comply with the standards of the Natural Environment Type 1 zone, ECR at 3.1.1, in which “visitor uses and park management practices are to be of a transient nature and nonmotorized except in extreme emergencies.” GMP at 19. Thus, construction of a road through this area is entirely inconsistent with NPS policy and the standards of the General Management Plan and would significantly impair the wilderness character that is key to the integrity of the Park.

Affirmative Duty to Conserve Park Resources. Even if the adverse impacts associated with the full build and partial build to Bushnell alternatives fell short of the impairment standard, the full build and partial build to Bushnell alternatives would be inconsistent with NPS’ legislative mandate under the Organic Act and the Redwood Amendment which impose an affirmative duty to manage the Park “to conserve the scenery and the natural and historic objects and the wild life therein,” 16 U.S.C. § 1, and to administer the Park “in light of the high public value and integrity of the National Park System.” 16 U.S.C. § 1a-1. NPS has construed these statutory directives to mean that “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.” MP at 1.4.3. NPS has already concluded that the full build and partial build to Bushnell alternatives do not satisfy these standards. PAR at 13.

NPS has identified no park or NPS value served by construction of the full build alternative that would counterbalance the adverse impacts to park resources that would result from that alternative. NPS policy provides that “[m]ajor actions or commitments aimed at changing resource conditions or visitor use in a park, and major new development or rehabilitation, will be consistent with an approved general management plan and will be linked to a long-term goal in a current strategic plan.” Directors Order 2 at 3.3.3.4. Although NPS has noted that the full build alternative “may generate moderate increases in the number of visitors to the study area,” PAR at 21, NPS has not identified any goal or value within the management plan or strategic plan for the GSMNP that would be served by that outcome. Indeed, the 2005-2008 strategic plan for the GSMNP notes that the GSMNP already experiences heavy visitation.

Nor has NPS identified a need for the full build alternative as required by NPS policy. NPS has conceded at public hearings that the full build alternative would serve no regional transportation need. The Existing Conditions Report notes that there are “relatively low volumes of traffic” within the study area, even during the peak summer months. ECR at 2.3.1. NPS management policy requires NPS to “avoid the construction of buildings, roads, and other development that will cause unacceptable impacts on park resources and values” and to avoid the “costs of unnecessary or ineffective facilities.” MP at 9.1. Accordingly, NPS policy prohibits the service from developing a facility within a park “until a determination has been made that the facility is necessary and appropriate.” MP at 9.1 (emphasis added). In making such a determination, “the

protection of each park's resources and values will be the primary consideration." MP at 9.1.1. To that end, the proposed facility must "not cause unacceptable adverse impacts to natural and cultural resources" and be "fully consistent with the park's general management plan." MP at 9.2. The General Management Plan for the GSMNP, in turn, states as a management objective that the NPS will "ensure that all developments for park administration, visitor use, and concessioner operations are the minimum necessary for safe, efficient park administration and essential visitor services." GMP at 55 (emphasis added). Because the full build alternative is not necessary or appropriate to serve any Park value or objective identified by NPS, does not address any transportation need, will cause unacceptable adverse impacts to park resources, and is inconsistent with the General Management Plan for the Park, selection of the full build alternative is prohibited by NPS policy.

For these reasons, NPS has repeatedly concluded that construction of the North Shore Road cannot be justified. NPS' position since 1980 has been "to settle the claims arising from the 1943 agreement through a cash settlement to Swain County in lieu of the road." NPS Major Management Issues/Decision published on April 9, 2002. The General Management Plan for the Park declined to include the North Shore Road on its list of long-term developments, proposing construction of a day use facility at the tunnel terminus instead. GMP at 42. Similarly, an NPS Briefing Statement regarding the road published October 16, 2001, clearly states NPS's opposition to construction of the road:

The NPS believes that adverse impacts to natural and cultural resources outweigh the benefits that might accrue if the road is constructed. The Park is one of the most bio-diverse places in North America and the section of the Park that would be impacted by the proposed road is one of the largest remaining roadless areas east of the Mississippi River.

Reversal of this position in the absence of significant new evidence undermining the basis for the conclusion reached would be arbitrary. NPS has identified no new information suggesting that the cost of the road or the adverse impacts to park resources that it would cause are less than previously believed. In fact, the more detailed studies completed as part of this environmental review process have only revealed the full scope and magnitude of that cost and of those impacts. Thus, NPS must adhere to its longstanding position against construction of the North Shore Road and select the Monetary Settlement alternative as its preferred alternative because construction of the North Shore Corridor alternative would violate the prohibition against impairment of park resources, NPS' affirmative duty to conserve park resources, and NPS policy.

II. The NPS Must Select the Monetary Settlement As Its Preferred Alternative Because Only the Monetary Settlement Alternative Meets the Test of Reasonableness Articulated by the NPS for the Project.

For purposes of this project, the NPS has defined a reasonable alternative as one that is both "prudent" and "feasible." PAR at 4. "To be reasonable, an alternative must not create any truly unique problems such as unusual factors, extraordinary magnitude of cost

compared to benefits, community or environmental disruption of extraordinary magnitude, loss of irretrievable GSMNP resources, or an accumulation of these factors.” PAR at 4. Of the four action alternatives identified for detailed study, only the Monetary Settlement alternative both serves the purpose and need of the project and passes this test of reasonableness.

A. The North Shore Corridor Alternative is Not Reasonable Because the Extraordinary Magnitude of its Cost far Exceed its Benefit.

Although the Preliminary Alternatives Report asserted that all alternatives chosen for detailed study, including the North Shore Corridor, satisfied the Service’s test of reasonableness, the Service noted that “a new evaluation might be warranted as new information became available later in the course of the study.” PAR at 4. The NPS now has new information warranting such a reevaluation and establishing by any standard that the North Shore Corridor alternative is not reasonable. In particular, the North Shore Corridor alternative is not suitable as a preferred alternative because of the “extraordinary magnitude of cost compared to benefits.” The NPS has revised its estimate of road construction from \$150 million in the Preliminary Alternatives Report to \$374 million, exclusive of mitigation costs. At this price, the cost of the North Shore Corridor alternative is more than seven times the cost of the Monetary Settlement alternative. As explained below, even this revised estimate understates the true cost of constructing the North Shore Corridor alternative. As a result, the North Shore Corridor alternative is not a reasonable alternative and must be eliminated from further consideration.

1. NPS Has Underestimated the Extraordinary Cost of the North Shore Corridor Alternative.

In response to questions at recent public hearings, NPS disclosed that its \$374 million estimate for construction of the North Shore Corridor alternative reflected mitigation costs associated with addressing acid-forming rock formations in the study area but did not include other mitigation costs, such as avoiding or mitigating impacts to sensitive species habitat or wetlands. NPS has likely underestimated the cost of addressing acid-forming rock formations. Furthermore, the additional mitigation costs not disclosed in these preliminary studies will add significantly to the final cost of constructing the North Shore corridor alternative, and must be reflected in the final DEIS for NPS to evaluate that alternative in the context of its full cost.

The NPS Has Likely Underestimated the Cost of Mitigating Acid-Forming Rock for the North Shore Corridor Alternative. As noted in the Existing Conditions Report, 99% of rock formations in the project area, “have acid-producing potential with an extremely low acid-buffering capacity.” ECR at 86. The Copperhill Formation, in particular, which “dominates the study area,” is a “serious acid-producing formation.” ECR at 87. Rock formations west of Hazel Creek, which would be disturbed under the North Shore Corridor alternative, “have the highest potential for acid production and are likely to contain higher concentrations of metallic minerals than the surrounding rocks.” PAR at App. B. Even in their current undisturbed condition, these rock formations are

having a detrimental impact on water quality in the study area. Sediments along the mouth of Hazel Creek show an elevated increase in copper content and stream and spring samples in the Wehuty Formation contained pH values as low as 2.7. ECR at 86.

The Existing Conditions Report identified a range of options that would be employed to mitigate the impacts of excavating acid-forming rock formations including removal offsite, blending, treatment, encapsulation, and implementation of an engineered drainage system. ECR at 89. Although the NPS asserts that the cost of these mitigation measures is reflected in the cost estimate for construction of the North Shore Corridor alternative, no information has been provided as to the relative cost of the respective mitigation measures or the extent to which each will be employed throughout the study area. Depending on the assumptions applied, NPS may have dramatically underestimated of the final cost of construction. Furthermore, although information released reveals that construction will generate 400,000 cubic yards of material in excess of the fill capacity for the project, it is not clear that the cost of hauling away and properly disposing of that acid-forming rock has been reflected in the project costs. Neither is it clear whether NPS has considered the future cost of continuous liming of streams and exposed rock surfaces, ECR at 89, as required by NPS policy. MP at 9.1.1.1 (total cost of new facility must be “computed over a product’s or system’s useful life”).

The NPS has Underestimated the Cost of Constructing the North Shore Corridor Alternative By Excluding Substantial Mitigation Costs. NPS has chosen to exclude the cost of mitigation measures (aside from mitigating acid-forming rock) from its costs estimate for the construction of the North Shore Corridor alternative. As a result, the \$374 million estimate circulated to the public is a significant underestimate of the total cost of that alternative. This approach violates park service policy, which requires that “[t]he total cost of a system, facility, or other product will be considered in its planning, design, and construction.” MP at 9.1.1.1. Accordingly, the NPS must calculate and include the cost of clearly anticipated mitigation measures in its cost estimate for construction of the North Shore Corridor alternative.

Park Service policy requires the NPS to institute extensive mitigation for wildlife when constructing a transportation system in a park, including “terrestrial and aquatic wildlife corridor crossings and other accommodations to avoid or mitigate harm to individual animals, the fragmentation of plant and animal habitats, and the disruption of natural systems.” MP at 9.2. The Park Service has recognized the need for such mitigation throughout the project area including wildlife underpasses/overpasses, landscape connectors, bridging and bottomless arch culverts. 2005 Project Displays (“Natural Resources”). Because these structural mitigation elements are clearly anticipated throughout the corridor, NPS has a reasonable basis for creating an estimate of the additional cost attributable to these measures.

Additional mitigation will be required to avoid wetlands and streams in the project area. NPS Management Directives require the Service to “avoid direct and indirect support of new construction in wetlands unless there are no practicable alternatives,” and to “first consider relocating or redesigning facilities, rather than

manipulating streams.” MP at 4.6.5, 4.6.6. Accordingly, NPS has acknowledged that the project will require minor road modifications and/or realignments, restoration/enhancements, bridging and bottomless arch culverts, and sensitive design techniques. 2005 Project Displays (“Natural Resources”). Although NPS has acknowledged that these wetlands and stream mitigation measures will be necessary, it has declined to include them in cost estimates for construction of the North Shore Corridor alternative, as required by NPS policy.

Nor has the NPS released any information suggesting that it has considered the additional construction and mitigation costs associated with unstable geological conditions in the project area. The NPS has identified quaternary deposits, which can cause mass-wasting events, in the Eagle Creek area. ECR at 83. NPS management directives require the Service to site facilities “where they will not be damaged or destroyed by natural physical processes” including “unstable soils and geologic conditions.” MP at 9.1.1.6. Again, although mitigation measures to address unstable soils have been identified by NPS and are required by NPS policy, NPS has failed to reflect such measures in the cost estimate for construction of the North Shore Corridor alternative.

For all these reasons, the \$374 million estimate for construction of the North Shore Corridor alternative is a significant underestimate of the extraordinary magnitude of the cost to construct that alternative.

2. The Extraordinary Cost of the North Shore Corridor Alternative Far Exceeds the Benefit of Constructing A Road Which NPS Acknowledges is Not Needed.

Given the extraordinary magnitude of the \$374 million cost estimate for construction of the North Shore Corridor alternative, a number which is likely a significant underestimate of the final cost, the North Shore Corridor alternative cannot survive the test of reasonableness identified by the NPS for this project because it is neither prudent nor feasible. In exchange for such a significant investment, NPS and the United States taxpayer would achieve only a road which serves no regional transportation purpose, serves no purpose identified by the GSMNP General Management Plan, and provides only incidental and secondary economic benefit to Swain County.

The only potential benefits identified by NPS for the North Shore Corridor alternative are that it “may generate moderate increases in the number of visitors to the study area” and “may have the potential to indirectly provide moderate economic development opportunities for Bryson City and other study area communities.” PAR at 21. As the Great Smoky Mountains National Park is already the most used park in the national park system and already suffers from a funding shortfall and maintenance backlog, increased visitorship is not a significant benefit to counterbalance the substantial cost of the project. Park Service policy underscores this point by making clear that “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.” MP at 1.4. In addition, any

“moderate economic development opportunities” that might be provided by the project are dwarfed by the cost of the alternative. As explained below, the Monetary Settlement, if properly analyzed, has the potential to create the same or greater economic stimulus to Swain County and, at less than one seventh the cost, does so far more efficiently than the North Shore Corridor alternative.

Because the extraordinary magnitude of the cost for constructing the North Shore Corridor alternative far exceeds the benefits of construction, and because, as is discussed below, construction of the alternative would cause “community or environmental disruption of extraordinary magnitude” and the “loss of irretrievable GSMNP resources,” PAR at 5, the North Shore corridor alternative fails the test of reasonableness identified by NPS for this project and must not be selected as the preferred alternative.

B. The Monetary Settlement Is Reasonable Because the Benefit It Would Provide to Swain County More Than Justifies Its Cost.

Unlike other alternatives under consideration, the Monetary Settlement alternative poses no risk of “community or environmental disruption of extraordinary magnitude” or “loss of irretrievable GSMNP resources.” Accordingly, the Monetary Settlement is a reasonable alternative under the test articulated by the NPS for this project unless it would entail “extraordinary” costs that far exceed its benefits.

The cost of the Monetary Settlement alternative is not in question. The Commissioners of Swain County have officially resolved to accept a cash settlement of the 1943 agreement of \$52 million. As discussed below, that cost is a fraction of the conservative projection offered by the NPS for construction of the North Shore Corridor alternative. Despite its reduced cost, the Monetary Settlement alternative has the potential to provide greater benefits than any other alternative under consideration.

Although NPS has recognized that Swain County could use the Monetary Settlement to “pursue economic development opportunities within the county’s jurisdiction, which would potentially enhance public facilities, employment opportunities, and/or the local tourism industry,” the NPS has declined to examine the full benefits generated by the Monetary Settlement on the ground that the nature of those benefits will depend on how Swain County chooses to invest the settlement money. PAR at 19. Instead of offering an estimate or a range of possible outcomes (investment in education or economic development, for example, or reduction of local property taxes), the NPS has assumed only that Swain County would spend the entirety of the cash settlement within 18 years on small capital projects. That scenario is not based on any plan or suggestion by Swain County as to how it would invest the \$52 million provided by the Monetary Settlement alternative. Under this small capital project scenario, NPS has projected that the Monetary Settlement would generate 49 jobs per year in the first 18 years and 16 or more jobs per year after 2026.

This study falls short of NPS’ duty to “rigorously explore and objectively evaluate” alternatives under consideration. 49 C.F.R. § 1502.14(b). NEPA requires

agencies to take a “hard look” at the likely impacts of their actions before proceeding. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996). Furthermore, NPS policy mandates that NPS management decisions must be “based on ample technical and scientific studies,” Director’s Order 12, and “guided by high-quality, scientifically acceptable information.” See MP at 4.1.1. When an EIS is prepared, the Service must apply these same standards to its evaluation of economic impacts of the alternatives under consideration. See 40 C.F.R. § 1508.14.

To meet these standards and to allow comparison among the alternatives, NPS must consider a range of possible uses for the monetary settlement and their impact on the Swain County economy. At least one proposal has been suggested by Swain County citizens: investment of the \$52 million in a trust and expenditure of the annual income on the priorities of the county. Those expenditures could include education, economic development seed money, and other programs that would improve the long term economic productivity of the county.

In addition, NPS appears to have applied a double-standard in its evaluation of the economic implications of the Monetary Settlement and North Shore Corridor alternatives. NPS has projected that, after completion of the North Shore Road, 207 jobs per year would be created as a result of construction of the North Shore Corridor alternative. That estimate reflects indirect and induced secondary growth resulting from the expenditure of tourist funds in Swain County.

Materials released and statements made by NPS to date, however, suggest that multipliers for indirect and induced growth resulting from the Monetary Settlement alternative have not been considered. NPS consultants have stated that, because the economic impact of the Monetary Settlement alternative will vary with how Swain County invests the money, it is not possible to arrive at an estimate of growth attributable to the Monetary Settlement alternative. It is not clear from this statement whether NPS has declined to consider indirect and induced secondary effects of the monetary settlement, the potential increase to the county’s economic productivity from wise investment policies (in education and economic development, for example), or both. The job growth estimates released to the public to date are consistent with an analysis that looked only to direct economic effects associated with expenditure of the monetary settlement on construction of small capital projects (short-term construction jobs) and administration of the resulting facilities (management and maintenance) but not the multipliers associated with indirect and induced secondary effects of injecting \$2 million per year into the Swain County economy. If NPS has indeed taken that position, it has significantly underestimated the economic benefit to local communities of the Monetary Settlement alternative.

Because the Monetary Settlement alternative would serve the stated purpose and need of the project, provide substantial economic benefits to Swain County and avoid the extraordinary costs and environmental consequences associated with the other alternatives under consideration, it is reasonable under the standard articulated by NPS for this project.

III. The Monetary Settlement Alternative Will Avoid The Significant Impacts To Biological Resources That Would Result From Construction Of The Build Alternatives.

NPS has identified as a goal for this project the protection of “the significant and diverse natural resources and ecosystems of the park,” PAR at 3, and has stated an objective of protecting “federally-listed threatened and endangered species and their habitats.” PAR at 4. These project goals are consistent with NPS policy which mandates that “[n]atural resources will be managed to preserve fundamental physical and biological processes, as well as individual species, features, and plant and animal communities.” MP at 4.1. The Management Directives further provide that the Service “will not attempt to solely preserve individual species” but rather “all the components and processes of naturally evolving park ecosystems.” MP at 4.1. These policies require selection of the Monetary Settlement alternative as the preferred alternative for this project because construction of the build alternatives would cause substantial negative impacts to individual species and to park ecosystems.

A. NPS Has Not Conducted An Adequate Survey of the Project Area to Identify Species That Will Be Adversely Affected By A Build Alternative.

NPS has stated at recent public hearings that its entire biological resources inventory was conducted over a period of several months. Such a survey is inadequate to identify species that could be adversely affected by construction in the project area. At the most recent project meetings, NPS identified 2 federal species of concern identified in the project area and 3 species listed as rare in North Carolina. This survey identified substantially fewer federal species of concern than would be expected from previously reports described in the Existing Conditions Report. In the Existing Conditions Report, NPS identified 13 federal species of concern that had been identified in or near the project area. ECR at 158-61. The Existing Conditions report also identified 11 species listed as rare by the state of North Carolina that previously had been identified in or near the project area.² ECR at 165-66. Most alarmingly, the Existing Condition Report identified three species listed as endangered or threatened that previously had been identified in or near the project area but were not identified by the biological survey. ECR at 148.

The disparity between species identified by previous reports and species identified by the biological resources inventory calls into question the adequacy of the biological resources inventory conducted for this project. At a minimum, a full year-round survey must be conducted to ensure that NPS has identified all rare species in the project corridor and adequately identified potential impacts to those species that would result from construction of a build alternative.

² NPS must “inventory, monitor, and manage state and locally listed species in a manner similar to its treatment of federally listed species, to the greatest extent possible.” MP at 4.4.2.3.

B. NPS Must Reject Construction of a Build Alternative Because of Uncertain Impacts to Species New to Science.

NPS has discovered 21 duff invertebrate species new to science and 1 snail species new to science in the project corridor. By virtue of their recent discovery, nothing is known about the distribution, abundance, or habitat requirements of these species. ECR at 169. If any of these species are rare, construction of a build alternative through the area, with its attendant impacts to habitat and water quality, could have a devastating impact on these new species. Thus, selection of a build alternative without a complete understanding of the nature and status of these species would risk permanent extinction of a species or extirpation of a species from the Park.

Park Service policies require more. Park Service Management Directives provide that the Service will inventory native species “that are of special management concern to parks (such as rare, declining, sensitive, or unique species and their habitats) and will manage them to maintain their natural distribution and abundance.” MP at 4.4.2.3 (emphasis added). The Management Directives further provide that:

“[P]lanning for park operations, development, and management activities that might affect natural resources will be guided by high- quality, scientifically acceptable information, data, and impact assessment. Where existing information is inadequate, the collection of new information and data may be required prior to decision- making. Long-term research or monitoring may also be necessary to correctly understand the effects of management actions on natural resources whose function and significance are not clearly understood”
MP at 4.1.1.

This standard complements and reinforces the Service’s obligation under the National Environmental Policy Act (NEPA) to take a “hard look” at the potential impact of construction of the North Shore Corridor alternative on species new to science. In addition, Director’s Order 12 addressing NEPA compliance provides that:

“Technical and scientific analyses on potential impacts that are essential in making a well-reasoned decision will be obtained even though such information may not be readily available. If such information cannot be obtained due to excessive cost or technical impossibility, the proposed alternative for decision will be modified to eliminate the action causing the unknown or uncertain impact or other alternatives will be selected.”
Director’s Order 12 at 4.4.

Thus, when, as here, the Park has inadequate information about a unique species to assess the significance of impacts to that species or its habitat, the service must (1) conduct long-term research or monitoring necessary to resolve that uncertainty or (2) choose an alternative that avoids potential impacts to the species. Accordingly, NPS cannot select a build alternative as its preferred alternative without first conducting sufficient long-term research into the nature and status of these 22 species new to science

to assure that construction will not violate the Park Service's obligation to maintain these species in their natural distribution and abundance within the Park.

C. Construction Of A Build Alternative Would Violate NPS Policy Because Of Adverse Impacts To Biological Resources.

NPS Management Directives provide that “[t]he National Park Service will maintain as parts of the natural ecosystems of parks all native plants and animals.” MP at 4.4.1. This standard prohibits the Park Service from taking action that could result in the extirpation of any species from the Park. Thus, the NPS cannot select a build alternative as its preferred alternative if it will cause the elimination from the Park of any listed or rare species, any species of concern, species new to science, or any of the 33 species new to park records identified by the biological survey for this project. If for example, a species new to park records is determined to be rare within the Park boundaries, the NPS must avoid any alternative that will undermine the continued survival of that species within the Park. Consistent with the standards for adequate scientific analysis and certainty described above, NPS must analyze the distribution and abundance of these species in the Park and ensure that the chosen alternative will not eliminate any species from the Park.

Furthermore, NPS must not select the North Shore Corridor alternative as its preferred alternative because that alternative will undermine fundamental physical and biological processes, as well as individual species. In particular, the North Shore Corridor alternative would fragment the largest unfragmented tract of mountain terrain in the eastern United States. This rare expanse of contiguous forest provides important habitat for a host of forest interior species that require large tracts of unfragmented forest.

For example, “[t]he relatively undisturbed, contiguous nature of the forests contained within GSMNP and Nantahala National Forest offer optimal habitat conditions for neotropical migrant birds.” ECR at 142. In addition, “the park is an important refuge from cowbird parasitism for many songbirds, such as the neotropical migrants.” ECR at 142. Thus, it is not surprising that the biological resources survey for this project identified 46 species of neotropical migrant songbirds in the project area. Interior forest species in the Park adapt poorly to unnatural influences in their ecosystems. ECR at 140.

Despite the significance of fragmentation to forest interior species, nothing in the information released by NPS suggests that the Service has conducted a fragmentation study for the North Shore corridor and other build alternatives. Such a study is critical to the Service's ability to evaluate the cumulative impacts of construction on interior forest species. In particular, NPS has offered no indication that it has considered the biological consequences of creating an orphan tract of land between the North Shore Corridor and Lake Fontana that is divided from the rest of the Park on both sides. Creation of such a tract is inconsistent with Management Directives requiring NPS to manage ecosystems to “preserve fundamental physical and biological processes, as well as individual species, features, and plant and animal communities.” MP at 4.1.

IV. The Monetary Settlement Alternative Will Avoid The Significant Impacts To Water, Floodplain and Wetland Resources That Would Result From Construction Of The Build Alternatives.

NPS must select the Monetary Settlement alternative as its preferred alternative because it is the only alternative that satisfies NPS' objective for this project of protecting "streams, seeps, wetlands, floodplains, and other water resources." PAR at 4.

NPS policy requires the Service to "avoid, whenever possible, the pollution of park waters by human activities occurring within and outside of parks" and to "[t]ake all necessary actions to maintain or restore the quality of surface waters and ground waters within the parks." MP at 4.6.3. NPS policy also requires NPS to "preserve floodplain values and minimize potentially hazardous conditions associated with flooding" by avoiding "the long and short-term environmental effects associated with the occupancy and modification of floodplains." Director's Order 77-2. Finally, NPS must "avoid direct and indirect support of new construction in wetlands unless there are no practicable alternatives." MP at 4.6.5. These policies prohibit NPS from selecting the full build alternative or partial build to Bushnell alternative as its preferred alternative.

As noted by NPS, "the project study area, contains some of the most pristine area and some of the cleanest water in North Carolina. The portion of the basin surrounding Fontana Lake also contains some of the most famous trout streams in the state." ECR at 99. The build alternatives would have a devastating impact on these water resources. The full build alternative in particular would traverse the largest amount of the water supply watershed critical area, the most wetlands, and the largest area of floodplains. PAR at 4.3.6. The full build alternative would also require excavation west of Hazel Creek where the underlying rocks are believed to have the highest potential for acid production and metallic contamination. PAR at 4.3.6.

The cumulative impact of a build alternative, when combined with the effects of atmospheric acid deposition and continued acid drainage from closed mines in the project area, will significantly impair these water resources. The project area suffers from high total atmospheric deposition of sulfur and nitrogen and shallow, poorly buffered soil, which could "lead to increased acidity of the waters, including Fontana Lake, within the project study area," even in the absence of construction in the project area. ECR at 99 and 104. Atmospheric acid deposition is already "impacting aquatic as well as terrestrial resources." ECR at 173. Similarly, NPS has concluded that "historic mining activity in the Fontana Lake watershed area currently negatively impacts the water quality of nearby surface waters." ECR at 108-109. Thus, the environmental consequences of exposing acid-forming rock during construction of any build alternative, when combined with existing threats to water quality in the Park, will cause impairment of the high quality surface waters in violation of the NPS Organic Act, NPS policy, and North Carolina State law. See 15A NCAC 02B.0201(d) (protection of high quality surface waters).

The cumulative impact of wetlands loss must also be considered in light of the recent loss of wetlands in the Ravensford land exchange. PAR at App. B. Wetlands are

one of the rarest ecosystem types found in the Park. The full build and partial build alternatives would take up to 5 and 15 additional wetlands, respectively. Selection of a build alternative in these circumstances would violate NPS policy which has adopted a no net loss policy for wetlands and which requires NPS to “preserve and enhance the natural and beneficial values of wetlands.” MP at 4.6.5.

Accordingly, NPS must select the Monetary Settlement alternative, which will have no adverse effect on surface water, watershed, floodplain, or wetland resources, as its preferred alternative.

V. The No Action, Laurel Branch Picnic Area and Partial Build to Bushnell Alternatives Do Not Serve the Purpose and Need of this Project

Although the Preliminary Alternatives Report states that each of the alternatives chosen for detailed study were screened for their ability to serve the project’s purpose and need, only two of the alternatives chosen, the Monetary Settlement and the North Shore Corridor, satisfy that standard. As articulated by the NPS, the purpose of this project is to “to discharge and satisfy any obligations on the part of the United States that presently exist as the result of the July 30, 1943, Memorandum of Agreement (1943 Agreement) between the United States Department of the Interior (DOI), the Tennessee Valley Authority (TVA), Swain County, North Carolina, and the state of North Carolina.” PAR at 2. The Service’s stated need for this study is “to determine whether or not it is feasible to complete the road and to evaluate other alternatives that would satisfy the obligation.” PAR at 2.

The 1943 agreement can be discharged and satisfied only by discharging the United States’ commitments under the 1943 agreement or by tendering substitute performance acceptable to all parties to the contract. Selection of the North Shore Corridor alternative and construction of the project would discharge the 1943 agreement through performance. The Monetary Settlement would discharge the 1943 agreement through the agreement of all signatories to accept substitute performance. Swain County is a signatory to the contract. The Swain County Board of Commissioners, the county’s governing body and the only body with authority to settle contracts on behalf of the county, N.C. Stat. §§ 153A-11, 153A-34, resolved on February 11, 2003 to seek a cash settlement of the 1943 agreement. Thus, the Monetary Settlement and North Shore Corridor alternatives would serve the stated purpose and need of this project.

The remaining alternatives, however, would not discharge the obligations of the United States under the 1943 agreement and must not be selected as the agency’s preferred alternative. “When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.” Angoon v. Hodel, 803 F.3d 1016, 1021 (9th Cir. 1986).

The no action alternative would continue the status quo and leave the United States’ obligations under the 1943 agreement unresolved.

The partial-build alternatives would also fail to satisfy the letter of the 1943 agreement. The Preliminary Alternatives report recognized that construction of N.C. 28 along the southern edge of Fontana Lake did not discharge the United States' obligations under the 1943 agreement because that agreement "specified a road on the north shore of Fontana Lake, connecting Bryson City and Deal's Gap." PAR at 9. Nonetheless, the report fails to recognize that the Partial Build to Bushnell and Laurel Branch Picnic Area alternatives fail to serve the purpose and need for this project for the same reason. Neither partial build alternative would meet the explicit requirement of the 1943 Agreement to connect Bryson City and Deal's Gap. Accordingly, neither partial build alternative would satisfy and discharge the obligations of the United States through performance.

Furthermore, the partial build alternatives can not serve as a basis for discharging the obligations of the United States under the 1943 agreement through settlement. That result can be achieved only through the consent of Swain County and the other signatories to the agreement. As noted by the NPS, Swain County has offered to settle the 1943 agreement on specific terms which do not include a partial build. The preliminary alternatives study suggests that the Partial Build to Bushnell alternative was retained for further study because "[b]ased on previous public comment, the Bushnell Area may be a viable solution to settle the 1943 Agreement." Public comment, however, even favorable comment from Swain County citizens, cannot salvage the feasibility of the partial build alternative when the governing body of Swain County will not accept that alternative as substitute performance under the 1943 agreement. Thus, because the partial build alternatives will not discharge the United States obligations under the 1943 agreement through performance and because Swain County will not agree to settle the 1943 agreement on those terms, the partial build alternatives are not viable or reasonable alternatives and cannot serve as the agency's preferred alternative.

VI. Conclusion

For these reasons NPS must select the Monetary Settlement alternative as its preferred alternative.

Thank you for your consideration of these comments.

Sincerely,

/s

Austin D.J. Gerken