

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

LITTLE TRAVERSE LAKE PROPERTY OWNERS ASSOCIATION, a Michigan non-profit corporation, **DOUGLAS JONES, L. GENE MORSE** and **LINDA MORSE**, in their capacities as **CO-TRUSTEES of THE LEROY and LINDA MORSE TRUST, MARY ANN SHUTZ**, in her capacity as **TRUSTEE of THE MARY ANN SHUTZ TRUST**, and **MARCIA SKJAERLUND**,

Case No.: 1:15-cv-00789

Hon. Gordon J. Quist

Plaintiffs,

v

NATIONAL PARK SERVICE,

Defendant.

**BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

INDEX OF AUTHORITIES ii

INTRODUCTION1

STATEMENT OF FACTS2

A. Background Facts2

B. Segment 9 of the Trail3

STANDARD OF REVIEW5

LEGAL ARGUMENT.....5

A. The March 2009 EA Failed to Disclose and Analyze Environmental Impacts.....8

B. The FONSI was Issued Before Final Decisions were Made Regarding the Trail.....15

C. NPS Violated NEPA by Failing to Prepare an EIS.....18

D. NPS Failed to Consider Adequate Range of Alternatives.....21

CONCLUSION23

CERTIFICATE OF SERVICE24



INDEX OF AUTHORITIES

Cases

Andrus v Sierra Club, 422 U.S. 347, 358; 99 S.Ct. 2335, 2341; 60 L.Ed.2d 943 (1979) 8

Blue Mountain Biodiversity Project v Blackwood, 161 F.3d 1208, 1212 (1998) 18, 21

Bluewater Network v. Salazar, 721 F.Supp.2d 7 (D.D.C. 2010) 7

Citizens Against Pellissippi Parkway Extension, Inc. v Mineta, 375 F.3d 412, 414 (6th Cir. 2005) 6

Davidson v United States Dept. Energy, 838 F.2d 850, 855 (6th Cir. 1988)..... 5

Dine Citizens Against Ruining Our Environment v Klein, 747 F.Supp.2d 1234, 1254 (D. Colo. 2004) 22, 23

Greater Yellowstone Coal v Flowers, 359 F.3d 1257, 1277 (10th Cir. 2004)..... 22

Kentucky Riverkeeper, Inc. v Rowlette, 714 F.3d 402, 407 (6th Cir. 2013)..... passim

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-67 (1983)..... 5

Nat'l Ass'n of Home Builders v Defenders of Wildlife, 551 U.S. 664, 658; 127 S.Ct. 2518; 168 L.Ed.2d 467 (2007)..... 11

Robertson v Methow Valley Citizens Council, 490 U.S. 332, 349; 109 S.Ct 1935; 104 L.Ed.2d 351 (1989) 21

Statutes

16 U.S.C. § 460x(a) 19

16 U.S.C. § 460x(b) 2, 20

16 U.S.C. § 460x-5(d)..... 2, 20

28 U.S.C. § 2412..... 24

42 U.S.C. § 4331 5

42 U.S.C. § 4331(b) 5

42 U.S.C. § 4332(2)(C)..... 18



42 U.S.C. § 4332(C)..... 6

42 U.S.C. § 4332(E)..... 21

42 U.S.C. §§ 4321-4370..... 1

5 U.S.C. § 702..... 1

5 U.S.C. § 706..... 5

5 U.S.C. § 706(2)(A)..... 15

5 U.S.C. §§ 551-706..... 1

M.C.L. 221.20 17

M.C.L. 324.3010 14

M.C.L. 324.30306 14

M.C.L. 324.35304 14

Other Authorities

40 C.F.R. § 1502.23 16, 17

40 C.F.R. § 1502.5 16

40 C.F.R. § 1508.23 16

40 C.F.R. § 1508.27(a)..... 18

40 C.F.R. § 1508.27(b) 18

40 C.F.R. § 1508.27(b)(3)..... 19

40 C.F.R. § 1508.27(b)(4)..... 19, 21

40 C.F.R. § 1508.7 9, 11

40 C.F.R. § 1508.8 9, 11

40 C.F.R. § 1508.9 7

40 C.F.R. § 1508.9(a)(1) 8

40 C.F.R. § 1508.9(b) 7, 22

40 C.F.R. §§ 1500-1508..... 1, 8



Title 16, Chapter 1, of the United States Code 1

Rules

FED. R. CIV. P. 56(c) 5, 24



INTRODUCTION

This is a civil action for declaratory relief under the Administrative Procedures Act (APA) 5 U.S.C. §§ 551-706. The claims arise from Defendant's violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370, and its implementing regulations, 40 C.F.R. §§ 1500-1508. This action is brought pursuant to the right of review provision of the APA, 5 U.S.C. § 702.¹

Defendant National Park Service violated federal law by issuing its Finding of No Significant Impact ("FONSI") in connection with the Leelanau Scenic Heritage Route Trailway Plan, now named the Sleeping Bear Heritage Trail ("the Trail"), to be located in or near the Sleeping Bear Dunes National Lakeshore ("Lakeshore"). Defendant issued the FONSI based upon an inadequate and faulty Environmental Assessment (EA) and *before* final decisions were made relating to the Trail's route and construction means and methods. Plaintiffs challenge Defendant's failure to meet its procedural and substantive duties required by NEPA by failing to adequately perform environmental review procedures in the EA regarding Segment 9 of the Trail as well as failing to supplement its findings and conclusions after substantial changes were made to the Trail.²

¹ Defendant National Park Service is a subordinate agency of the United States Department of Interior, organized and existing pursuant to Title 16, Chapter 1, of the United States Code.

² Plaintiff Little Traverse Lake Property Owners Association ("LTLPOA ") is a Michigan non-profit corporation organized in 2004, and its membership is comprised of owners of property on or adjacent to Little Traverse Lake and Traverse Lake Road. LTLPOA was formed, *inter alia*, to engage in activities designed to protect and enhance the environmental quality of Little Traverse Lake and adjacent property, which includes the areas affected by Segment 9 of the Trail. It works to serve as a liaison between its 100+ members and the Defendant National Park Service on matters that directly affect its members and the surrounding environment. LTLPOA and the individual Plaintiffs have participated in those phases of the Trail's planning that were well publicized or for which notice was received.

In particular, construction of Segment 9 of the Trail, as currently proposed, will cause a significant environmental impact as a result of the degradation of wildlife habitat, visual quality, solitude, and permanent changes to the topography, including wetlands and "critical dune areas," thereby adversely affecting Plaintiffs' aesthetic, recreational, and environmental interests in the affected areas. These environmental impacts were not considered or evaluated by NPS before it issued its FONSI, and as such, Defendant's actions violated NEPA. Consequently, to prevent this irreparable injury to the environment and to rectify Defendant's unlawful agency action, Plaintiffs seek an order declaring that Defendant NPS failed to comply with NEPA, as well as such other additional relief as the Court deems just and equitable.

STATEMENT OF FACTS

A. Background Facts

The Lakeshore is located in Leelanau and Benzie Counties.³ Congress established the Lakeshore in 1970 by way of legislation acknowledging that "[i]n developing the lakeshore, full recognition shall be given to protecting the private properties for the enjoyment of the owners," and "[i]n developing the lakeshore the Secretary shall provide public use areas in such places and manner as he determines will not diminish the value or enjoyment for the owner or occupant of any improved property located thereon." 16 U.S.C. §§ 460x(b) and 460x-5(d).

The Trail involves a non-motorized, paved pathway of approximately 27 miles running adjacent to and through the Lakeshore in Leelanau County for multi-use recreational purposes. (PageID. 771). The Trail, as proposed, is comprised of 9 segments running south to north from M-22 at Manning Road to CR 651. (PageID. 771-773). The Trail Project is included as part

³ A more detail explanation of the relevant facts may be found in the Complaint. (Doc. 1, PageID. 1-23). Where appropriate, facts stated in this brief will cite to the administrative record, which Defendant NPS has filed as Doc. Nos. 16, 17, and 18. (See PageID. 496-3229).

of the Leelanau Scenic Heritage Route that was designated in 2001 under the Michigan Department of Transportation State Heritage Route Program to provide guidance on maintaining the scenic characteristics along M-22. The Trail is included as part of the Lakeshore's General Management Plan, and NPS was assisted in development of the Trail by the Leelanau Scenic Heritage Route Committee which has representatives from the twelve (12) local municipalities, the Michigan Department of Transportation (MDOT), the Grand Traverse Band of Ottawa and Chippewa Indian Tribes, the Leelanau Conservancy, the Leelanau County Road Commission, the Leelanau County Planning Commission, interested organizations, and citizens. In the development of the Trail, Defendant NPS took the position that the concept requires investigation, planning and an environmental assessment where it affects lands managed by the NPS and consistent with NEPA. (PageID. 766-768).

B. Segment 9 of the Trail

Segment 9 of the Trail, which is the segment at issue in the case at bar, was originally planned to run entirely within the road right-of-way of M-22 from CR 669 to CR 651. However, in October, 2008, a proposed preferred alternative route (Alternative B) was identified calling for Segment 9 of the Trail to be routed on Traverse Lake Road for approximately 3 miles. (PageID. 1212-1387).

Traverse Lake Road is a quiet, residential county road 2.7 miles from end to end. Both ends of the scenic road connect with M-22, but it offers no shortcut to M-22 traffic. (Doc #8, ¶ 17, PageID. 429). Segment 9 is proposed to be routed along the north side of the road which is bounded by National Lakeshore property and four private parcels, and the south side of the road is bounded by over 100 private parcels. Both sides of the road are heavily wooded with many mature trees and wetlands. (*Id.*) Near the eastern end of the road, there are a series of

sand dunes, some in excess of 50 feet in height with slopes greater than 1:3, that end at the paved portion of the road. The critical dunes in this area, which are protected under Michigan law, completely cover the road shoulder for a distance of more than 700 feet. (*Id.*)

Despite strong public opposition to rerouting Segment 9 onto Traverse Lake Road, Defendant released a revised Environmental Assessment in March 2009 (the "March 2009 EA") that not only failed to address the public's concerns regarding the rerouting of Segment 9, but also created numerous additional concerns. (PageID. 758-935). With the March 2009 EA, Defendant proposed that Segment 9 be routed north at the west end of Traverse Lake Road on an off-road board walk, and then continue along the north side of Traverse Lake Road as a 10 foot wide separate off-road asphalt path crossing private land within the road right of way, as well as Lakeshore Property, and extending to the eastern end of the road. (PageID. 795).

The March 2009 EA provided no indication that by changing the proposed route of Segment 9 from the paved surface of Traverse Lake Road to a boardwalk and separate off-road asphalt path, that the construction of the Trail would result in extensive tree clearing involving the removal of hundreds of mature trees, significant disturbance of wetland and wildlife habitat areas, the crossing of a stream, the excavation of critical dune areas on the eastern end of Traverse Lake Road, and crossing the front yards of private residences within ten feet of private structures in some areas. (Doc. 1, PageID. 25) Despite these and numerous other omissions and deficiencies regarding the EA, in August 2009, Defendant issued its FONSI with regard to the Trail, including Segment 9. (PageID. 516-525). Yet, more than six years later, in March, 2015, Defendant responded to a request under the Freedom of Information Act

("FOIA") stating that the final route of Segment 9 "has yet to be determined." (PageID. 27-28).⁴

STANDARD OF REVIEW

The Court should grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In a case brought under the APA, review is limited to the Administrative Record. See *Davidson v United States Dept. Energy*, 838 F.2d 850, 855 (6th Cir. 1988).

Under the Administrative Procedures Act, the court must reject agency action that is not in accordance with law, or is without observance of procedures required by law, or is "arbitrary and capricious." 5 U.S.C. § 706. Although the "arbitrary and capricious" standard of review applied in APA cases is deferential, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" and the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-67 (1983) (citations omitted).

LEGAL ARGUMENT

NEPA declares a broad national commitment to protecting and promoting environmental quality. See 42 U.S.C. § 4331. In particular, 42 U.S.C. § 4331(b) provides that it is "the continuing responsibility the Federal Government to use all practicable means . . . to

⁴ To date, approximately 13 miles of the Trail have been completed. The next segment from Port Oneida to Bohemian Road (CR 669) is scheduled to be completed by June, 2016. See <http://sleepingbeartrail.org>. Construction has not yet begun on Segment 9. (*Id.*)

improve and coordinate Federal plans, functions, programs, and resources" to the end that the Nation may, among other things: "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;" assure "safe, healthful, productive, and esthetically and culturally pleasing surroundings" for all Americans; and, attain "the widest range of beneficial uses of the environment" without "degradation" or "other undesirable and unintended consequences." (*Id.*)

To ensure that this commitment is upheld, NEPA sets forth the procedural requirements by which federal agencies must assess the environmental impacts of "major federal actions." *Citizens Against Pellissippi Parkway Extension, Inc. v Mineta*, 375 F.3d 412, 414 (6th Cir. 2005) (relying on 42 U.S.C. § 4332(C)). These procedures require agencies to take a "hard look" at the environmental consequences of their actions. *Kentucky Riverkeeper, Inc. v Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013). In particular, NEPA requires federal agencies to prepare an environmental impact statement whenever the major federal action "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(C). As part of its charge to implement NEPA, NPS issued "Director's Order No. 12" (DO-12) which in turn led to the issuance of the "DO-12 Handbook."⁵ The Handbook is based upon NEPA and its implementing regulations, and, according to its own terms, has "the force of law." (PageID.3618) According to the Handbook, one of the first steps in NEPA compliance - referred to as a "minimum requirement" - is the preparation of an Environmental Screening Form ("ESF"). (PageID.3635) The Handbook states: "[y]ou must complete an ESF for any project that may have an impact on the human environment."⁶ (*Id.*) Despite the fact that there can be no dispute that the proposed

⁵ The DO-12 Handbook was added to the administrative record following Plaintiffs' objections to the record as originally filed. (ECF No. 21, PageID.3615 *et seq.*)

⁶ "Human Environment" is defined "as the natural and physical environment, and the relationship of people with that environment." (PageID.3720)

routing of Segment 9 of the Trail is likely to have an impact on the human environment, no ESF was prepared. A completed ESF would have provided clear "yes" or "no" answers on the impact of the Trail on the human environment, including Segment 9. (PageID.3725-3730) Failure on the part of NPS to prepare an ESF in connection with the Trail is a *per se* violation of NEPA, DO-12, and the Handbook.

In addition to the mandatory requirement to prepare an ESF, agencies are authorized to first prepare a less burdensome environmental assessment as a method for determining whether a proposal needed an environmental impact statement. *Kentucky Riverkeeper*, 714 F.3d at 407-408 (citing 40 C.F.R. § 1508.9). The environmental assessment is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact," including brief discussions of the need for the proposal, alternatives, environmental impacts, and a list of individuals and agencies consulted. 40 C.F.R. § 1508.9.

Nevertheless, even though less demanding than an environmental impact statement, "an environmental assessment still require[s] the authorizing agency to consider the environmental impacts of its proposals." *Kentucky Riverkeeper*, 714 F.3d at 408 (citing 40 C.F.R. § 1508.9(b)) (emphasis added). If after preparing an environmental assessment, the agency determines that the proposed action will have no significant environmental consequences, it may forego issuing an environmental impact statement and instead issue a finding of no significant impact. See 40 C.F.R. § 1508.9. However, the agency must be able to make a convincing case for its finding, and preparation of an environmental impact statement can be avoided only if the agency finds that any changes or safeguards reduce impacts to a minimum. See *Bluewater Network v. Salazar*, 721 F.Supp.2d 7, 39 (D.D.C. 2010). When the agency improperly relies on an

environmental assessment to eschew its NEPA obligations to "adequately consider[] and disclose[] the environmental impacts of its actions," courts have a duty to set aside the agency action. *Kentucky Riverkeeper*, 714 F.3d at 411 (holding that were the agency's environmental assessment failed to comply with NEPA and its regulations, the agency's action is properly set aside as arbitrary and capricious).

Here, the March 2009 EA, on which NPS based the issuance of its FONSI, failed to adequately consider and disclose the environmental impacts that will be caused by the proposed route for Segment 9 of the Trail. Under the circumstances detailed below, NPS was required to complete an environmental impact statement, but it failed to do so. In addition, NPS failed to consider an adequate range of alternatives with regard to its actions, specifically its decision regarding the route for Segment 9. Therefore, NPS's decision to issue the FONSI rather than to prepare an environmental impact statement (EIS) was arbitrary and capricious, and the FONSI issued by NPS in August 2009 should be set aside and the matter remanded to NPS to prepare an EIS.

A. The March 2009 EA Failed to Disclose and Analyze Environmental Impacts

The March 2009 EA failed to adequately analyze the direct, indirect, and cumulative effects that Segment 9 of the Trail will have on the environment; accordingly, NPS violated NEPA by issuing its FONSI in August 2009. As NEPA regulations explain, an EA must provide "sufficient evidence and analysis" to adequately demonstrate the project's environmental impact. 40 C.F.R. § 1508.9(a)(1).⁷ An EA must consider the cumulative impact

⁷ The Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA, which are binding on all federal agencies. 40 C.F.R. §§ 1500-1508. CEQ regulations are entitled to substantial deference. *Andrus v Sierra Club*, 422 U.S. 347, 358; 99 S.Ct. 2335, 2341; 60 L.Ed.2d 943 (1979).

as well as both the direct and indirect effects of a project. *See* 40 C.F.R. §§ 1508.7, 1508.8. A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” § 1508.7. Along the same lines, direct effects are those that “are caused by the action and occur at the same time and place,” while indirect effects are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8.

In the case at bar, the March 2009 EA proposes, as its preferred Alternative B, that Segment 9 of the Trail will turn north at the intersection of M-22 and Traverse Lake Road and continue on the west side of Traverse Lake Road "onto an off road boardwalk within the county road right of way" and then "as a separate 10' off road asphalt path on the north side of Traverse Lake Road either within the county road right-of-way or on Lakeshore property" (PageID. 795). The Trail will then follow an old two track road that runs from the northeast end of Little Traverse Lake becoming a crushed limestone path behind the Bufka Farmstead. (*Id.*)

However, the March 2009 EA fails to sufficiently consider the fact that the proposed off-road boardwalk and asphalt path for Segment 9 will be built in heavily wooded areas, wetlands, critical dune areas, and wildlife habitat. The north side of Traverse Lake Road is bounded by Lakeshore property and private parcels with private residences. (PageID. 805). The shoulders are unpaved and both sides of the road are heavily wooded with many mature trees. (Doc. 8, ¶ 17, PageID. 429). Further, near the eastern end of the road, there are a series of sand dunes, some in excess of 50 feet in height with slopes greater than 1:3. (*Id.*) The critical dunes in this area completely cover the road shoulder for a distance of more than 700 feet and are protected under Michigan law. (*Id.*) Yet, the March 2009 EA ignores these conditions. Further, the EA fails to account for the environmental impacts of building the boardwalk

through wetlands and/or cutting a large swath through mature forest to accommodate construction of Segment 9. The EA also fails to address how the 10-12 foot wide asphalt path will affect the wildlife habitat and the ecosystem, especially the protected critical dune areas.⁸

In opposing the Plaintiff's request to supplement the administrative record in this matter, NPS erroneously claimed that the record does somehow identify the "soil type and dune slope" relevant to the construction of Segment 9. (Doc. 21, PageID. 3600) (citing AR 337). However, the portion of the administrative record cited to by NPS relates to Segment 5. Indeed, in the cited document, which provides information regarding the soil characteristics for the Trail's various segments, the only segment listed for "Dune Land" and "Active Sand Dunes" is Segment 5. (PageID. 851). Segment 9 is not listed, and the document fails to address the protected critical sand dunes that are located at the eastern end of Traverse Lake Road – critical and protected sand dunes that will be significantly impacted by the construction of 10-12 foot wide off-road asphalt path and, presumably, a retaining wall.

In other words, the March 2009 EA changed the proposed route of Segment 9 in a way that would cause its construction to significantly impact heavily wooded areas, wetlands, and protected critical dune areas and private parcels, but then failed to provide "sufficient evidence and analysis" to adequately demonstrate the environmental impacts of that change. In doing so, NPS violated 40 C.F.R. 1508.9(a)(1). Simply put, the result of changing Segment 9 to an off-road path will have a number of effects to the environment that will occur "at the same time

⁸ The March 2009 EA indicates that for shared use paths, such as that now proposed for Segment 9, the "corridor" should be at least 10-12 feet wide. (PageID. 870). Indeed, for those segments already built, a 20 foot wide cut was used. In short, the EA does not identify the actual cut width necessary to build Segment 9, and consequently, the impact upon the environment or feasibility has not at all been addressed or analyzed in connection with Segment 9.

and place” as the construction of Segment 9. See 40 C.F.R § 1508.8. The adverse effects from this action are reasonably foreseeable, especially "when added to other past, present, and reasonably foreseeable future actions.” See § 1508.7 and § 1508.8.

These effects on the environment, however, are ignored by NPS because the March 2009 EA merely adopts the conclusions regarding the effects of constructing Segment 9 in the entirely different manner as proposed in the October 2008 EA. As such, the March 2009 EA is flawed, conflicting, and incomplete and the FONSI issued by NPS should be set aside. See *Kentucky Riverkeeper*, 714 F.3d at 407 (holding that an agency's decision is arbitrary and capricious when the agency has, among other things "entirely failed to consider an important aspect of the problem.") (quoting *Nat'l Ass'n of Home Builders v Defenders of Wildlife*, 551 U.S. 664, 658; 127 S.Ct. 2518; 168 L.Ed.2d 467 (2007)).

Notably, the October 2008 EA included Table 17 in Appendix G, which contained information regarding the impacts to the environment and feasibility for Segment 9 (as well as the other segments), with numerical scores assigned to various subtopics. (PageID. 1376). Option 9.2 relates to the proposal that Segment 9 follow Traverse Lake Road using the existing chip-sealed surface of the road. (PageID. 1250 and 1260).⁹ With regard to Option 9.2, Table 17 indicates a score of "0 Existing; Negligible slope" under heading "Topography." (PageID. 1376). This is despite the fact that proposed route for Segment 9 was changed with the March 2009 EA to include an off road asphalt path running through protected critical dune areas, Table 17 was **not** revised in any way. (PageID.924). In fact, **none** of the options identified in Table 17 included with the March 2009 EA even relate to Segment 9 as proposed in Alternative B.

⁹ The various options for each segment are shown on the "Trailway Option Maps," which are included as Appendix H. (PageID. 1378-1387).

Consequently, Table 17 contains **no** evidence or analysis regarding a route for the Trail that requires excavation of protected critical dunes with slopes greater than 1:3 for an off-road asphalt path.

This point is important because the March 2009 EA erroneously states that in both the short-term and long-term only "minor adverse impacts to topography" will occur as a result of the Trail, and that those minor adverse impacts will be limited to Segments 1, 2, and 4. (PageID. 837). Given the undisputed existence of sand dunes at the eastern end of Traverse Lake Road, the impact to the topography caused by the proposed off road path would be "moderate" at the very least. (PageID.836) (defining moderate impact to occur where "average grades in potential new trail development areas are 5% to 15 % slope"). *Yet*, that impact is not referenced or identified in the March 2009 EA.

Other inaccuracies also exist within the March 2009 EA. The EA recognizes that there is a wetland area from Narada Lake to Little Traverse Lake and beyond to Townline Road.¹⁰ (PageID. 821). Nevertheless, Table 17 fails to acknowledge or address the potential environmental impact of crossing those wetlands and Shalda Creek with the proposed off road boardwalk or creek crossing. (PageID.924).¹¹ When Segment 9 was intended to utilize the existing road surface of Traverse Lake Road, the wetland area or creek was not impacted. However, Alternative B in the March 2009 EA proposes that Segment 9 include an off-road creek crossing and a boardwalk that will run directly through the wetland area located on private

¹⁰ Narada Lake is shown on the map for Segment 8. (PageID. 804). The March 2009 EA also recognizes that "Alternative B crosses Shalda Creek at Traverse Lake Road." (PageID. 821).

¹¹ This is despite the fact that Table 17 lists a subcategory for "Streams & Creeks," which identify (and attribute environmental impacts to) other stream crossings. (PageID. 924). Again, none of the options listed in Table 17 relate to the route designated as Alternative B. (PageID. 934-35) Rather, the options listed in Table 17 as Options 9.1-9.9 are the same options listed in the October 2008 EA. (See PageID. 934, 1386 and 1387).

property on the west side of Traverse Lake Road without assessing the resulting impact on the environment or the property owner. (PageID. 795) Table 17 was not revised and indicates “0” impact to wetlands or streams/creeks for the segment along Traverse Lake Road.

Further, as shown on Table 17, the impact for Option 9.3, which proposes a route over wetlands on the northeast side of Little Traverse Lake, is listed as "3 Limited boardwalk." (PageID. 924). Option 9.3 corresponds to part of the description of the proposed route for Segment 9 set forth in Alternative B – *i.e.*, that after the 10 foot off road asphalt path on the north side of Traverse Lake Road, "[t]he Trailway would then follow an old two track road that runs from the northeast end of Little Traverse Lake becoming a crushed limestone path behind the Bufka Farmstead." (PageID. 795; *see also* PageID. 805 and 935). With regard to Option 9.3, the October 2008 EA stated that "NPS staff determined that the trail route option would fall in proposed wilderness and would not be allowed." (PageID. 1263). That statement regarding Option 9.3 was eliminated from the March 2009 EA when Option 9.3 became part of the route for Alternative B. (PageID. 808).¹² At the same time, the March 2009 EA proposed an off road boardwalk on the west side of Traverse Lake Road through wetlands and crossing Shalada Creek without updating Table 17 to account for that environmental impact. (PageID. 924) Certainly, if the impact of the Trail across wetlands at the northeast end of Little Traverse Lake is designated as "3," then the impact of the Trail across the wetlands on the west side of Traverse Lake Road (near Shalada Creek) has an impact too. This type of haphazard evaluation does not constitute reasonable analysis.¹³

¹² Table 18, which relates to "Impact to Feasibility," notes that Option 9.3 is merely in "[p]roximity to proposed wilderness boundary." (PageID. 925)

¹³ Presumably because the March 2009 EA failed to account for adverse environmental impacts discussed above, the FONSI erroneously states that Alternative B "will not violate any federal, state, or local environmental protection laws." (PageID. 523). The statement ignores that Part

The inaccuracies continue. With regard to tree removal in Segment 9, the March 2009 EA states that north of Bufka farm the Trail would be placed in an area of mature hardwoods but that "[m]inimal tree removal is expected due to the wide spacing of the existing mature trees in this area." (PageID. 844). **No** mention is made regarding the mature trees that will be removed if Segment 9 is routed north of Traverse Lake Road. The statement regarding tree removal is merely copied verbatim from the October 2008 EA. (PageID. 1298). However, clearing a swath to extend the Trail for more than two miles on the north side of Traverse Lake Road through a heavily wooded area will obviously require the destruction of countless trees – far more than the "[m]inimal tree removal" that was expected with the route proposed with the October 2008 EA (*i.e.*, a route using the existing road surface). Similarly, the \$18,225 cost estimates for the Traverse Lake Road section from the October, 2008 EA calling for an on-road trail were **NOT** changed in the March, 2009 EA which contemplates an off-road trail requiring extensive dune excavation, retaining walls, boardwalks, bridging, extensive tree removal, and a new asphalt path. (Compare PageID.894 and 1080) The failure to revise the March 2009 to reflect these changes renders the EA inaccurate, incomplete, and unreliable.¹⁴

353 of Michigan's Natural Resources and Environmental Protection Act (Sand Dune Protection and Management) that requires the issuance of a permit by the Michigan Department of Environmental Quality (MDEQ) for any use within a critical dune area. See M.C.L. 324.35304. In addition, permits from MDEQ are required for stream crossings and actions that negatively impact wetlands. See M.C.L. 324.30102 and M.C.L. 324.30306. Neither the required permits, nor applications for those permits, appear in the Administrative Record. Absent these permits, the suggestion that Segment 9 may be constructed as proposed without violating state law is not accurate.

¹⁴ The March 2009 EA also does not address or evaluate the significant impact the preferred Alternative B route of Segment 9 of the Trail will have upon wildlife, particularly the critical deer habitat south of Bufka farm and north of Traverse Lake Road, which will be dissected by the Alternative B route.

In short, although the Court will engage in only a limited NEPA review, it has the duty to ensure that NPS took a hard look at the environmental consequences of its decision. In this regard, an agency's decision is arbitrary and capricious, and violates NEPA, when it has "entirely failed to consider an important aspect of the problem" See *Kentucky Riverkeeper*, 714 F.3d at 407. Here, NPS failed to consider a number of important aspects that will arise as a result of routing Segment 9 of the Trail in the manner proposed as Alternative B in the March 2009 EA. The APA, of course, directs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Accordingly, because the decision by NPS to issue the August 2009 FONSI was arbitrary and capricious, this Court should set it aside.

B. The FONSI was Issued Before Final Decisions were Made Regarding the Trail

Another troubling aspect of NPS's decision to issue the FONSI is the fact that it did so **before** final decisions were made relating to the Trail's route and construction means and methods. As explained above, on March 30, 2015, in response to a FOIA request, NPS indicated that "the final route of Segment 9 has yet to be determined." (PageID. 27-28).¹⁵ Yet, the FONSI somehow concluded the Trail route would not significantly impact the natural or human environments despite the fact that the final route of Segment 9 is still unknown. Further, at this point, the FONSI, which was issued in August 2009, is already almost seven years old and construction of Segment 9 of the Trail is not due to begin until 2017, at the earliest. According to DO-12, use of an "outdated or inadequate document" relied upon to take original

¹⁵ NPS further stated that "[i]n subsequent discussions with interested parties, such as the Little Traverse Lake Property Owners Association, Cleveland Township, and the Leelanau County Road Commission," it has indicated "a willingness to modify th[e] route [Segment 9] slightly as long as it could be shown to have similar or lesser environmental impact." (PageID. 27).

action requires initiation of the NEPA process and preparation of a new document for public review. (PageID.3663; see also PageID.3746).

Simply put, NPS is relying on an outdated FONSI to support its arbitrary conclusion that Segment 9 of the Trail will have no significant impact on the environment before a final decision regarding the route for Segment 9 is even made. In issuing the FONSI, NPS considered the proposed route for Segment 9 in only vague and abstract terms, without understanding the particular impacts that will necessarily arise when a more precise location is established at some time in the future. By its very nature, this decision is arbitrary and capricious. NEPA is premised on the idea that a federal agency must prepare a timely environmental impact statement as it considers a proposed action, so that the agency may understand the effects that will result from that action. See 40 C.F.R. § 1502.5 and § 1508.23. An agency obviously cannot consider the environmental impacts of a proposed action unless it first knows the proposed action that is being evaluated (or at least until the agency has established well-defined alternative actions). Deciding that the Trail will not have a significant environmental impact and then plotting the actual route for the Trail, as NPS did is putting the cart before the horse.

In relevant part, 40 C.F.R. § 1502.5 provides that an agency "shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal." A proposal exists when the agency has goal and is "actively preparing to make a decision on one or more alternative means of accomplishing that goal," so that the effects on the environment can be "meaningfully evaluated." 40 C.F.R. § 1502.23.

Based on the faulty March 2009 EA, NPS wrongly concluded that preparation of an EIS was not necessary and it issued the FONSI instead. However, neither the March 2009 EA nor the decision to forego preparation of the EIS occurred "close as possible" to the time that NPS was developing a proposal regarding the final route that Segment 9 will actually take. Rather, nearly seven years have passed since NPS issued the FONSI, and NPS is still developing the route for Segment 9. The very purpose of NEPA is to require federal agencies to consider the environmental impacts of a particular action at a time those impacts can be "meaningfully evaluated." 40 C.F.R. § 1502.23. NPS effectively evaded this requirement by making a decision that no significant impact would occur without first knowing the action that it was actually taking (other than in the most vague terms). In this way, NPS has tried to issue the FONSI as some type of broad waiver that will excuse it from further consideration of whatever environmental impacts will truly arise whenever the final route for Segment 9 is eventually established.

As described in the March 2009 EA, the proposed route for Segment 9 as set forth in Alternative B, is far too imprecise to allow the type of meaningful evaluation of environmental impacts that NEPA demands. The route proposed as Alternative B merely provides for a separate 10' off road asphalt path on the north side of Traverse Lake Road "either within the county road right-of-way or on Lakeshore property south of proposed wilderness" (PageID. 795). By statute, the county road right-of-way is 60 feet wide (M.C.L. 221.20), although the paved portion of the road is only 22 feet wide. (Doc. #8, ¶ 17, PageID. 429). As a result, the "county road right-of-way" on the north side of Traverse Lake Road that lies outside the currently-paved portion is approximately 19 feet wide. The "proposed wilderness" is that area of the Lakeshore that was proposed as wilderness in the 2009 General Management

Plan/Wilderness Study, which the Trail attempts to avoid. (PageID. 833).¹⁶ The since designated wilderness begins 100 feet north of the road centerline.¹⁷ Accordingly, the area in which the 10 foot wide path might ultimately be constructed is anywhere between 19 feet and 100 feet from the centerline of Traverse Lake Road. Given the critical dune areas, numerous mature trees and private parcels that exist within this general area, not knowing where the trail might be constructed renders the conclusion that Segment 9 will have no significant impact arbitrary and capricious.

C. NPS Violated NEPA by Failing to Prepare an EIS

NPS also violated NEPA when it failed to prepare an EIS and instead relied on the less detailed EA to issue its FONSI. Under NEPA, an agency is required to provide an EIS when it will be undertaking a “major Federal actio[n],” which “significantly affect[s] the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The determination of whether an action will significantly affect the quality of the environment requires an agency to look at both the context of the action and its intensity. See 40 C.F.R. § 1508.27(a), (b). If an agency decides not to prepare an EIS, “it must supply a ‘convincing statement of reasons’ to explain why a project’s impacts are insignificant.” *Blue Mountain Biodiversity Project v Blackwood*, 161 F.3d 1208), 1212 (9th Cir. 1998 (citation omitted). “The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” (*Id.*)

Here, given the numerous omissions from the March 2009 EA, NPS failed to take the required “hard look” at the potential environmental impacts of the Trail, especially as those

¹⁶ A copy of the 2009 General Management Plan/Wilderness Study is included in the Administrative Record. (PageID. 595-688).

¹⁷ The bills establishing the protected wilderness areas at the Lakeshore, S.23 and H.B. 163, were signed into law in March, 2014.

impacts will be caused by the construction of Segment 9. In particular, the March 2009 EA estimates Trail usage within the first 3 years at approximately 350,000-400,000 visitors per year with the majority of use occurring between the months of June and September. (PageID.771). Despite this recognition, however, the EA makes absolutely **no** mention of how this level of use will impact the human environment. The EA also fails to propose any efforts to mitigate the effect on private property, Cleveland Township Park, or residents living on Segment 9 of the Trail route. Further, no studies or data on the impact of the increased traffic and safety were made.

To determine whether a proposed project will have a "significant" impact on the environment (requiring preparation of an EIS), an agency must evaluate, among other things, "[u]nique characteristics of the geographic area" and "the degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. §§ 1508.27(b)(3) and (b)(4).

Here, uniqueness of the Lakeshore cannot be questioned. In establishing the Lakeshore in 1970, Congress expressly found that "certain outstanding natural features, including forests, beaches, dune formations, and ancient glacial phenomena" exist in this area. 16 U.S.C. § 460x(a). Implementation of Segment 9 of the Trail, as currently proposed, will adversely affect and cause irreparable injury to aesthetic, recreational, and environmental interests in the affected areas as a result of extensive tree cutting, paving, and excavation at areas designated as "protected critical dune habitats." Construction of Segment 9 of the Trail as proposed will cause a significant environmental impact as a result of the degradation of wildlife habitat, visual quality, solitude, and permanent changes to the topography, including wetlands and "critical dune areas."

Further, construction of the Trail, especially Segment 9, has been highly controversial. The vast majority of the written public comment received by the NPS in October 2008 was in opposition to changing Segment 9 of the Proposed Trail route from M-22 to Traverse Lake Road. Of all the comments received, 70% of the written comments were strongly opposed to the Alternative B routing of the Trail on or near Traverse Lake Road. Nonetheless, in the March 2009 EA, Segment 9 of the Trail was changed so that the preferred Alternative B route would not be limited to being located on Traverse Lake Road, but, instead, would be a 10 foot off-road boardwalk and asphalt path on the north side of Traverse Lake Road either within the county road right-of-way or on Lakeshore property within 100 feet of the road centerline. The EA contains no indication how these proposed changes to Segment 9 might adversely impact the private property owners on the north side of Traverse Lake Road, other residents along road, and the Cleveland Township Park.

This is despite the fact that Congress realized that establishing the Lakeshore was highly controversial because, at least in some instances, it involved the transfer of private property to the public and impacted the private property rights of other owners. Striking a balance for the public good and the recognition of private property rights, Congress required in developing the Lakeshore "full recognition shall be given to protecting the private properties for the enjoyment of the owners," and that "public amenities" will not diminish the value or enjoyment for the owner or occupant of any improved property located thereon. 16 U.S.C. §§ 460x(b) and 460x-5(d)). The NPS, however, failed to evaluate how Segment 9 might impact the private property owners (on both sides of Traverse Lake Road), and in so doing, ignored "the degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4).

In sum, NEPA “ensures that the agency. . .will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.” *Robertson v Methow Valley Citizens Council*, 490 U.S. 332, 349; 109 S.Ct 1935; 104 L.Ed.2d 351 (1989). NPS deviated from the requirements of NEPA when it failed to take a "hard look" at the potential environmental impact of its actions when it declined to prepare the EIS. See *Blue Mountain Biodiversity Project*, 161 F.3d at 1213 (holding “that “general statements about “possible” effects and “some risk” do not constitute a “hard look” absent a justification regarding why more definitive information could not be provided.”) (citations omitted). Consequently, NPS did not genuinely engage in "reasoned decision-making, " nor was its decision to forego the EIS fully-informed or well-considered; rather, its decision was arbitrary and capricious.¹⁸

D. NPS Failed to Consider Adequate Range of Alternatives

NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). This "alternatives provision" applies even when the agency prepares an environmental assessment, and it requires the agency to give meaningful consideration to reasonable alternatives. See 40 C.F.R. § 1508.9(b). "The obligation to consider alternatives to the proposed action is at the heart of the NEPA process, and is operative even if the agency finds no significant

¹⁸ In addition, both October 2008 EA and the March 2009 EA are over 100 pages in length. DO-12 directs that EAs in excess of 50 pages may be simply "an EIS in disguise," in which case a formal EIS should be prepared, which was not done in this instance. (PageID.3686). The EAs at issue constitute an EIS in disguise and should be redone.

environmental impact." *Dine Citizens Against Ruining Our Environment v Klein*, 747 F.Supp.2d 1234, 1254 (D. Colo. 2004) (citing *Greater Yellowstone Coal v Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004).

Although the March 2009 EA superficially considers three alternatives (Alternative A, Alternative B, and the No-Action Alternative), the EA fails to even recognize the possibility that the Trail's length be anything less than 27 miles or that it might not extend all the way CR 651. No reason exists to have such an artificial restriction on the Trail. Under the heading "Purpose and Need," the EA states that the goal of the Trail is to provide "a continuous scenic pathway" from M-22 and Manning Road at the south boundary of Leelanau County north to Good Harbor Bay. (PageID. 771). The Trail is intended to provide "a safe, alternative transportation opportunity" for park visitors that connects the National Lakeshore's primary visitor sites and facilities, including beaches, trailheads and other points of interest. (*Id.*)

While the EA contains a number of proposed alternatives for the Trail, it fails to analyze (or even acknowledge) an alternative that would route Segment 9 of the Trail north off M-22 on Bohemian Road (a/k/a County Road 669). This alternative route would still end at Good Harbor Bay, meeting NPS stated goals for the Trail, in an area with existing facilities (restrooms, parking and picnic areas) and beaches, and would include the option of continuing east and west on or adjacent to Lake Michigan Road along the lake shore in an area already designated as a recreational zone in the Master Plan of the National Lakeshore. (See Maps, PageID 686 and 789). Further, this alternative route meets the stated goals of the Trail, uses existing land, roads, and trails within the Lakeshore, avoids sensitive ecological areas, significantly lessens the number of mature trees to be removed, and eliminates excavating critical dune areas. It also significantly reduces construction costs, and eliminates the impact

upon the human environment along Traverse Lake Road by avoiding constructing the Trail through a residential neighborhood or across private property. Plaintiffs have even advocated for this Segment 9 alternative route both publicly and directly to the NPS. (PageID. 403).

Yet, inexplicably, The March 2009 EA does not even mention this proposed route, nor does it discuss why such an alternative was not considered.¹⁹ While an agency might not be required to consider and eliminate every conceivable alternative, an agency may not “define the project so narrowly that it forecloses reasonable consideration of alternatives.” *Dine Citizens*, 747 F.Supp.2d at 1255. Here, the Trail, as currently proposed, is arbitrarily linked to an idea that the Trail must end at a single location within the entire Lakeshore – County Road 651 – and that no other location is acceptable. Such a rigid and inflexible approach is precisely the type narrow planning that forecloses reasonable consideration of other alternatives and violates the very policies on which NEPA is premised.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court GRANT their Motion for Summary Judgment pursuant to FED. R. CIV. P. 56(c), DENY Defendant's Motion for Summary Judgment and enter an order declaring that Defendant National Park Service has violated NEPA, and the APA for the reasons alleged above, awarding

¹⁹ The FONSI states that “[a] number of other options were considered by the Trailway Committee during the planning process, but were eliminated due to excessive grading issues, impacts to private property, steep topography, [and] potential impacts on proposed wilderness or safety.” (PageID. 519). All of the foregoing reasons for abandoning other Trail route options exist in the preferred Alternative B route proposed for Segment 9, yet NPS has either ignored these factors in deciding to route Segment 9 down Traverse Lake Road or has not taken a hard look at other reasonable alternatives. If the environmental factors considered in the EA of a 10 foot off-road asphalt trail in the preferred Alternative B were scored correctly (PageID.924), Segment 9 would have the greatest environmental impact of any segment along the entire Trail.

their reasonable attorneys' fees and costs incurred in this action pursuant to 28 U.S.C. § 2412, and any such other and further relief as this Court deems just, proper, and equitable

Respectfully Submitted,

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Dated: May 27, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LITTLE TRAVERSE LAKE PROPERTY OWNERS ASSOCIATION, a Michigan non-profit corporation, **DOUGLAS JONES, L. GENE MORSE** and **LINDA MORSE**, in their capacities as **CO-TRUSTEES of THE LEROY and LINDA MORSE TRUST, MARY ANN SHUTZ**, in her capacity as **TRUSTEE of THE MARY ANN SHUTZ TRUST**, and **MARCIA SKJAERLUND**,

Case No.:

Hon.

Plaintiffs,

v

NATIONAL PARK SERVICE,

Defendant

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs, by and through their attorneys, Fraser Trebilcock, state for their complaint for declaratory relief as follows:

Nature of the Action

1. This is a civil action for declaratory relief under the Administrative Procedures Act (APA) 5 U.S.C. §§ 551-706. The claims arise from Defendant's violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370, and its implementing regulations, 40 C.F.R. 1500-1508. This action is brought pursuant to the right of review provision of the APA, 5 U.S.C. § 702.

2. Defendant National Park Service (NPS) violated federal law by issuing its Finding of No Significant Impact (FONSI) in connection with the Leelanau Scenic Heritage Route Trailway Plan, now named the Sleeping Bear Heritage Trail ("the Trail"), to be located

in or near the Sleeping Bear Dunes National Lakeshore ("Lakeshore"), based upon an inadequate and faulty Environmental Assessment (EA) and *before* final decisions were made relating to the Trail's route and construction means and methods.

3. Plaintiffs challenge Defendant's failure to meet its procedural and substantive duties required by NEPA by failing to adequately perform environmental review procedures in the EA regarding Segment 9 of the Trail as well as failing to supplement its findings and conclusions after substantial changes were made to the Trail.

4. Plaintiffs seek:

- a. An order declaring that Defendant NPS failed to comply with NEPA;
- b. An order awarding Plaintiffs their reasonable attorneys' fees and costs associated with this litigation pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412; and
- c. Such other additional and further relief as the Court deems just and equitable.

5. The requested relief is necessary to preserve the status quo, to prevent unlawful agency action, and to prevent irreparable injury to the environment.

Jurisdiction, Venue, and Basis for Relief

6. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

7. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e).

8. Declaratory relief is appropriate pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 2201.

Parties and Standing

9. Plaintiff Little Traverse Lake Property Owners Association ("LTLPOA ") is a Michigan non-profit corporation organized in 2004, and its membership is comprised of owners of property on or adjacent to Little Traverse Lake and Traverse Lake Road. LTLPOA was formed, *inter alia*, to engage in activities designed to protect and enhance the environmental quality of Little Traverse Lake and adjacent property, which includes the areas affected by Segment 9 of the Trail. It works to serve as a liaison between its 100+ members and the National Park Service on matters that directly affect its members and the surrounding environment. The LTLPOA, through its members, has actively participated in those phases of the Trail's planning that were well publicized or for which notice was received.

10. Plaintiffs Douglas Jones, L. Gene Morse and Linda Morse, in their capacities as Co-Trustees of The Leroy and Linda Morse Trust, Mary Ann Shutz, in her capacity as Trustee of the The Mary Ann Shutz Trust, and Marcia Skjaerlund (collectively "the Individual Plaintiffs"), are the owners of real property in Cleveland Township, Leelanau County, Michigan contiguous to where Segment 9 of the Trail is proposed to be constructed.

11. The Trail, as currently proposed, includes a minimum ten foot wide asphalt linear park to be constructed over or immediately adjacent to private property owned and occupied by the Individual Plaintiffs and a number of LTLPOA's other members.

12. Implementation of Segment 9 of the Trail, as currently proposed, will adversely affect and cause irreparable injury to Plaintiffs' aesthetic, recreational, and environmental interests in the affected areas as a result of extensive tree cutting, paving, and excavation at areas designated as "critical dune habitats." Construction of Segment 9 of the Trail as proposed will cause a significant environmental impact as a result of the degradation

of wildlife habitat, visual quality, solitude, and permanent changes to the topography, including wetlands and "critical dune areas." Plaintiffs will sustain injury to their interests, and those of the LTLPOA's other constituent members, if the Trail is undertaken in the absence of a legally adequate and scientifically valid analysis of the Trail's natural and human environmental impacts and compliance with all federal laws.

13. Defendant NPS is a subordinate agency of the United States Department of Interior, organized and existing pursuant to Title 16, Chapter 1, of the United States Code. NPS is the federal agency that took the final agency actions challenged herein.

Factual Background

A. The Trail and Segment 9

14. The Lakeshore is located in Leelanau and Benzie Counties. Congress established the Lakeshore in 1970 by way of legislation acknowledging that "[i]n developing the lakeshore, full recognition shall be given to protecting the private properties for the enjoyment of the owners," and "[i]n developing the lakeshore the Secretary shall provide public use areas in such places and manner as he determines will not diminish the value or enjoyment for the owner or occupant of any improved property located thereon." (16 U.S.C. §§ 460x(b) and 460x-5(d)).

15. The Trail involves a non-motorized, paved pathway of approximately 27 miles running adjacent to and through the Lakeshore in Leelanau County for multi-use recreational purposes. Planning for the Trail began in 2005, and as originally planned, the Trail was to be located entirely on public lands in the Lakeshore or within the road rights-of-way of M-22 and M-109.

16. The Trail is comprised of 9 segments running south to north. Segment 9, which is the segment at issue, was originally planned to run entirely within the road right-of-way of M-22 from CR 669 to CR 651. However, as part of the EA, a proposed preferred alternative route (Alternative B) was identified calling for Segment 9 of the Trail to be routed on Traverse Lake Road for approximately 3 miles.

17. Traverse Lake Road is a quiet, residential county road 2.7 miles from end to end. Both ends of the scenic road connect with M-22, but it offers no shortcut to M-22 traffic. The paved surface is 22 feet wide; the shoulders are unpaved with mature trees close to road edge. The north side of the road is bounded by National Lakeshore property and four private parcels. The south side of the road is bounded by over 100 private parcels. Both sides of the road are heavily wooded with many mature trees and wetlands. Near the eastern end of the road, there are a series of sand dunes, some in excess of 50 feet in height with slopes greater than 1:3, that end at the paved portion of the road. The critical dunes in this area completely cover the road shoulder for a distance of more than 700 feet. (**Exhibit 1**, Photographs)

18. The EA states that the Trail "will generally parallel M-22 and M-109, the major roads through the Lakeshore," as also initially promoted in publicized material describing the proposed Trail. This statement is belied by the fact that 40% of Segment 9 of the preferred Alternative B Trail route does not parallel either M-22 or M-109, but rather, is routed down or near Traverse Lake Road.

19. After the initial EA was issued, and the public review period closed on October 31, 2008, the EA was reissued in March, 2009 with revisions to Segment 9 of the preferred Alternative B. Instead of Segment 9 being routed on Traverse Lake Road using the existing road surface, the EA called for the revised Segment 9 to be routed north at the west

end of Traverse Lake Road on an off-road boardwalk, and then *either* crossing private property within the county road right-of-way as a 10 foot asphalt path or on Lakeshore property up to 100 feet from the roadway centerline.

20. Segment 9 of the Trail, as reflected in the preferred Alternative B, will result in extensive tree clearing including the removal of hundreds of mature trees, significant disturbance of wetland and wildlife habitat areas, and excavation of critical dune areas on the east end of Traverse Lake Road which are more than 50 feet in height, have a slope greater than 1:3, and cover the road shoulder for a distance of more than 700 feet.

21. According to the EA, as constructed, the Trail width will be 10 feet wide with 2-foot rock shoulders requiring a 14-foot wide cut through the varied and environmentally sensitive terrain of Segment 9 of the Trail with additional tree clearing on each side to facilitate trail construction. The EA does not reflect this change or the impact the Trail will have upon the natural and human environments of Segment 9.

22. On March 30, 2015, in response to a Freedom of Information Act request seeking documents depicting the final route of Segment 9, the NPS stated that it is "unable to provide the requested documents as the final route of Segment 9 has yet to be determined."

(Exhibit 2)

B. The Environmental Assessment

23. An EA was prepared in connection with the Trail. The first version (Exhibit 3) was released for public review and comment in October, 2008. Based on public comment, segments 1, 2, and 9 in the preferred Alternative B were revised. A second version of the EA (Exhibit 4) containing minor revisions was released for public review and comment in March, 2009. Both versions of the EA contain an "Overall Trailway Segments

Map" that depicts segment 9 of the Trail being routed on M-22 and not Traverse Lake Road. (Ex. 3, p. 2-12; Ex. 4, p. 10)

24. As part of the public review and comment, a "Public Input Flyer" was distributed at several community meetings along with a map of the overall Trail route. The same flyer and map are included in both versions of the EA. (Ex. 3, pp. 3-108-109; Ex. 4 pp. 103-104) The map that was distributed as part of the invitation for public review and comment did not depict Traverse Lake Road as being on the proposed Trail route nor was it identified as a proposed alternative route. By looking at the Public Input Flyer, a resident living on Traverse Lake Road would have no reason to believe that Traverse Lake Road corridor is any part of the proposed Trail.

25. The vast majority of the written public comment received by the NPS in October, 2008 was in opposition to changing Segment 9 of the Proposed Trail route from M-22 to Traverse Lake Road. Of all the comments received on all of the segments, 70% of comments were strongly opposed to the Alternative B routing of the Trail on or near Traverse Lake Road. Nonetheless, in the revised EA, Segment 9 of the Trail was changed so that the preferred Alternative B route would not be limited to being located on Traverse Lake Road, but, instead, would be a ten foot off-road boardwalk and asphalt path on the north side of Traverse Lake Road either within the county road right-of-way or on Lakeshore property within 100 feet of the road centerline.

26. The revised EA issued in March, 2009 is flawed, conflicting, and incomplete as it relates to Segment 9 of the Trail, including:

- a. Factors considered in the 2009 EA recommending the preferred Alternative B included impacts to the environment and impacts to feasibility. Numerical scores were assigned to subtopics within these two categories, however, the tables in the EA identifying the scores for

each subtopic were *never* re-evaluated after the route of Segment 9 was changed to include undisturbed wilderness, wetland, and critical dune areas. For example, in Table 17 of the EA quantifying impacts to the environment, a score of "0- Existing; Negligible slope" is indicated under "topography" despite the fact that the Segment 9 Trail route will require extensive excavation of critical dunes more than 50 feet in height with slopes greater than 1:3. Table 17 also indicates a score of "0" for wetlands, streams and soils despite the fact that the Segment 9 Trail route will cross wetlands and a creek. (**Ex. 4**, Appendix, Table 17)

- b. In Table 18 quantifying impacts to feasibility, a score of "0- Utilize existing road no modification" is indicated under "cost" despite the fact that the Segment 9 Trail route is intended to be a 10 foot off-road asphalt path that will require extensive dune excavation with retaining walls, boardwalks over wetland areas, building a bridge over a creek, and significant tree removal. (**Ex. 4**, Appendix, Table 18)
- c. The EA identifies Segment 9 of the Trail as a 10 foot off road asphalt path on the north side of Traverse Lake Road. The EA also indicates that for shared use paths, such as that now proposed for Segment 9, the "corridor" should be at least 10-12 feet wide. Indeed, for those segments already built, a 20 foot wide cut was used. In short, the EA does not identify the actual cut width necessary to build Segment 9, and consequently, the impact upon the environment or feasibility has not at all been addressed or analyzed in connection with Segment 9. (**Ex. 4**, pp. 32 and 107)
- d. The 2008 version of the EA, with regard to tree removal in Segment 9, states: "Minimal tree removal is expected due to the wide spacing of the existing mature trees in this area." That same statement is repeated verbatim in the 2009 version of the EA *even after* Segment 9 of the Trail route along Traverse Lake Road changed from an on-road trail using the existing chip-sealed surface to an off road asphalt path corridor at least 10 to 12 feet in width requiring a wide construction cut in heavily wooded areas. (**Ex. 3**, p. 2-86; **Ex. 4**, p. 81)
- e. The 2009 EA, in the cost summary, identifies Segment 9 of the preferred Alternative B proposal as consisting of 2.43 miles of on-road bike lanes. (**Ex. 4**, p. 122) This is not consistent with the Trail as currently proposed in the preferred Alternative B route for Segment 9 which calls for off-road construction in woodlands, wetlands and creek, and critical dune areas. There is no mention of costs associated with operation and maintenance, including the impact upon Cleveland Township Park. Thus, the cost estimates are grossly understated.

- f. The EA estimates Trail usage within the first 3 years at approximately 350,000-400,000 visitors per year with the majority of use occurring between the months of June and September. (Ex. 4, p. 8) Despite this, the EA makes no absolutely no mention of how this level of use will impact the human environment or efforts to mitigate the effect on private property, Cleveland Township Park or residents living on Segment 9 of the Trail route. As well, no studies or data on the impact of the increased traffic were made.
- g. Analysis of the "Impacts of the Trailway Alternatives" are identical and unchanged between the two versions of the EA despite the fact that Segment 9 of the Trail Route changed from an on-road bike lane to an off-road 10 to 12 foot wide corridor. (Ex. 3, p. 2-56; Ex. 4, p. 54)
- h. The EA does not take into account or assess the effect cutting a minimum 14 foot wide swath in mature forest to accommodate construction of Segment 9 of the Trail route, nor does it analyze how a minimum 10-12 foot wide asphalt road will affect the ecosystem, including critical dune areas.
- i. The EA does not address or evaluate the significant impact the preferred Alternative B route of Segment 9 of the Trail will have upon wildlife, particularly the critical deer habitat south of Bufka farm and north of Traverse Lake Road which will be dissected by the preferred Alternative B route.
- j. The EA does not address or evaluate the significant impact the preferred Alternative B route of Segment 9 of the Trail will have upon private property and insuring that "[i]n developing the lakeshore, full recognition shall be given to protecting the private properties for the enjoyment of the owners," and insuring that "[i]n developing the lakeshore the Secretary shall provide public use areas in such places and manner as he determines will not diminish the value or enjoyment for the owner or occupant of any improved property located thereon." (16 U.S.C. §§ 460x(b) and 460x-5(d)).

27. Pursuant to the NEPA regulations, agencies are required to adopt NEPA implementing procedures. 40 C.F.R. § 1507.3. NPS has done so by way of "Director's Order No. 12" (DO-12) which has "the force of law." (DO-12, p. 2).

28. Both versions of the EA are over 100 pages in length. DO-12 directs that EAs in excess of 50 pages may be simply "an EIS in disguise," in which case a formal EIS should be prepared, which was not done in this instance. (DO-12, p. 70)

29. DO-12 directs that an EA should address the effect a project has upon the human environment so that potential significant impacts can be addressed by way of an EIS. (DO-12, p. 27). NEPA's regulations define the "Human Environment" as the "natural and physical environment, and the relationship of people with that environment." (40 C.F.R. 1508.14) Here, the EA does not speak at all to the significant negative impacts upon the human environment created by the preferred Alternative B route of Segment 9, including the significant negative impacts upon the residents of Traverse Lake Road, private property, and Cleveland Township Park.

30. DO-12 warns against "trying to avoid an EIS rather than reducing impact through 'mitigated EAs.'" (DO-12, p. 70). Here, the Trail EA proposes to mitigate the effect of removing hundreds of mature trees along the Segment 9 Trail route by replanting 50 small trees. (Ex. 3, p. 131) This effort at mitigation is wholly inadequate. DO-12 speaks directly to this by stating that the removal of a large number of mature trees and replacing them with seedlings is an inadequate mitigation effort. (DO-12, p. 70) In that case, DO-12 directs that an EIS should be prepared. *Id.*

31. DO-12 also warns that "[c]ourt battles on EAs have been lost on the basis that...the EA depended on mitigation to reduce impacts to below a 'significance' threshold." (DO-12, p. 73)

C. **Finding of No Significant Impact**

32. In August, 2009, NPS issued its Finding of No Significant Impact ("FONSI") in connection with the Trail.

33. Despite the fact that the EA is flawed, conflicting, incomplete, and contrary to NPS' own NEPA procedures, NPS relied upon the EA to conclude that the Trail posed no significant impact and does not require an EIS. (**Exhibit 5**, FONSI, p. 9)

34. Because the FONSI itself is based upon the flawed EA, the FONSI likewise is severely flawed, including:

- a. The FONSI states that "[n]o railway development would occur on private lands." (**Ex. 5**, p. 2) Segment 9 of the Trail calls for the construction of a minimum 10-foot wide linear park directly on, over, or immediately adjacent to parcels of private property owned by the Individual Plaintiffs and the LTLPOA's other members. (**Exhibit 6**, Photographs)
- b. DO-12 states that "[i]f you need several mitigation measures to avoid a significant impact, or if the mitigation measures are highly speculative or distant in time, you should carefully consider preparing an EIS instead of a mitigated EA." (DO-12, p. 70). The FONSI identifies seven categories of mitigation measures, with a total of 21 individual mitigation measures to be undertaken.
- c. Contrary to the EA, which scopes Segment 9 of the Trail route both in terms of impacts and cost as a completely on road trail, the FONSI states that the preferred Alternative B, Segment 9 Trail route "would be constructed in areas of very little previous disturbance." (**Ex. 5**, p. 5)
- d. The FONSI states that there are "[n]o long-term major adverse or beneficial impacts" requiring an EIS. (**Ex. 4**, p. 6) It goes to state that "moderate adverse impacts to operations and maintenance are expected." *Id.* Both statements are completely contrary to the findings in the EA which state: "At this time it is uncertain who will be responsible for trail operations and maintenance...The impacts of the other actions described above would result in short term and long-term, major impacts to operations and maintenance. Alternative B's contribution to these cumulative impacts would be major." (**Ex. 3**, p. 98) Thus, the NPS is simply ignoring the findings in its own EA identifying major adverse impacts by concluding that there are "no

highly uncertain, unique, or unknown risks identified during either the preparation of the [EA] or during the two public review periods." (**Ex. 4**, p. 7)

- e. According to the FONSI, "[l]ong term adverse impacts will occur to topography, wetlands and water quality, vegetation and wildlife, Michigan state-listed species, soils, socioeconomics, and operations and maintenance." (**Ex. 4**, p. 7) Despite this statement, the NPS determined that there will be no significant impact because the Trail would be built "almost exclusively in previously disturbed areas." *Id.* This statement is directly at odds with NPS' statement in the FONSI that Alternative B "would be constructed in areas of very little previous disturbance." *Id.* p. 5.
- f. The FONSI states that the "trail proposal is included in the 2009 Final General Management Plan/ Wilderness Study/ Environmental Impact Statement (GMP)" for the Lakeshore. (**Ex. 5**, p. 1) The GMP, however, contemplates that an EIS should be prepared before any such trail is built: "[A] hike/bike trail could be developed at the initiative of partners; a separate study would be needed to make certain that such a trail would have no significant impact."
- g. Appendix D to the GMP, detailing the proposed development of the Trail, states that "high use zoning does not imply the acquisition of private lands for the hike/bike trail." Preferred Alternative B of Segment 9 is proposed to be routed directly over private property.

35. Pursuant to NEPA's implementing regulations, NPS was required to cooperate with State and local agencies to the fullest extent possible in connection with the Trail. 40 C.F.R. § 1506.2. Pursuant to DO-12, NPS was required to "consult local, state, and other federal agencies as part of scoping to determine all of the applicable requirements and any permits needed for Trail completion." (DO-12, p. 30)

36. Both the EA and FONSI are silent on any cooperation with State and local agencies other than the comment in the FONSI that "[t]he selected alternative will not violate any federal, state, or local environmental protection laws." (**Ex. 4**, p. 8) This is an incorrect statement.

37. Part 353 of Michigan's Natural Resources and Environmental Protection Act (Sand Dune Protection and Management), requires the issuance of a permit by the Michigan Department of Environmental Quality (MDEQ) for any use within a critical dune area. M.C.L. 324.35304.

38. The eastern end of Segment 9 of the preferred Alternative B Trail calls for construction of a minimum 14-foot wide corridor in critical dune areas which are more than 50 feet in height, have a slope greater than 1:3, and completely cover the road shoulder for a distance of more than 700 feet. (**Ex. 1**, Photographs) The Alternative B proposal for Segment 9 will require extensive cuts in the dunes and the construction of retaining walls in order to accommodate the Trail, a fact not addressed in the EA or the FONSI.

39. Upon information and belief, NPS has not sought nor obtained a permit from MDEQ for the use of, or construction in, critical dune areas in connection with Segment 9 of the Trail. Both the EA and FONSI are silent as to the impact on critical dune areas or any contact with MDEQ, and the statement in the FONSI that "[c]ritical ecological areas have been avoided" is false. (**Ex. 5**, p. 6)

40. Routing Segment 9 of the Trail on the north side of Traverse Lake Road will require a stream crossing and negatively impact wetlands both of which will require a permit from MDEQ which has not been sought. (M.C.L. 324.30102 and M.C.L. 324.30306)

41. For that portion of Segment 9 of preferred Alternative B that is planned to be constructed in the Traverse Lake Road right-of-way, NPS is also required to obtain a right-of-way use permit from the Leelanau County Road Commission (LCRC).

42. Upon information and belief, NPS has not sought nor obtained a permit from LCRC for construction of Segment 9 of the Trail within the right-of-way of Traverse Lake Road.

43. NEPA requires preparation of an EIS whenever a Trail's impact on the human environment may be significant. In this regard, DO-12 states: "NEPA (sec. 102(2)(C)) requires you to prepare an EIS whenever your park proposes or approves an action whose impacts on the human environment may be significant...If something your park is proposing might have significant impact on the human environment, you must prepare an EIS." (DO-12, p. 45) (emphasis added).

44. Both NEPA's implementing regulations and DO-12 set forth factors to be analyzed and considered in determining whether an impact is "significant," including:

- a. The degree to which public health and safety are affected;
- b. Unique characteristics of the geographic area, including site-specific characteristics relating to wetlands, or ecologically critical areas;
- c. The degree to which effects on the quality of the human environment are likely to be highly controversial; and
- d. Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27; DO-12, pp. 46-47.

45. The EA concludes that "[d]evelopment of the Trailway would have negligible impacts on the population of the area both in the long and short term." (Ex. 3, p. 91) The FONSI likewise concludes: "There were no highly uncertain, unique, or unknown risks identified during either the preparation of the [EA] or during the two public review periods." (Ex. 5, p. 7)

46. The EA and the FONSI, however, failed to take a critical or hard look at the significant impacts Segment 9 of the Trail route will have upon the human environment. No studies or analyses were done relating to the impact that the anticipated 350,000-400,000 trail users or increased vehicular traffic will have upon the residents of Traverse Lake Road, private property, Cleveland Township Park or the health and safety of both trail users and residents. This is despite the fact that portions of Segment 9 of the Trail are planned to be constructed very close to occupied residences across private property. (**Ex. 6**, Photographs)

47. Since the FONSI was issued, already constructed Trail segments have used a 20 foot wide cut in some areas. This change in scope was not considered or reviewed as part of the EA, particularly as to Segment 9, and thus, the FONSI is inaccurate in its conclusion on the lack of significant impact.

48. The FONSI references 37 written comments on all of the segments as part of the initial EA review and public comment period in October, 2008. However, the FONSI fails to point out that 26 of the comments, or 70%, were strongly opposed to the Alternative B routing of the Trail on or near Traverse Lake Road. Instead, the FONSI, in addition to ignoring the opposing views entirely, deems this strong opposition as not "highly controversial." (**Ex. 5**, p. 6)

49. NPS' course of proceeding throughout the planning process, particularly its failure to even acknowledge the overwhelming opposition to the preferred Alternative B of Segment 9 and change of scope pertaining to the Trail's width, suggests that the FONSI was a *fait accompli*, even before completion of the FONSI and contrary to NEPA's implementing regulations which mandate that information be made available to citizens and public officials "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

50. Both the EA and FONSI fail to address the violation of state and local requirements relating to critical dune and right-of-way permits if Alternative B of Segment 9 is built as currently proposed.

51. The FONSI, issued in August, 2009, is now almost six years old and construction of Segment 9 of the Trail is not due to begin, at the earliest, until 2017. According to DO-12, use of an "outdated or inadequate document" relied upon to take original action requires initiation of the NEPA process and preparation of a new document for public review. (DO-12, p. 47)

52. The FONSI, issued in 2009, concluded that the proposed Alternative B Trail route along Traverse Lake Road would not significantly impact the natural or human environments despite the fact that, as of March 30, 2015, "the final route of Segment 9 has yet to be determined." (**Exhibit 2**)

53. All told, the EA and resulting FONSI are highly flawed, incomplete, contradictory, and fail to abide by NEPA, its implementing regulations, and DO-12.

Count I
Violation of NEPA- Failure to Disclose and Analyze Environmental Impacts

54. Plaintiffs incorporate by reference paragraphs 1 through 53.

55. NEPA requires federal agencies to analyze the foreseeable environmental impacts, including direct, indirect, and cumulative impacts, of "major federal actions." 42 U.S.C. § 4332(c)(1); 40 C.F.R. § 1508.7. NEPA requires the analysis and consideration of cumulative effects which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.25(a).

56. The Trail, including Segment 9, constitutes major federal action pursuant to 40 C.F.R. § 1508.18.

57. Pursuant to NEPA's regulations, an EA must "provide sufficient evidence and analysis for determining whether" a project will have a significant impact on the environment. 40 C.F.R. § 1508.9(a)(1).

58. The data relied upon by NPS in making its FONSI in connection with Segment 9 of the Trail was inadequate and incomplete, and in the Trail EA, NPS failed to adequately disclose and analyze the likely effects of the Trail, including:

- a. Impacts of changing Segment 9 from an on-road path using the existing chip-sealed surface to an off road minimum 14-foot wide corridor built in heavily wooded areas, wetlands, critical dune areas, and wildlife habitat.
- b. Impacts upon wetlands and stream on the west end and the critical dune areas on the east end of Segment 9.
- c. Impacts upon the human environment, and the ability of Traverse Lake Road residents to enjoy their homes due to noise and traffic.
- d. Impacts caused by deforestation and excavation along the Trail trail route and up to 100 feet into the National Lakeshore.
- e. Impacts to the public health and safety.
- f. Impacts to the Trail's actual cost.
- g. Impacts to the residents of Traverse Lake Road as a result of 350,000-400,000 trail users, with the majority of use during the summer months when vehicular travel is increased.
- h. Impacts due to lack of any plan for maintenance of the Trail or the Cleveland Township Park located on Traverse Lake Road.
- i. Impacts to wildlife habitat which will be dissected by proposed route.
- j. Impacts to the scenic natural beauty of Traverse Lake Road or the resulting reduction of property values.
- k. Impacts to owners of private property and their enjoyment of such property.

59. Defendant NPS' actions as described above are arbitrary, capricious, and not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

Count II
Violation of NEPA- Failure to Prepare an EIS

60. Plaintiffs incorporate by reference paragraphs 1 through 59.

61. NEPA requires an EIS for any major federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2); 40 C.F.R. § 1502.3.

62. Defendant NPS violated NEPA by issuing a FONSI for the Trail because Segment 9 of the Trail raises issues that, at a minimum, should be evaluated by way of an EIS, including:

- a. Segment 9 of the Trail, contrary to the FONSI, does significantly impact critical ecological areas including critical dune areas, mature forests, and wetlands.
- b. Segment 9 of the Trail will have a significant impact upon the human environment, including the construction and use of the preferred Alternative B route.
- c. Segment 9 of the Trail, as proposed in the preferred Alternative B route, will have a major adverse impact upon the natural and human environment, including the lack of a maintenance plan.
- d. Segment 9 of the Trail will cause significant impacts to mature forests and the unique topography of the preferred Alternative B route.
- e. Segment 9 of the Trail will significantly impact the ability of Traverse Lake Road residents to enjoy their property due to noise and traffic.
- f. Segment 9 of the Trail, contrary to the FONSI, is controversial and will have a significant adverse impact upon the natural and human environments as made known by the public review comments.
- g. Segment 9 of the Trail, without the appropriate permits issued by MDEQ and the LCRC, will violate state and local laws.

- h. Segment 9 of the Trail was deemed to have no significant impact based upon an on-road trail using the existing chip-sealed surface and not a minimum 14-foot wide corridor at least 10 feet off the roadway as currently proposed.
- i. Segment 9 of the Trail will have a significant impact because much of the preferred Alternative B route will be constructed in undisturbed natural areas.
- j. Segment 9 of the Trail will have a significant impact upon the human and natural environment as evidenced by the need for 21 different mitigation measures in the FONSI.
- k. Segment 9 of the Trail will have a significant negative impact upon public health and safety.
- l. Segment 9 of the Trail will have a significant impact upon wildlife habitat.
- m. Segment 9 of the Trail will have a significant negative impact upon private property, the enjoyment of such property, and property values along Traverse Lake Road.
- n. Segment 9 of the Trail will have a significant impact upon critical dunes 50 feet in height with a slope greater than 1:3.

63. Defendant NPS' actions as described above are arbitrary, capricious, and not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

Count III

Violation of NEPA- Failure to Analyze an Adequate Range of Alternatives

64. Plaintiffs incorporate by reference paragraphs 1 through 63.

65. NEPA requires an agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 102(2)(E). Agencies "shall rigorously explore and objectively evaluate all reasonable alternatives, and

for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

66. In the "Purpose and Need" section of the EA (**Ex. 4**, § 2, p. 8), the stated goal of the Trail is to provide a continuous pathway from M-22 at the south boundary of Leelanau County, north to the National Lakeshore boundary at Good Harbor Bay. The Trail is intended to provide a safe, alternative transportation opportunity for park visitors that connects the National Lakeshore's primary visitor sites and facilities, including beaches, trailheads and other points of interest. *Id.*

67. The EA contains a number of proposed alternatives for Segment 9 of the Trail (**Ex. 4**, Appendix), however, it does not analyze an alternative that would route Segment 9 of the Trail north off M-22 on Bohemian Road (a/k/a County Road 669) and ending at Good Harbor Bay in an area with facilities and beaches, with the option of continuing east and west on or adjacent to Lake Michigan Road along the lake shore in an area already designated as a recreational zone in the Master Plan of the National Lakeshore.

68. This proposed route meets the stated goals of the Trail, uses existing land, roads and trails in the National Lakeshore, avoids sensitive ecological areas, significantly lessens the number of mature trees to be removed, and eliminates excavating critical dune areas. It also significantly reduces construction costs, and eliminates the impact upon the human environment along Traverse Lake Road by avoiding constructing the Trail through a residential neighborhood or across private property. Plaintiffs have advocated for this Segment 9 alternative route both publicly and directly to the NPS. (**Exhibit 6**)

69. The EA does not discuss this proposed route nor does it discuss why such an alternative was not considered.

70. The FONSI states that "[a] number of other options were considered by the Trailway Committee during the planning process, but were eliminated due to excessive grading issues, impacts to private property, steep topography, [and] potential impacts on proposed wilderness or safety." (Ex. 5, p. 4) All of the foregoing reasons for abandoning other Trail route options exist in the preferred Alternative B route proposed for Segment 9, yet NPS has either ignored these factors in deciding to route Segment 9 down Traverse Lake Road or has not taken a hard look at other reasonable alternatives. If the environmental factors considered in the EA of a 10 foot off-road asphalt trail in the preferred Alternative B were scored correctly (appendix, Table 17), Segment 9 would have the greatest environmental impact of any segment along the entire Trail.

71. Defendant NPS' actions as described above are arbitrary, capricious, and not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

Count IV
Violation of NEPA- Reliance on Incomplete, Misleading, and Inaccurate Data

72. Plaintiffs incorporate by reference paragraphs 1 through 71.

73. NEPA requires agencies to use high quality information and accurate scientific analysis; disclose "any responsible opposing view;" "make explicit reference ...to the scientific and other sources relied upon for conclusions in the statement; disclose any scientific uncertainties; and complete independent research and gather information if no adequate information exists (unless the costs are exorbitant or the means of obtaining the information are not known)." 40 C.F.R. §§ 1500.1(b), 1502.9(b), 1502.22, and 1502.24.

74. Neither the EA nor the FONSI reference any studies or data used to support the conclusion that there is no significant impact to the human and natural environments,

including studies or data related to human and traffic impacts that Segment 9 of the preferred Alternative B route will have upon the residents of Traverse Lake Road and private property, destruction and dissection of wildlife habitat, impact on wetland areas, or excavation of critical dune areas.

75. Neither the EA nor FONSI disclose opposing views to the preferred Alternative B route of Segment 9 despite the fact that 70% of the written comments received during the October, 2008 public review and comment period on all of the segments were in opposition to the preferred Alternative B route of Segment 9.

76. The inconsistencies contained in the EA leads to an inaccurate analysis and presentation of the impact to the environment, whereas if the assessments on a 10 foot off-road asphalt path were done correctly, the proposed Segment 9 would have the greatest impact to the environment of any segment along the entire route.

77. Because "the final route of Segment 9 has yet to be determined," the analysis and information contained in both the EA and FONSI cannot be accurate or complete.

(Exhibit 2)

78. NEPA requires that NPS take a "hard look" at the direct, indirect, and cumulative impacts that Segment 9 of the Trail, as proposed, will have upon the natural and human environments, and to do so, NPS must rely on complete and accurate information which it did not do.

79. NPS violated NEPA by presenting and relying upon inaccurate and misleading information in the EA and FONSI, to wit: (i) evaluating the environmental impacts of an on-road trail while presenting Segment 9 of the Trail as an off-road trail; (ii) distributing a "Public Input Flyer" devoid of any reference to routing Segment 9 down Traverse Lake Road;

and (iii) issuing the EA containing an "Overall Trailway Segments Map" showing segment 9 being routed on M-22 and not Traverse Lake Road.

80. Defendant NPS' actions as described above are arbitrary, capricious, and not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

Prayer for Relief

WHEREFORE Plaintiffs respectfully requests this Court order the following relief:

- A. An order declaring that Defendant National Park Service has violated NEPA, and the APA for the reasons alleged above;
- B. Awarding Plaintiffs their reasonable attorneys' fees and costs incurred in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- C. All such other and further relief as this Court deems just, proper, and equitable.

Respectfully Submitted,

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