

COALITION FOR OUTDOOR ACCESS

COMMENTS

on

United States Forest Service

Advanced Notice of Proposed Rulemaking

National Environmental Policy Act Compliance

83 Fed. Reg. 302 (January 3, 2018)

I. Introduction

The Coalition for Outdoor Access (COA) respectfully submits these comments on the United States Forest Service (USFS) Advanced Notice of Proposed Rulemaking on National Environmental Policy Act Compliance, published at 83 FR 302 (January 3, 2018).

The Coalition for Outdoor Access is an alliance of organizations with an interest in the outfitter-guide permitting systems of the federal land management agencies. The Coalition came together in 2014 to improve the operation of these systems for the benefit of the agencies, the recreational landscapes they support, the organizations who provide facilitated recreational experiences on federal lands and waters, and for the members of the public who use these services. The Coalition is made up of organizations that represent for-profit outfitters and guides, nonprofit outfitters and guides, university recreation programs, volunteer-based clubs, the outdoor industry, and the conservation advocacy community.

II. COA's Goals for the Rulemaking

The Coalition for Outdoor Access strongly supports the principles of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA) and believes that environmental review is a vital part of the land management decision-making process. We urge USFS to approach changes to the NEPA process carefully so the agency continues to have the necessary tools to ensure USFS managed lands remain attractive recreation destinations for a wide range of users. The preservation of landscapes is fundamental to their recreational value and this should remain at the heart of the agency's approach. We also believe it is important to preserve opportunities for the recreating public to participate in decisions about the way the agency's lands and waters are managed.

As the agency considers a proposed rule on NEPA compliance, we believe an opportunity exists for the agency to improve the environmental review process as it relates to issuing outfitter-guide permits. The environmental analysis requirements that are currently being applied to outfitting and guiding proposals are unnecessarily complex. The cost of these analyses is preventing the Forest Service from issuing permits to authorize new recreational activities, and from reauthorizing some existing activities. This is preventing people from visiting National Forests and Grasslands.

These analysis requirements are also inequitable. The categorical exclusions that USFS has historically used for outfitter-guide permitting are relatively narrow and allow the agency to authorize outfitting and guiding activities in relatively few circumstances. In contrast, the agency's existing categorical exclusions currently allow it to authorize activities that have significantly larger impacts on the land than outfitting and guiding. For example, 36 CFR 220.6(e)(10) allows hazardous fuels reduction activities using prescribed fire on up to 4,500 acres of land. Likewise, section 220.6(e)(12) allows the harvest of 70 acres of live trees and the construction of a half mile of temporary road.

Interestingly, section 220.6(e)(1) also allows the construction and reconstruction of trails without detailed environmental review. However, authorizations for the guided use of those trails are limited to minor, short-term uses of one year or less. *See* 36 CFR 220.6(d)(8). This strikes us as inconsistent. The use of an established trail should not be subjected to a higher level of scrutiny than the construction of the trail itself.

For these reasons, we believe the agency should carefully explore a recalibration of its NEPA compliance procedures for outfitting and guiding activity. We believe it is possible to preserve the letter and spirit of NEPA while at the same time simplifying the process for issuing outfitter-guide permits. We think the end goal of this rulemaking should be to ensure that the agency does the right amount of NEPA at the right time for the right reason and reduce the scope of review in circumstances when detailed analysis is unnecessary. This will help get more people out on the land, and free up agency resources to conduct detailed environmental review and analysis when and where it is most important.

III. Rulemaking Context

In order to ensure that the Forest Service strikes the right balance, the agency should first put this rulemaking in the right context and clearly identify the source of the problem it is trying to solve by reexamining its NEPA compliance procedures. This means making a threshold distinction between problems that are legal and problems that are operational.

Legal problems are those that can be traced to the language of a regulation that is too narrow or too broad and is producing an undesirable result. If the agency determines that there are problems with the language of the regulations, the agency should propose revisions to the regulations and put these revisions out for public comment. As we explain further below, we believe there are some legal issues that are worth exploring in an NPRM.

Operational problems stem from the way the agency's regulations are being interpreted and applied, or from superfluous procedures and practices that have built up in the NEPA process over time. The agency should not try to solve operational problems by revising the existing regulations. Instead, the agency should use other strategies such as training and educating agency staff and working to change the agency's culture around the administration of NEPA.

The Coalition is ready and willing to assist the agency as it develops solutions for these operational and cultural challenges.

The Coalition for Outdoor Access believes it is vitally important for the agency to recognize the legal versus operational distinction, and to formulate solutions that will genuinely address the problems it is trying to solve as it develops its Notice of Proposed Rulemaking. This will help the agency adopt the right strategy for improving its NEPA compliance procedures.

III. Specific Recommendations for Agency Action

With the foregoing principles in mind, COA makes the following recommendations for the agency as it develops its Notice of Proposed Rulemaking.

A. Conduct Reviews on a Broader Scale

The ANPRM seeks comment on "[a]pproaches to landscape-scale analysis and decision making under NEPA that facilitate restoration of National Forest System lands." COA believes a form of landscape-scale analysis would also be useful in the outfitter-guide context.

By landscape-scale analysis, we mean the agency should strive to make greater use of programmatic environmental review and tiering to approve outfitter-guide activity on a larger scale and over a larger geographic area. This would reduce the need to conduct detailed project-based case-by-case environmental reviews of each outfitting and guiding proposal as it is submitted. With a broadly applicable environmental review in place, the agency could streamline approval of specific outfitting and guiding requests under one analysis and decision. The agency may also find it easier to apply categorical exclusions to specific recreation permit proposals if a programmatic analysis has already been performed. The Mt. Baker-Snoqualmie National Forest in USFS Region 6 has implemented this strategy with great success and could serve as a model for other forests. This type of large-scale environmental review will eliminate unnecessary paperwork and delay when issuing individual outfitter-guide permits and will increase opportunities for the public to connect with the forest.

The Coalition for Outdoor Access urges the agency to include elements in the NPRM that encourage, or even require, the agency to utilize programmatic environmental analysis as a preferred method for environmental review of guided recreation activities.

B. Clarify Existing Categorical Exclusions

The Forest Service currently has three categorical exclusions that apply to outfitting and guiding. Section 220.6(d)(8) of 36 CFR excludes:

Approval, modification, or continuation of minor, short-term (1 year or less) special uses of NFS lands. Examples include, but are not limited to . . . (i) Approving, on an annual basis, the intermittent use and occupancy by a State-licensed outfitter or guide."

Section 220.6(d)(10) excludes:

Amendment to or replacement of an existing special use authorization that involves only administrative changes and does not involve changes in the authorized facilities or increase in the scope or intensity of authorized activities, or extensions to the term of authorization, when the applicant or holder is in full compliance with the terms and conditions of the special use authorization.

Section 220.6(e)(15) excludes:

Issuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are not changes to the authorized facilities or increases in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization.

There is also a Department of Agriculture CE for "educational and information programs and activities." 7 CFR 1b3(A)(4). This CE is available to the Forest Service but appears to be rarely used by the agency to authorize outfitting and guiding activity.

Taken together, these CEs exclude:

1. educational and information programs and activities;
2. one year permits for minor, intermittent use;
3. amendments and replacements of permits without changes to facilities, scope or intensity of authorized activities, or extensions of the term;
4. issuance of a new permit for a new term to replace an existing or expired permit without changes to facilities or increases in the scope or intensity of authorized activities.

We believe these CEs require clarification in order to better address the situations that commonly arise in the administration of outfitter-guide permits. In particular, it would be useful to clarify and/or propose modifications to these CEs that address the following situations:

1. A permit holder would like to change the activities offered under the permit without changing the general location of the activities or the number of authorized service days. Would this be considered an administrative change that could be made under one of the existing CEs?
2. A permit holder would like to reduce the number of service days in one location and increase the number of service days in another location by the same amount. Would this be considered an administrative change that could be made under one of the existing CEs?

3. An outfitter or guide would like a new one-year permit for more service days than the temporary permit rule currently allows (400/year under FSH 2709.14 Section 53.1K). Could this be done under the existing 36 CFR 220.6(d)(8) or any of the other CEs?

We recommend that the agency seek comment in the NPRM on clarifications to these CEs. If necessary, we urge the agency to propose modifications to these CEs that would clarify their application to these situations.

C. Seek Comments on Additional Categorical Exclusions

The recommendations set forth above offer significant opportunities for improving the approval of recreational outfitter-guide activities. However, the ANPRM specifically sought comments on whether there are "[c]lasses of actions that are unlikely, either individually or cumulatively, to have significant impacts and therefore should be categorically excluded from NEPA's environmental assessment and environmental impact statement requirements, such as . . . special use authorizations." 83 FR 302 (January 3, 2018).

The Coalition for Outdoor Access supports this approach and recommends that the agency seek public comment on new categorical exclusions (CEs) that would give the agency greater flexibility to administer outfitter-guide permits. In most instances, recreational outfitting and guiding activities take place on established recreational infrastructure that is already being used for the same activities by the general public. Furthermore, in many locations, outfitter-guide use is substantially less than that of the general public. For these reasons, many recreation special use authorizations are unlikely to significantly increase the amount of environmental impacts beyond that of existing unguided recreation activities. Taking these considerations into account, COA believes the creation of new CEs for the administration of recreation special use permits may be a way to improve the permitting process that is consistent with agency goals.

Specifically, COA recommends the agency seek public comment on one or more proposed CEs that would allow the agency to (1) issue new temporary permits for up to two years, (2) increase the number of authorized service days for an existing permittee, and (3) authorize an existing permittee to conduct new uses. Each of these proposed CEs should be limited to proposals for recreation activities that:

1. Take place on established recreational infrastructure in areas that are open to the general public;
2. Are the same or substantially similar to existing recreational uses currently taking place in the same location;
3. Are consistent with the applicable forest plan and Wilderness management plan; and
4. Do not significantly increase the scope or intensity of overall visitor use and do not exceed carrying capacity limits (if those limits have been determined).

We recommend the agency include one or more proposed CEs along these lines in the NPRM and invite public comment on them.

IV. Conclusion

The Coalition for Outdoor Access appreciates the opportunity to comment on the Forest Service's Advanced Notice on NEPA compliance procedures. We look forward to the opportunity to review and comment on the Notice of Proposed Rulemaking.

Signed,

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