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ASSOCIATION FOR OUTDOOR RECREATION & EDUCATION  
THE MOUNTAINEERS | YMCA BOLD & GOLD  
OUTDOOR INDUSTRY ASSOCIATION

**COMMENTS**

on

**United States Forest Service  
Notice of Proposed Rulemaking  
National Environmental Policy Act Compliance  
84 Fed. Reg. 27544 (June 13, 2019)**

**I. Introduction**

The organizations and businesses noted herein respectfully submit these comments on the United States Forest Service (USFS) Proposed Rule on National Environmental Policy Act Compliance, published at 84 Fed. Reg. 27544 (June 13, 2019).

We are an alliance of organizations with an interest in the outfitter-guide permitting systems of the federal land management agencies. We advocate to improve the operation of these systems for the benefit of the agencies, the recreational landscapes they support, the organizations who provide guided recreational experiences on federal lands and waters, and for the members of the public who use these services. Collectively, our group includes organizations that represent for-profit outfitters and guides, non-profit outfitters and guides, university recreation programs, volunteer-based clubs, and the outdoor industry.

**II. Goals for the Rulemaking**

We support the principles of the National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA) and believe that environmental review and opportunities for public input are a vital part of the land management decision-making process. Accordingly, we encourage the USFS to approach changes to the NEPA process in a manner that provides the agency with the necessary tools to ensure USFS managed lands remain attractive recreation destinations for a wide range of users. We also believe it is important to preserve opportunities for the recreating public and other stakeholders 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 a significant 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 and they are preventing the Forest Service from issuing permits to authorize new recreational activities. This is preventing people from visiting National Forests and Grasslands with an outfitter, guide, or organized group and it places unnecessary administrative burdens on agency staff. For activities with no discernible environmental impacts, such as non-ground disturbing outdoor recreation activities, the permitting process should be quick and efficient for all involved.

Current analysis requirements are also unbalanced. 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 has categorical exclusions for other activities that allow it to authorize projects that have significantly larger impacts on the resource than outfitting and guiding. For example, 36 CFR 220.6(e)(12) allows the harvest of 70 acres of live trees and the construction of a half mile of temporary road.

For these reasons, we support the agency's intention to recalibrate its NEPA compliance procedures for outfitting and guiding activity. It is possible to preserve the letter and spirit of NEPA while at the same time simplifying the process for issuing outfitter-guide permits. Doing so 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. Comments on the NPRM**

In the following section we offer comments and recommendations on the NPRM. We begin with general comments on the overall approach of the NPRM and then we provide specific recommendations for improvements to the rule as it relates to recreation special uses.

#### **A. General Comments**

##### 1. Reduction of public notice and public participation

We have significant concerns about the dramatic reduction in public notice and opportunities for public participation contemplated by the proposed rule. We urge the agency to reconsider these changes and preserve robust public participation in land management decision-making.

Under current USFS regulations, “[s]coping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS (§220.6).” See 36 CFR 220.4(e)(1). In contrast, under the proposed rule, scoping would only be required when an environmental impact statement is being prepared. See proposed 220.4(d)(2). No scoping would be required for categorical exclusions or environmental assessments. The effect of this change would be to eliminate public scoping from an overwhelming majority of agency actions, thereby reducing opportunities for public participation in most agency decision making.

Furthermore, because SOPA posting is only required for actions that include a decision memo, decision notice or record of decision, the proposed elimination of scoping would result in no public notification whatsoever for actions taken with a CE that do not require a decision memo.

We oppose the reduction in public notification and public participation contained in the proposed rule. The public has a right to participate in agency decisions about the way public lands are managed. Members of the public have a valuable role to play in helping the agency determine whether a proposed project will have significant environmental impacts.

For example, in the preparation of an environmental assessment, the scoping process often enables the agency to reach a Finding of No Significant Impact (FONSI) in a timely manner because the agency has solicited input from the public in the early stages of project development. Many proposed

projects are modified based on the comments submitted during the scoping process. Decision notices often impose conditions and limitations on the approval of projects based on the comments received during scoping. These modifications and conditions often significantly reduce the environmental impact of the project and make the FONSI possible. Without scoping and public comment, the agency would not have the information it needs to identify potential modifications and limitations and make a carefully considered decision as to whether a FONSI is appropriate.

In lieu of the current scoping requirements, it appears the agency plans to rely on the Schedule of Proposed Actions (SOPA) for public notification. Listing a project in a SOPA report, however, is not a sufficient alternative to scoping. The SOPA is extensive and complex, and it is difficult for the public to navigate the many projects and ultimately determine which are related to their interests. Scoping on the other hand, is a proactive form of public notification that often targets specific stakeholders who may be interested in a project. In addition, scoping occurs early in the project timeline, providing the public with ample time to consider and comment on a proposed action.

We urge the agency to retain the current scoping requirement for all proposed actions. Doing so will provide the agency with valuable public input that can be used to ensure proposed projects minimize their environmental impacts and comply with NEPA.

## 2. Categorical Exclusions for Restoration and Infrastructure

The proposed rule contains a series of revised and new CEs for ground disturbing activities that have the potential to negatively impact businesses and organizations that provide outfitting and guiding services on the National Forest System. The most significant examples are:

- Proposed section 220.5(e)(26), which would authorize without an environmental analysis “ecosystem restoration and/or resilience activities” on up to 7,300 acres, including up to 4,200 acres of commercial logging (6.6 square miles), so long as the project includes a single restoration add-on (*e.g.*, replacing a single culvert to restore fish passage).
- Proposed section 220.5(e)(24) would authorize the construction of five miles of new road or reconstruction of ten miles of existing road, also without an environmental analysis.

We recognize the agency’s current categorical exclusions for ecosystem restoration and road construction may be insufficient in some circumstances. However, the new CEs proposed in sections 220.5(e)(26) and 220.5(e)(24) go too far. Projects of this type and size could have long-lasting, adverse effects on outfitting and guiding businesses and organizations. For example, restoration projects up to 7,300 acres in size could destroy an area used by an outdoor education organization to train students in cross country travel. It could also result in significant runoff into a trout stream, undermining the ability of a fly-fishing outfitter to provide quality fishing opportunities to the public. Similarly, exempting five miles of new road construction from environmental analysis, as proposed under section 220.5(e)(24), could interrupt wildlife migration patterns and shrink wildlife habitat, making it more difficult for hunting outfitters to find game for their clients.

We are not suggesting that restoration projects and road building should never be authorized. However, before projects of this type and size are undertaken, an environmental analysis should be conducted with input from the businesses and organizations that stand to be impacted. For these reasons, we recommend the proposed CEs in sections 220.5(e)(26) and 220.5(e)(24) be withdrawn.

### 3. Extraordinary Circumstances

Currently, as stated in 36 CFR 220.6(a) CEs may only be used when no “extraordinary circumstances” exist. Extraordinary circumstances are indicated to exist when there is a “cause-effect relationship between a proposed action and the potential effect on the [] resource conditions” (36 CFR 220.6(2)).

Under the proposed rule, extraordinary circumstances would not trigger an EA or EIS unless there is a “likelihood of *substantial* adverse effects” to one of the resource conditions. As a result, the insertion of “substantial” could inadvertently raise the threshold for when an extraordinary circumstance exists. Furthermore, there is no definition of substantial provided in the rule and complications could arise when individual line officers make their own interpretation of what is meant by “substantial.”

The extraordinary circumstances provisions of the existing rules serve as an important backstop on the use of categorical exclusions. We do not believe this backstop should be weakened by raising the standard for when extraordinary circumstances exist. It is important to remember the presence of an extraordinary circumstance does not mean that a project will not be approved. Instead, the rules merely ensure that the agency takes a closer look at a proposed action when one of these circumstances exist. Furthermore, the lack of a definition for the term “substantial” in the proposed rule could cause significant variation in how extraordinary circumstances are applied across the National Forest System, resulting in confusion and conflict.

### 4. Recommendation

We believe the issues we describe above represent significant problems that would fundamentally undermine the spirit of NEPA and cause unnecessary harm to areas of significant recreational value. Because these problems are so fundamental, we recommend the aforementioned elements of the proposed rule be withdrawn or entirely recrafted to include more robust public notification and public participation requirements, and more carefully designed categorical exclusions.

#### **B. Programmatic Review and Tiering**

Our groups believe that effective programmatic environmental review and tiering are a vital part of the solution for improving the process of issuing outfitter-guide permits. If conducted in sufficient detail, completion of programmatic review would reduce the need to conduct detailed project-based case-by-case environmental reviews of each outfitting and guiding proposal. With a broadly applicable environmental review in place, the agency could streamline approval of multiple 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. For these reasons, we encourage the agency to expand the use of programmatic review and tiering with clear sideboards for its use.

#### **C. Comments on the Proposed CEs for Special Uses**

The Forest Service proposal would add one new CE, expand an existing CE, and combine two other existing CEs related to special uses:

- Proposed section 220.5(d)(11) combines two existing categorical exclusions, one of which currently requires a decision memo and one of which does not, into a single categorical

exclusion that does not require a decision memo. This CE is for issuance of new special use authorizations to replace existing or expiring authorizations, when the action is clerical to account for administrative changes.

- Proposed section 220.5(d)(12) is a new categorical exclusion that does not require a decision memo. It would allow the agency to issue or amend a special use authorization for activities that occur on existing roads and trails, in existing facilities or in areas where activities are consistent with the applicable land management plan.
- Proposed section 220.5(e)(3) allows the approval, modification, or continuation of special uses that require less than 20 acres of NFS lands.

As mentioned previously, the categorical exclusions that USFS has historically used for recreation special use permitting are relatively narrow and have been a limiting factor in the agency's ability to authorize outfitting and guiding activities. We support targeted modifications to existing CEs and clearly defined new CEs that will enhance the agency's ability to help people experience national forests and improve efficiency in the recreation special use permitting process. These new and modified CEs should be calibrated to ensure the public is notified of proposed actions through the scoping process and CEs should be appropriate in scope to uphold the requirements and intent of NEPA.

#### 1. Proposed Special Use CE #1 - Section 220.5(d)(11)

Proposed special use CE #1 combines two existing categorical exclusions, one of which requires a decision memo and one which does not, into a single categorical exclusion that does not require a decision memo. The existing CEs (36 CFR 220.6(d)(10) and 36 CFR 220.6(e)(15)) are applied to the issuance of a new special use authorization to replace an existing or expiring authorization when such issuance is purely a clerical action to account for administrative changes. Historically, these CEs have accomplished the same result and therefore we support the concept of combining them into one CE for clarity and ease of use.

Because the proposed CE is applicable only to administrative changes that are purely clerical in nature, with no increase in scope or intensity, we can support the inclusion of the CE in categories of actions for which a decision memo is not required. However, if this CE is to be used without a decision memo, it further reinforces the necessity of scoping as a means of notifying the public of the action. Provided scoping is retained for categorical exclusions that don't require a decision memo, we support this proposed CE.

#### 2. Proposed Special Use CE #2 - Section 220.5(d)(12)

The proposed special use CE at 220.5(d)(12) would establish a new categorical exclusion for the issuance of a new authorization or amendment of an existing authorization for activities that occur on existing roads and trails, in existing facilities, or in areas where activities are consistent with the applicable land management plan or other documented decision. We believe this categorical exclusion would help to increase efficiency in the outfitter-guide permitting process.

To improve clarity and promote understanding, the scope of the proposed CE needs to be clearly stated and context for its use should be added. In addition, if a decision memo will not be required,

we believe it is imperative the current requirements for scoping be retained so the public is notified of the action. We recommend the following adjustments:

- The scope of the proposed CE at 220.5(d)(12) should be specific to recreation special uses. All of the examples provided in the proposed rule relate to recreation. However, it is unclear if the CE could be applied to other forms of special uses. We recommend language be added to indicate the CE is applicable only to recreation-related special uses.
- Context should be provided to further clarify the conditions in which the CE may be appropriately used. For example, the use of the CE should be limited to proposals for recreation activities that:
  - Take place on established recreational infrastructure in areas that are open to the general public;
  - Are the same or substantially similar to existing recreational uses currently taking place in the same general location;
  - Are consistent with the applicable forest plan, Wilderness management plan, or other documented decision; and
  - Do not exceed carrying capacity limits (if those limits have been determined).

With the aforementioned changes, and so long as the public will be notified of the action through scoping, we support the implementation of the proposed categorical exclusion in section 220.5(d)(12).

### 3. Proposed Special Use CE #3 – Section 220.5(e)(3)

The proposed special use categorical exclusion in section 220.5(e)(3) introduces two significant changes from the existing categorical exclusion at 36 CFR 220.6(e)(3). First, the proposed CE increases the allowable acreage to be categorically excluded from 5 acres to 20 acres. Second, the proposed CE eliminates the term “contiguous.” The net effect of these two changes could result in significant impacts to recreation landscapes and the quality of recreation experiences. By increasing the acreage to 20 acres and simultaneously allowing that acreage to be calculated among discontinuous parcels of land, there is a greater potential for viewsheds to be damaged, wildlife corridors to be disrupted, and longstanding recreation routes to be altered. Given the potential for such consequences, we recommend the proposed categorical exclusion in section 220.5(e)(3) be withdrawn.

## **V. Conclusion**

Our groups would like to thank the Forest Service for taking steps to revise its environmental analysis and decision-making procedures as they apply to outfitting and guiding activities. With the aforementioned recommendations, we believe the environmental analysis and decision-making process can be made more efficient while continuing to meet the requirements of NEPA, making it easier for more people to recreate with an outfitter, guide, or other outdoor leader. However, to ensure public comments are adequately accounted for, especially given the breadth of changes proposed, we recommend the agency put out another revision of the proposed rule for public comment before adopting a final rule.

Signed,

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