

U.S. Forest Service Proposes to Revise NEPA Regulations



On June 13, 2019, the U.S. Forest Service issued a [proposed rule](#) to revise its regulations (36 CFR part 220) implementing the National Environmental Policy Act (NEPA). The Agency last updated these regulations in 2008. Comments on the proposed rule are due by August 12, 2019. The Agency also intends to publish related draft guidance early next year.

This proposed rule is the latest in a series of federal initiatives to increase overall efficiency in environmental analyses for federal agency decision-making. Specifically, the Agency’s goal is to “complete project decision making in a timelier manner, improve or eliminate inefficient processes and steps, and increase the scale of analysis and the number of activities in a single analysis and decision.” This objective accords with the One Federal Decision framework and other Executive Branch steps across multiple Administrations to foster interagency coordination, clearer standards, less duplication, and greater predictability for project proponents.

The Agency’s proposed changes are intended to specifically facilitate decision-making and reduce backlogs for commonly proposed actions within national forests and other lands managed by the Agency, including responses to growing wildfire management and other challenges. Among the most important proposed additions are:

1. New Determination of NEPA Adequacy tool (DNA) modeled on U.S. Bureau of Land Management regulations.
2. New categorical exclusions for projects within certain already-disturbed areas.

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3. Clarification for public involvement.
4. Express endorsement of "condition-based" management alternatives.

Definitions and General Requirements

The proposed rule would add a DNA option to comply with NEPA, which provides a process for determining whether a completed Agency NEPA analysis suffices for a later proposed action that is substantially similar in nature. As drafted, the provision is limited to Agency NEPA analyses, though options of adoption and incorporation by reference remain available for other agencies' NEPA analyses. Additionally, the Agency would define "conditions-based management" as "a system of management practices based on the implementation of specific design elements from a broader proposed action," and expressly allow for this management approach within a proposed action and any alternatives. The Agency also would define when supplemental NEPA review is warranted consistent with other federal regulations and case law.

Addition and Expansion of Categorical Exclusions

Most of the proposed changes involve the addition or expansion of [categorical exclusions](#), which obviate the need to prepare more detailed NEPA review. The proposed rule also seeks to narrow the scope of "extraordinary circumstances" that may weigh against use of a categorical exclusion. Under the proposal, extraordinary circumstances exist when there is "a cause-and-effect relationship between a proposed action and listed resource conditions and the responsible official determines that there is a likelihood of substantial adverse effects," and the Agency "may also consider whether the long-term beneficial effects outweigh short-term adverse effects."

The Agency groups the proposed categorical exclusions into three general categories: restoration activities, infrastructure activities, and special uses. Categorically excluded restoration activities could now be implemented on up to 7,300 acres and could encompass proposed commercial or non-commercial timber harvest activities performed in conjunction with at least one additional restoration activity and covering up to 4,200 of those 7,300 acres.

The new categorical exclusions for Agency infrastructure would enable construction, maintenance, rehabilitation, and decommissioning of Agency roads, power lines, dams and reservoirs, oil and gas pipelines, communications sites, road and trail bridges, trails, and many facilities. Notably, the Agency could now more readily categorically exclude from detailed NEPA review construction or enhancement of recreation areas, and conversion of certain unauthorized or non-Agency trails, roads, and bridges into Agency facilities.

The Agency further would categorically exclude reauthorizations of certain existing or expired special uses, including for activities that occur on existing roads or trails, in existing facilities, or in areas where activities are consistent with the applicable land management plan. Finally, the proposed categorical exclusions would cover the approval, modification, or continuation of special uses of National Forest System lands that require less than 20 acres of land, instead of 5 acres under current Agency regulations.

The proposed rule will be open for a 60-day public comment period.

More Detailed NEPA Reviews and Public Participation

When a categorical exclusion is unavailable, the Agency may prepare either an environmental assessment (EA) or a more detailed environmental impact statement (EIS) where the proposed action may significantly affect the environment. The proposed rule would add to categories of actions “normally” requiring an EIS any mining operations that authorize surface disturbance on greater than 640 acres over the life of the proposed action. The proposal also would clarify requirements for alternatives analysis, including that action alternatives meet the purpose and need of the proposed action.

The Agency further seeks to “right-size” the public engagement and scoping processes to tailor it to different proposed actions, and to encourage early and ongoing engagement with the public and other parties. For EAs, the proposed rule would leave the level of public engagement to Agency discretion. More formal public participation requirements would continue for an EIS.

Next Steps

The proposed rule will be open for a 60-day [public comment](#) period. The Forest Service expects to publish a final rule in the summer of 2020. This is an excellent opportunity for project proponents to provide input to enable greater certainty on projects affecting any of the nearly 200 million surface acres managed by the U.S. Forest Service.

If the rule were finalized in its current form, the Agency’s NEPA process would likely be streamlined for numerous projects involving the proposed categorical exemptions, as well as those under conditions-based management. By categorically determining that many activities related to restoration, infrastructure, and certain special uses usually do not significantly impact the environment, the Agency can reduce the time required to complete NEPA review and allow projects to move forward. The Agency also desires to enhance maintenance efforts for its managed lands and infrastructure, while also increasing recreational use of those lands.

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