

## Updates

November 20, 2020

### Forest Service Releases Narrowly Tailored Update to Its NEPA Procedures

The U.S. Forest Service has released narrowly tailored changes to update its procedures under the National Environmental Policy Act, in the wake of the Council on Environmental Quality's recent overhaul of the NEPA regulations. See [85 Fed. Reg. 73620](#) (Nov. 19, 2020).[1] The changes take effect immediately. The Forest Service's final rule changes, which were scaled back from the agency's June 2019 proposed rule, are limited to two issues: (1) the addition of a "Determination of NEPA Adequacy" provision; and (2) new and modified grounds for issuing a Categorical Exclusion (CE). According to the Forest Service, the updated procedures will increase the agency's efficiency in environmental analysis and decision-making while meeting NEPA's requirements.

The Forest Service will reconsider other changes to its NEPA procedures that were included in the 2019 proposed rule, as part of the agency's review of its implementation of NEPA as directed by CEQ's revised regulations. These proposed changes include revisions to the agency's scoping and public engagement requirements, schedule of proposed actions, condition-based management, classes of actions that normally require an environmental impact statement, procedures associated with CE determinations, and use of other agency CEs. In its Federal Register notice, the Forest Service states that where its existing NEPA procedures are inconsistent with CEQ's revised regulations, then those regulations apply, unless there is a clear and fundamental conflict with the requirements of another statute (40 C.F.R. § 1507.3(a)). However, the Forest Service does not identify any inconsistent procedures that have been superseded by CEQ's revised regulations.

### **Determination of NEPA Adequacy**

The Forest Service's final rule adds a Determination of NEPA Adequacy (DNA) provision at 36 C.F.R. § 220.4(j), which outlines a process for determining whether a previously completed Forest Service NEPA analysis can satisfy NEPA's requirements for a subsequently proposed action. This new provision will operate essentially as an "internal adoption" mechanism to be used when a new proposed action is substantially the same as an alternative that was previously analyzed. When determining whether a DNA may apply, the Forest Service must consider the following factors: (1) the similarity between the prior decision and the proposed action, (2) the adequacy of the previous analysis of alternatives for the newly proposed action, (3) any significant new circumstances or information since the prior decision, and (4) the adequacy of the previous impact analysis for the new proposed action.

The Forest Service states this new provision is modeled after the U.S. Bureau of Land Management's current practices, although the language between the new Forest Service regulation and the BLM regulation do not mirror one another. The most notable difference between the rules is the Forest Service's use of the term "substantially the same," which is the CEQ standard for adoption of an environmental document (40 C.F.R. § 1506.3), instead of BLM's "essentially similar" language to describe the required relationship between the new proposed action and the previously analyzed action. Additionally, the Forest Service will continue to use Supplemental Information Reports to document findings of no new significant impacts, as provided for in the revised CEQ NEPA regulations (40 C.F.R. § 1502.9(d)(4)).

### **Categorical Exclusions, 36 CFR § 220.6**

Categorical Exclusions (CEs) are categories of actions that normally do not have a significant effect on the human environment, and therefore do not require Environmental Assessments or EISs except under extraordinary circumstances. 40 C.F.R. § 1501.4. The new Forest Service rule establishes six new CEs, the consolidation of two existing CEs into one, and the expansion of two existing CEs. The six new CEs incorporate activities related to recreation special uses, administrative sites, recreation sites, and restoration and resilience projects, along with two CEs for certain road management projects. The Forest Service prepared a supporting report for the CEs that substantiated the changes entitled "[Supporting Statement: Categorical Exclusions For Certain Special Uses, Infrastructure, and Restoration Projects](#)." CEQ has reviewed the new CEs and has issued a [letter stating that they conform with the new CEQ regulations](#). Below is a summary of the changes to the CEs.

### **Consolidation of Special Use Authorizations, 36 CFR § 220.6(d)(11)**

The final rule consolidates two previous CEs—the CE covering amendments to or replacements of existing special use authorizations (former 36 C.F.R. § 220.6 (d)(10)), and the CE covering the issuance of a new special use authorization for a new term to replace an existing or expired special use authorization (former 36 C.F.R. § 220.6(e)(15))—into a single CE that does not require documentation in a project or case file and decision memo. The move to consolidate these CEs was done to reduce confusion and increase efficiency for special use authorizations. While the Forest Service did not attempt to replace outdated terminology in order to clarify the types of activities that are authorized by this consolidated CE, it anticipates that the types of activities that will be authorized are very similar to those that were previously covered by the former two CEs.

### **Recreation Special Use Authorizations, 36 CFR § 220.6(d)(12)**

This new CE was established to facilitate the issuance of recreation special use permits where the activities are already occurring or are allowed on a noncommercial basis. The Forest Service notes that the activities authorized under this CE are those occurring on existing roads or trails, and use existing facilities, recreation sites, and occur in areas where such activities are allowed.

### **Special Use Authorizations, 36 CFR § 220.6(e)(3)**

For special use authorizations requiring documentation in a project or case file and decision memo, the final rule expands the five-acre limitation to a 20-acre limitation. The final rule also includes an updated, but not exclusive, list of examples of the types of activities that may fall under this CE. The Forest Service states that the types of activities that were historically authorized under this CE are very similar to those that will be covered under the expanded CE.

### **Road and Trail Decommissioning, 36 CFR § 220.6(e)(20)**

The new rule expands an already existing CE that allows for the decommissioning of any unauthorized roads or trails to include authorized National Forest System roads and trails. The CE allows for activities that would restore the roads and trails to a more natural state.

### **Recreation Site and Administrative Site CEs, 36 CFR §§ 220.6(e)(21) and (22)**

These two new CEs allow for construction, reconstruction, decommissioning, relocation, or disposal of buildings, infrastructure, or other improvements at recreation or administrative sites. The Forest Service foresees using these CEs to help restore its aging infrastructure at various administrative and recreational facilities, as well as allowing it to establish agency procedures for facility master planning.

### **Road Construction CEs, 36 CFR §§ 220.6(e)(23) and (24)**

The final rule adds two new CEs for road construction and maintenance activities that go beyond routine repair and maintenance but that have been demonstrated through experience to have less-than-significant effects. The first CE, in paragraph (e)(23), allows for road management activities to occur on up to eight miles of national forest service roads, a reduction from 10 miles in the proposed rule. The Forest Service clarifies that "road management" activities do not include construction or realignment but can include activities like rehabilitating a road or parking area that goes beyond normal repair or maintenance, shoulder-widening, safety improvements, or replacing bridges.

The second CE, in paragraph (e)(24), allows for construction and realignment activities on up to two miles of national forest service roads, a reduction from four miles in the proposed rule. The types of activities envisioned under this CE include constructing roads to improve trailhead and parking access, rerouting roads to reduce resource impacts, and improving or upgrading road surfaces.

Both of these CEs would require documentation in a project or case file and decision memo. Although there are limitations on these CEs, they may be used in conjunction with other CEs that are applicable to a project that includes road work, including the CE under section 220.6(d)(4), which allows for routine maintenance of national forest roads, has no mileage limit, and requires documentation in project or case file and decision memo.

### **Restoration and Resilience CE, 36 CFR § 220.6(e)(25)**

This new CE will allow for up to 2,800 acres of restoration/resilience activities to occur without undergoing an EA or EIS analysis when the primary purpose of the activity is to achieve restoration/resilience objectives. This CE also requires that project development occur via a collaborative process that "includes multiple interested persons representing diverse interests." The Forest Service intends this requirement to be flexible and to accommodate a variety of collaborative approaches, without any requirement to convene a formal collaborative group.

The final rule provides a list of activities that would meet the restoration and resilience objective, including stream restoration; aquatic organism passage rehabilitation or erosion control; invasive species control and reestablishment of native species; prescribed burning; reforestation; road and/or trail decommissioning (system and non-system); pruning; vegetation thinning; and timber harvesting. While it does allow for commercial timber harvesting, the Forest Service states that this is only when the commercial value is a secondary or ancillary benefit to the primary restoration activity. Additionally, salvage harvest is not an approved activity under this CE (however salvage harvest may be approved under other CEs, for example 36 C.F.R. § 220.6(e)(13)).

The acreage limitation in the final rule was reduced substantially from the proposed rule's limitation of 7,300 acres to better align the CE with existing data and to address comments that the Forest Service had failed to exclude outliers when calculating average acreage in the proposed rule.

### **Anticipated Next Steps**

Because the CEQ regulations direct agencies to propose updates to their individual NEPA regulations by September 14, 2021 (40 C.F.R. § 1507.3(b)), the Forest Service states that it will be revisiting its NEPA rules again soon. The Forest Service indicates that it expects to address many provisions in its next update, including procedures associated with CE determinations, use of other agency CEs, and also additional CEs that were proposed by various commenters on the 2019 proposed rule. Since the revised CEQ NEPA regulations are

subject to current lawsuit challenges and potential withdrawal or change in a new administration in 2021, there is a good deal of uncertainty at present regarding the ultimate scope or timing of any further Forest Service NEPA regulation changes.

## **Endnote**

[1] The CEQ NEPA regulations, which were adopted in July 2020 and took effect in September, are codified at 40 C.F.R. §§ 1500-1508. See [85 Fed. Reg. 43304](#) (July 16, 2020).

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