

## Forest Service Proposed Rule to Update Agency NEPA Regulations: Questions and Answers

*June 13, 2019*

### **How does the proposed rule address scoping and public engagement?**

The proposed rule updates the agency's approach to scoping and public engagement:

- The proposed rule maintains the Agency's requirement to provide public notice, through the Schedule of Proposed Actions, of all proposed actions that will be documented with a decision memo, EA, or EIS.
- The Agency will continue to require scoping for EISs in accordance with CEQ regulations.
- Additional public engagement for CEs and EAs is at the discretion of the local responsible official, except where specified by applicable statutes and regulations (such as the project-level objections process).

By emphasizing this discretion, the proposed rule recognizes that the appropriate level of public engagement varies according to the type of project and the area in which it occurs. Enabling the responsible official to "right-size" public engagement to the needs of each project offers efficiency by allowing limited resources to be directed where they are most needed. Additional public engagement would be conducted commensurate with the nature of the decision being made.

The proposed rule language aligns with additional guidance being added to the draft directives, specifically in the Forest Service Handbook. This guidance will encourage early and ongoing engagement with the public and other external partners (such as other Federal agencies, Tribes, States, and local governments) that is not limited to a single NEPA process.

### **What is a Determination of NEPA Adequacy?**

The proposed rule would add the "Determination of NEPA Adequacy" to the agency's NEPA regulations. A Determination of NEPA Adequacy (DNA) is a tool to determine whether a previously completed NEPA analysis can satisfy NEPA's requirements for a subsequent, new proposed action. In making this determination, the responsible official shall evaluate:

- Is the new proposed action essentially similar to a previously analyzed proposed action or alternative analyzed in detail in previous NEPA analysis?
- Is the range of alternatives previously analyzed adequate under present circumstances?
- Is there any significant new information or circumstances relevant to environmental concerns that would substantially change the analysis in the existing NEPA document(s)?
- Are the effects that would result from implementation of the new proposed action similar to those analyzed in the existing NEPA document(s)?

New project and activity decisions made in reliance on a DNA shall be subject to all applicable notice, comment, and administrative review processes.

The Determination of NEPA Adequacy increases efficiency by reducing redundant analyses of substantially similar proposed actions with substantially similar impacts. The Determination of NEPA Adequacy is used by other agencies like the BLM and is an extension of established NEPA concepts to avoid redundancy such as incorporation-by-reference, tiering, and adoption.

### **What is condition-based management?**

The proposed rule would add “condition-based management” to the agency’s NEPA procedures. Condition-based management is a system of management practices based on implementation of specific design elements from a broader proposed action, where the design elements vary according to a range of on-the-ground conditions in order to meet intended outcomes.

A condition-based management proposal must clearly identify the management actions that will be undertaken, and any design elements that will be implemented, when a certain set or range of conditions are present. The NEPA analysis must disclose the effects of all condition-based actions, taking into account design elements that limit such actions. Such proposal or alternative must also describe the process by which conditions will be validated prior to implementation.

The proposed rule codifies condition-based management based on existing practice to provide clear, consistent direction on its use, and to encourage more widespread use. Condition-based management is a way to meet NEPA’s requirements that provides the flexibility to implement projects while accounting for changing conditions on the ground over time. Condition-based management offers efficiency because it can be useful for landscape-scale projects that are implemented over longer time spans.

### **What else has changed in the regulations?**

- The proposed rule rearranges the CFR sections to align with the levels of NEPA documentation. The proposed rule sequentially addresses general guidance, Categorical Exclusions (CE), Environmental Assessments (EA), and Environmental Impacts Statement (EIS). This is a more logical order because it implicitly encourages the reader to start by considering whether a CE (generally the most efficient form of NEPA analysis) would apply to a proposed action.
- The proposed rule clarifies that when a proposed action consists of multiple activities, a responsible official can apply multiple CE categories to a single decision memo as long as all of the activities that comprise the proposed action fall within one or more CEs.
- The proposed rule emphasizes the primary purpose of preparing an EA is to reach a finding of no significant impact or to determine that an environmental impact statement is necessary. This change continues the agency’s emphasis on focusing the analysis in EAs and moving away from treating EAs as “mini-EISs.”

### **How does the proposed rule handle categorical exclusions?**

The proposed rule includes a series of new and revised categorical exclusions, relating to the following activities:

- Issuance of a new special use authorization to replace an existing or expired special use authorization, when such issuance is a purely clerical action to account for administrative changes and where there are no changes to the authorized facilities or increases in the scope or intensity of authorized activities. (Combines two existing CEs.)
- Activities that occur on existing roads or trails, in existing facilities, or in areas where activities are consistent with the applicable land management plan or other documented decision.

- Approval, modification, or continuation of special uses that require less than 20 acres of NFS lands.
- Activities that restore, rehabilitate, or stabilize lands occupied by roads and trails.
- Construction, reconstruction, decommissioning, relocation, or disposal of buildings, infrastructure, or other improvements at an existing administrative site.
- Construction, reconstruction, decommissioning, or disposal of buildings, infrastructure, or improvements at an existing recreation site.
- Converting an unauthorized trail or trail segment to an NFS trail.
- Converting a non-NFS road to an NFS road.
- Certain ecosystem restoration and/or resilience projects.
- A Forest Service action that will be implemented jointly with another Federal agency and the action qualifies for a categorical exclusion of the other Federal agency.

**How does the proposed rule improve the extraordinary circumstances review for categorical exclusions?**

The proposed rule updates the agency’s approach to the Extraordinary Circumstances review. The proposed rule clarifies the extraordinary circumstances standard (indicating when a categorical exclusion is not appropriate). Under the proposed rule, extraordinary circumstances exist when there is a likelihood of substantial adverse effects to listed resource condition.

The proposed rule also makes changes to the list of resource conditions that need to be considered as part of the extraordinary circumstances review: Specifically, the proposed rule removes sensitive species, adds Wild and Scenic Rivers, limits potential wilderness areas to those designated by Congress, and clarifies that roadless areas includes those designated under state-specific roadless rules.

**How would the proposed rule affect environmental impact statements?**

The Council on Environmental Quality requires each agency’s NEPA procedures to include typical classes of actions which normally require environmental impact statements. The proposed rule modifies the Forest Service’s list of actions that normally require an EIS, adding the development of a new land management plan or land management plan revision in accordance with the Forest Service land management planning regulations; adding mining operations that authorize surface disturbance on greater than 640 acres, which is analogous to the Bureau of Land Management’s provision; and removing actions that would substantially alter the undeveloped character of an inventoried roadless area or a potential wilderness area.

**Is the Forest Service also planning to update its NEPA directives?**

The Forest Service will propose revisions to its directives, Forest Service Handbook (FSH 1909.15) and Manual (FSM 1950), in conjunction with this rulemaking. FSM 1950 provides descriptions of Forest Service NEPA authority, objectives, policy, and responsibilities. Forest Service Handbook 1909.15 provides explanatory guidance interpreting CEQ and Forest Service procedures in regulation. A subsequent notice will announce the availability of the proposed directives and list information on how to comment on the proposed directives. When the notice is published, a copy of the proposed directives will be posted at <https://www.fs.fed.us/emc/nepa/revisions/index.htm>.

**How does the proposed rule affect objections (the project-level pre-decisional administrative review process)?**

The administrative review regulations at 36 CFR Part 218, including how the public files an objection, and what actions are subject to objections, are not changed in any way by the proposed rule.

**Did the Forest Service prepare an environmental impact statement on the proposed rule?**

No. The CEQ regulations do not require agencies to conduct NEPA analyses or prepare NEPA documentation when establishing or revising their NEPA procedures. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 230 F.3d 947, 954–55 (7th Cir. 2000).