



DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 220

RIN 0596-AD31

National Environmental Policy Act (NEPA) Compliance

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture, Forest Service (Agency) is adopting a final rule amending its National Environmental Policy Act (NEPA) regulations. The final rule establishes new and revised categorical exclusions (pertaining to certain special use authorizations, infrastructure management activities, and restoration and resilience activities) and adds the determination of NEPA adequacy provision to the Agency's NEPA regulations. These amendments will increase efficiency in the Agency's environmental analysis and decision-making while meeting NEPA's requirements and fully honoring the Agency's environmental stewardship responsibilities. Public comment has informed and improved the final rule.

DATES: This rule is effective November 19, 2020.

ADDRESSES: Additional information is available online at <https://www.fs.fed.us/emc/nepa/revisions/index.shtml>.

FOR FURTHER INFORMATION CONTACT: Christine Dawe; Director, Ecosystem Management Coordination; 406-370-8865. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The mission of the Forest Service is to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations. The National Environmental Policy Act (NEPA) has twin goals of requiring Federal agencies (1) to consider the significant environmental impacts of their proposed actions and (2) to inform the public that environmental concerns were considered in the decision-making process. These goals are not only complementary to the Agency's mission, but such informed decision-making is essential to its achievement. The Agency devotes considerable financial and personnel resources to NEPA analyses and documentation, completing on average 1,588 categorical exclusion (CE) determinations, 266 environmental assessments (EAs), and 39 environmental impact statements (EISs) annually (based on Fiscal Years 2014-2019). The Agency is amending its NEPA regulations as described in this final rule to make more efficient use of those resources to fulfill NEPA's requirements and, in turn, its mission. The final rule is consistent with the Council on Environmental Quality's (CEQ's) intent to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable, and timely manner, and to reduce unnecessary burdens and delays (40 CFR 1500.1).

An increasing percentage of the Agency's resources have been spent each year to provide for wildfire suppression, resulting in fewer resources available for other management activities, such as restoration. In 1995, wildland fire management funding made up 16 percent of the Forest Service's annual spending, compared to 57 percent in 2018. Along with a shift in funding, there has also been a corresponding shift in staff from non-fire to fire programs, with a 39 percent reduction in all non-fire personnel since 1995.

The Consolidated Appropriations Act of 2018 (2018 Omnibus Bill) included new budget authority for fighting wildfires, in addition to regular appropriations. While this budget stability is welcome, the trends discussed above make it imperative that the Agency

makes the most efficient use of available funding and resources consistent with its statutory authorities to fulfill its environmental analysis and decision-making responsibilities.

On January 3, 2018, the Agency published an Advance Notice of Proposed Rulemaking (ANPR) (83 FR 302) announcing its intent to revise its NEPA procedures with the goal of increasing the efficiency of environmental analysis. The Agency received 34,674 comments in response to the ANPR, of which 1,229 were unique. Most of the unique comments expressed support for the Agency's effort to identify efficiencies in the NEPA process. The unique comments in support of the ANPR all generally acknowledged that there is room for increased efficiency in the Agency's NEPA process. Some of these comments expressed unqualified support for increasing efficiency; other comments supported the Agency's goals but included caveats that these gains should not come at a cost to public involvement or conservation of natural resources.

On June 13, 2019, the Agency published a proposed rule (84 FR 27544) proposing revisions to its NEPA procedures. Following an initial 60-day comment period that was extended for 14 days in response to requests from the public, the Agency received roughly 103,000 comments. Roughly 6,200 comments were unique, individual comments; the remainder were organized response campaign comments (form letters). A detailed summary of comments on the proposed rule and the Agency's response follows below.

After the Forest Service rulemaking process had begun, CEQ published an advance notice of proposed rulemaking on June 20, 2018, announcing that it was "considering updating its implementing regulations for the procedural provisions of the National Environmental Policy Act" (83 FR 28591). On January 10, 2020, after publication of the Forest Service's proposed rule, CEQ published a proposed rule to revise its regulations at 40 CFR Parts 1500-1508 (85 FR 1684). On July 16, 2020, CEQ published a final rule revising its regulations (85 FR 43304).

The Council on Environmental Quality's revised regulations took effect on September 14, 2020 (40 CFR 1506.13). Where existing Forest Service NEPA procedures are inconsistent with CEQ's revised regulations, CEQ's revised regulations shall apply, unless there is a clear and fundamental conflict with the requirements of another statute (40 CFR 1507.3(a)). Per CEQ's revised regulations, the Forest Service shall develop, as necessary, proposed procedures to implement the CEQ's revised regulations no more than 12 months after September 14, 2020, including to eliminate any inconsistencies with CEQ's revised regulations (40 CFR 1507.3(b)).

In light of CEQ's revised regulations, the Forest Service's final rule is of limited scope. The Forest Service is amending its NEPA regulations to add only the new and expanded CEs and a Determination of NEPA Adequacy provision as described in more detail below. Other changes to the Forest Service's NEPA regulations that were included in the proposed rule, along with associated comments, will be reconsidered in association with the Agency's review of its NEPA procedures as directed by CEQ's revised regulations. These changes include, but are not limited to, revisions to the Agency's scoping and public engagement requirements, schedule of proposed actions, condition-based management, classes of actions that normally require an EIS, procedures associated with CE determinations, and use of other agency CEs.

Summary of the Final Rule

The amendments in the final rule will increase efficiency in the Agency's environmental analysis and decision-making while meeting NEPA's requirements and fully honoring the Agency's environmental stewardship responsibilities. The final rule adds a Determination of NEPA Adequacy provision, which outlines a process for determining whether a previously completed Forest Service NEPA analysis can satisfy NEPA's requirements for a subsequently proposed action. The final rule also establishes six new CEs, consolidates two existing CEs into one, and expands two existing CEs. The six new CEs

include activities related to recreation special uses, administrative sites, recreation sites, and restoration and resilience projects, along with two CEs for certain road management projects. Two existing CEs are consolidated into one covering clerical modification or reauthorization of existing special uses. The two expanded CEs cover (1) approval, modification, or continuation of special use authorizations on up to 20 acres of NFS lands and (2) decommissioning of both unauthorized roads and trails and National Forest System roads and trails. These CEs are described in greater detail in the comment responses below and in the document titled, “Supporting Statement: Categorical Exclusions For Certain Special Uses, Infrastructure, and Restoration Projects,” available at <https://www.fs.fed.us/emc/nepa/revisions/index.shtml>.

Additionally, to avoid public confusion the final rule includes a technical amendment to remove and reserve paragraph § 220.6(e)(10), which was enjoined in *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007).

The proposed rule would have reordered the content of §§ 220.5, 220.6., and 220.7 to align with the levels of NEPA documentation (CE, EA, EIS). The final rule does not reorder the content of these sections.

Comments on the Proposal / Section by Section Description of the Final Rule

General Comments

Comments expressed a wide range of opinions—both strongly for and against—the proposed rule. Comments expressing support for the proposed rule stated that it was a means to improve the Agency’s NEPA processes. Other comments, however, opposed various provisions of the proposed rule, expressing concern that the revisions could: (1) diminish social, economic, or environmental outcomes and lead to abuse; (2) result in inadequate environmental analysis and undermine the Forest Service’s mission; (3) reduce the opportunity for public comment and environmental review of projects; (4) and erode public trust, violate existing laws and regulations, and increase potential litigation.

Response: The Agency notes the general comments in support of or in opposition to the rule. The Agency has carefully considered the input from the public, other government entities, and Tribes and has made several adjustments to the final rule to address the concerns described above. These changes are described in more detail below and include, for example, not moving forward with some of the proposed CEs and adding additional limitations to other CEs. Throughout the rulemaking process, the Agency's goal has been to develop a final rule that enables the Agency to efficiently deliver environmental analysis to decision-makers that is scientifically based, is of high quality, and honors environmental stewardship responsibilities. The final rule achieves this goal and will facilitate decision-making that fulfills the Agency's mission of sustaining the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations.

The Agency will make diligent efforts to involve the public in implementing its NEPA procedures as required by CEQ's revised NEPA regulations at 40 CFR 1506.6. The Agency's final rule does not address or reduce existing Agency public involvement practices concerning CEs. Scoping and public engagement requirements will be assessed during the development of revised Agency NEPA procedures required by CEQ's revised NEPA regulations. Further, the Agency will continue to comply with the requirements of all applicable laws and regulations, such as the National Environmental Policy Act, National Forest Management Act, Endangered Species Act, and National Historic Preservation Act.

Comment: Some commenters suggest that there is insufficient justification to support the need for the proposed rule as described in the **Federal Register** notice or indicate, in opposing the proposed rule, that the regulations it would amend are relied upon by the commenters and other stakeholders.

Response: The CEQ regulations state that agencies shall reduce excessive paperwork and delay by using CEs and, for efficiency, shall identify CEs in their agency NEPA procedures (40 CFR 1500.4(a), 1500.5(a), and 1501.4(a)). The final rule reduces paperwork

and delay by adding the Determination of NEPA Adequacy provision and establishing new and expanded categorical exclusions based on Agency experience and expertise. The CEQ NEPA regulations at 40 CFR parts 1500-1508 encourage agencies to continue to review their NEPA policies and procedures and to revise them as necessary. To the extent commenters raise concerns about reliance rights, the Forest Service further notes that rules implementing NEPA, such as this one and its predecessor, are purely procedural. They simply direct the actions of public officials. They therefore do not engender specific, reasonable, and detrimental reliance by individuals and groups outside the government.

Comment: Commenters suggested a need to prepare an EIS to assess the potential impacts from implementation of the proposed rule; in particular, comments request that the Forest Service evaluate proposed rule impacts to social, cultural, and economic conditions of affected communities and user groups; climate change and carbon stores; scenic integrity; National Scenic and Historic Trails; and caves and karst resources.

Response: The CEQ regulations do not require agencies to prepare a NEPA analysis before establishing or updating agency NEPA procedures. See, e.g., *Heartwood, Inc. v. U.S. Forest Service*, 230 F.3d 947, 954–55 (7th Cir. 2000). Agency NEPA regulations establish the procedures for fulfilling their responsibilities under NEPA but are not the Agency’s final determination of what level of NEPA analysis is required for a particular proposed action. This rule does not authorize any activity or commit resources to a project that may affect the environment. This rule does not have any reasonably foreseeable impact on the environment, nor does the rule authorize or prohibit any action that would have any effect on the environment.

Comment: After CEQ published a notice of proposed rulemaking to revise its regulations for implementing NEPA on January 10, 2020 (85 FR 1684), the Forest Service received a request from several organizations that it abandon or suspend its rulemaking effort pending the outcome of CEQ’s rulemaking effort.

Response: The Forest Service has coordinated with CEQ throughout the Forest Service's rulemaking process. Partially as a result of CEQ's revised regulations, the Forest Service's final rule is of limited scope and amends its regulations to add only new and expanded CEs and the DNA provision. On November 10, 2020, CEQ issued a letter stating that CEQ has reviewed this rule and has found it to be in conformity with NEPA and CEQ regulations (per 40 CFR 1507.3). Where existing Agency NEPA procedures are inconsistent with CEQ's revised regulations, CEQ's revised regulations shall apply (*see* 40 CFR 1507.3(a)). As explained above, the Forest Service will review its NEPA regulations and initiate another rulemaking process as required by CEQ's revised regulations.¹

Comment: Commenters disagreed with the discussion of costs and benefits of the proposed rule in its accompanying **Federal Register** notice and stated that the determination did not consider all potential costs. Commenters contend that faster decision-making, especially if it eliminates some opportunities for public input, will often result in worse decisions. This, in turn, will increase the overall amount of time spent on projects due to delays from litigation or re-analysis. Comments suggest that spending more time on NEPA analysis will ensure the analysis is of higher quality. Additionally, some commenters argue that there are no efficiencies to be gained in completing a project under a CE instead of an EA, and that CEs take less time only because projects analyzed under a CE are generally of smaller size than those analyzed in an EA.

Response: The amendments in the final rule are more limited in scope than the Forest Service's proposed rule. The Agency has updated the discussion of cost and benefits of the final rule consistent with these changes (*see* the *Executive Order 12866* section). The final rule does not address existing Agency public involvement practices concerning CEs.

¹ CEQ has determined that the categorical exclusions contained in agency NEPA procedures as of September 14, 2020, are consistent with the new CEQ regulations. *See* § 1507.3. The Forest Service notes its concurrence that its existing categorical exclusions are consistent with the 2020 CEQ NEPA regulations.

The notion that CEs are no more efficient than EAs runs counter to the Agency's experience that less-detailed NEPA documentation takes less time to complete than more-detailed NEPA documentation. Indeed, this claim by commenters similarly runs contrary to the whole design of the NEPA regulations since their inception and continuing up through the 2020 CEQ NEPA regulations. Specifically, there are three levels of NEPA review, each of which requires successively more documentation and analysis than the prior level: determination of whether a CE applies, completion of an EA, and completion of an EIS. *See* 40 CFR § 1501.3(a) (describing these three levels); *see also* 40 CFR § 1501.4(a) (2019) (noting how these three levels interrelate).

Nevertheless, the Agency compared the days from project initiation to decision for the 68 sample EAs used to develop the restoration CE to the 140 projects completed under the CE in Section 603 of the Healthy Forests Restoration Act since its establishment. The Section 603 CE, like the restoration CE, has a maximum project size in the thousands of acres and covers an array of activities, including several similar activities. Using the 68-EA sample, the median time to complete an EA per 1000 acres was 186 days. Conversely, the median time to complete a decision memo using the Section 603 CE per 1000 acres was 111 days. This analysis supports the Agency's premise that CEs represent a more timely and efficient form of NEPA compliance.

Comment: Comments suggest that the Forest Service should focus on addressing causes of agency inefficiency in environmental decision-making (e.g., funding, staffing, training, internal policies and consistency, and agency culture).

Response: The Agency recognizes that factors outside of its NEPA regulations also contribute to inefficiency in environmental analysis and decision-making. In late 2017, the Agency announced its Environmental Analysis and Decision-Making change effort, which intends to reduce the time and cost of environmental analysis and decision-making processes to produce efficient, effective, and high-quality land management decisions. The scope of

this change effort includes and extends beyond revising the Agency's NEPA regulations. The Environmental Analysis and Decision-Making change effort includes, for example: a new, national NEPA training program; formation of National Historic Preservation Act and Endangered Species Act task forces to identify and implement efficiencies; compliance performance metrics for leadership; production of an environmental analysis and decision-making information library and network sharing platform; and development of a contracting center of excellence.

Section 220.4 General Requirements (Determination of NEPA Adequacy)

Comment: Some commenters stated that use of Determinations of NEPA Adequacy (DNAs) would curtail effective analysis and public input by relying on non-site-specific, potentially outdated information, and that the Bureau of Land Management (BLM) model is not appropriate for the Agency. Commenters requested the concept be eliminated or that additional sideboards be applied to ensure it is applied correctly. Commenters also requested that the Forest Service provide more details for when a previous NEPA analysis can satisfy NEPA requirements for a subsequent action, such as geographical considerations (e.g., location, scale); temporal considerations (e.g., previous decision date); and current and desired conditions considerations. Comments also stated that DNAs should require public input and documentation. Alternatively, comments expressed support for the use of DNAs to expedite agency action by reducing redundant analyses of substantially similar proposed actions with substantially similar impacts. Some comments also urged that the proposed rule should more closely follow BLM guidance and language for DNAs.

Response: Section 220.4(i) of the proposed rule added the DNA provision, which outlines a process for determining whether a previously completed Forest Service NEPA analysis can satisfy NEPA's requirements for a subsequently proposed action. The proposed DNA review process required consideration of the following factors: The similarity between the prior decision and the proposed actions, the adequacy of the alternatives to the proposed

action, any significant new circumstances or information since the prior decision, and the adequacy of the impact analysis for the proposed action.

The final rule retains and clarifies the DNA provision at § 220.4(j). A DNA documents the responsible official's review and determination whether a NEPA analysis prepared for a prior activity can satisfy NEPA's requirements for a new proposed action that is substantially the same. For example, approval of a special use permit for a commercial fishing derby at a lake on NFS lands could rely on NEPA documentation prepared for the same or similar event the year before. If the elements outlined at § 220.4(j)(1) are not met for the proposed action currently under consideration, the DNA provision should not be used.

The Forest Service has modelled its DNA regulation after provisions of the BLM's NEPA procedures and is consistent with CEQ's NEPA regulations (40 CFR 1500.4(p), 1501.12, 1502.9(d)(4), and 1506.3). CEQ's regulations require elimination of duplication, encourage incorporation by reference, allow reevaluation of prior NEPA analyses, and allow adoption of other agencies' NEPA documentation. BLM uses DNAs in association with previously prepared BLM NEPA documents. The Forest Service intends the use of DNAs to be in line with BLM's practice and will operate as essentially an "internal adoption" mechanism to be used when a new proposed action is substantially the same as an alternative analyzed in a prior Forest Service NEPA document.

The BLM's DNA mechanism also allows officials to use DNAs to document that no supplementation of an EIS or EA is required. However, the Forest Service will continue to use its Supplemental Information Reports (see FSH 1909.15, sec. 18) to assess new information and changed circumstances rather than use DNAs for such purposes consistent with 40 CFR 1502.9(d)(4).

As requested by some commenters, the final rule revises § 220.4(j) to more closely align with language from the Department of the Interior and the BLM. However, § 220.4(j)(1)(i) uses "substantially the same" instead of the BLM's use of "essentially similar"

to describe the required relationship of the new proposed action to the previously analyzed proposed action. This change aligns with CEQ's related adoption provision, 40 CFR 1506.3, as described above.

The final rule also clarifies that, in order to use a DNA, the responsible official must determine that each of the elements set out at § 220.4(j)(1) are met. In addition, the final rule clarifies at § 220.4(j)(2) that proposed actions undergoing a DNA review shall be included on the Schedule of Proposed Actions; be subject to scoping; be subject to administrative review processes that were applicable to the prior decision; and include issuance of a new decision document.

Section 220.6 Categorical Exclusions

Comment: Commenters expressed both general support and opposition to the use or expansion of CEs, as described in the proposed rule. Those in favor stated the new CEs will help the Agency conduct its NEPA review of projects in a more timely and efficient manner, supported the analysis done to substantiate the proposed CEs, and expressed confidence that responsible officials will use CEs appropriately. Those in opposition believed that the proposed CEs involved actions that would or could have significant effects, maintained that many or all proposed actions should undergo detailed analysis and public involvement, or that responsible officials would have too much discretion under the proposed CEs.

Response: The Agency has noted the comments providing general support or opposition. Comments specific to a certain CE are addressed below in additional responses. Administratively established CEs are a valid form of NEPA review. The CEQ regulations direct that for efficiency, agencies shall identify in their agency NEPA procedures categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement (40 CFR 1501.4).

The Forest Service is establishing new CEs in the final rule pursuant to CEQ's implementing regulations at 40 CFR 1507.3. On November 10, 2020, CEQ issued a letter stating that CEQ has reviewed this rule and has found it to be in conformity with NEPA and CEQ regulations (per 40 CFR 1507.3). The Forest Service has prepared a supporting statement for the CEs that outlines the process the Forest Service followed to substantiate the establishment of the CEs. This document is titled, "Supporting Statement: Categorical Exclusions For Certain Special Uses, Infrastructure, and Restoration Projects," and is available at <https://www.fs.fed.us/emc/nepa/revisions/index.shtml>. Specific responses to comments raised on the supporting statements are also addressed in later sections of this notice.

Categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require EAs or EISs. The use of CEs can reduce paperwork and delay, so that EAs or EISs are targeted toward proposed actions where significant environmental impacts are uncertain or anticipated.

Consistent with CEQ regulations, the application of non-statutory Forest Service CEs is limited by "extraordinary circumstances," in which a normally excluded action may have a significant effect (40 CFR 1501.4). Activities conducted under Agency CEs must be consistent with Agency procedures and must comply with all applicable Federal and State laws for protecting the environment. Management direction set forth in Forest Service land management plans also provides important parameters. Land management plans help ensure that potential environmental effects have been taken into account through the consistency requirement set forth in the National Forest Management Act and USDA's implementing regulations (16 U.S.C. 1604(i); 36 CFR 219.15) directing projects and activities be consistent with plan direction or be accounted for through project-specific amendments.

Listing a category of actions as able to be categorically excluded in the agency's NEPA regulations does not constitute a final conclusive determination regarding the

appropriate level of NEPA review for a specific proposed action. Listing a category of actions creates an initial presumption that a CE, rather than an EA or an EIS, is normally appropriate to support approval of the listed actions. The extraordinary circumstances review, interdisciplinary process, or public input can result in the determination to prepare an EA or an EIS.

The Forest Service made several modifications to the final rule regarding CEs as a result of public comment. The proposed CEs for converting unauthorized roads and trails to National Forest System roads and trails, as presented in the proposed rule at § 220.5(e)(23) and (25), were not carried forward in the final rule due to public concerns about whether establishment of those CEs could encourage the creation of unauthorized roads and trails. Additionally, the final rule includes modifications to the restoration CE (§ 220.6(e)(25)); the roads CEs (§ 220.6(e)(23) and (24)); and the special uses CEs (§ 220.6(d)(11) and (12) and § 220.6(e)(3)). Specific changes made to the CEs are discussed further in the responses to comments below and the Supporting Statement.

Comment: Some commenters asked the Forest Service to review all existing CEs and consider increasing their limits. Other commenters suggested the Forest Service is required to review all CEs for their potential for significant effects before proposing additional CEs.

Response: The Agency has exercised its discretion in defining the scope of the current rulemaking process and in electing to pursue additional CEs for special uses, infrastructure, and restoration consistent with its program needs. The Agency believes these program areas present the best opportunities for increasing efficiency in the Agency's NEPA procedures in furtherance of producing efficient, effective, and high-quality land management decisions that will timely accomplish work on the ground consistent with its statutory mission and authorities and be more responsive to the public. Focused consideration on establishing CEs for individual program activities is consistent with past agency practice to develop CEs (see, e.g., Oil and Gas Activities (72 FR 7391), Special Use Authorizations

(69 FR 40591), Soil and Water Restoration Activities (78 FR 56153); Limited Timber Harvest (68 FR 44598)).

Comment: Beyond the additional and modified CEs identified in the proposed rule, commenters also asked that the Forest Service incorporate new CEs for a variety of activities, including grazing- and range-related activities, vegetation management plans and vegetation management activities, watershed and other research projects, land exchanges, and mineral exploration.

Response: The Agency appreciates the public interest expressed in identifying additional opportunities for CEs. While the Agency has elected to maintain the rulemaking's focus on special uses, infrastructure, and restoration, this does not preclude the agency from examining additional opportunities for improvement through additional reviews. For example, the Forest Service recently announced in the Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions its intent to update its CE for rangeland management improvement projects at § 220.6(e)(9) to incorporate modern range management practices (see <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=0596-AD46>).

Comments on New and Revised CEs Not Requiring Documentation in a Project or Case File and Decision Memo

Comment: Many comments expressed support for the CE in paragraph (d)(11) of the proposed rule, along with the Agency's goals to expedite processing of special use authorizations and reduce confusion in implementation of existing CEs in paragraphs (d)(10) and (e)(15). Some commenters requested limiting this CE to recreation special uses, requiring documentation in a decision memo, requiring public involvement, or adding additional examples of actions that would be covered by the CE.

Response: The final rule consolidates two similar existing CEs regarding special use authorizations into a new category at § 220.6(d)(11). The Forest Service agrees that

consolidation of CEs at §§ 220.6(d)(10) (covering amendment to or replacement of an existing special use authorization) and (e)(15) (covering issuance of a new special use authorization for a new term to replace an existing or expired special use authorization) of the existing regulations will reduce confusion and increase efficiency in use of the CE for special use authorizations. The Forest Service has extensive experience using these CEs. A review of use of the CE at § 220.6(e)(15) from fiscal years 2012-2016 demonstrates that responsible officials have been relying on this CE appropriately, well within its constraints. From fiscal years 2012 through 2016, category (e)(15) was used 1,584 times (roughly 317 times per year). A review of these projects indicated that the CE is being used as intended and within its limiting factors. Because the new, consolidated CE is limited to actions to replace an existing authorization where there are no changes to the authorized facilities or increases in the scope or magnitude of the authorized activities, the Agency has determined that documentation with a decision memo or project file is not required. An applicant or holder also must continue to comply with the terms and conditions of the existing special use authorization.

Some of the examples of actions covered by the CE have been clarified, but the list of examples for the category is not intended to be exhaustive, and additional examples have not been incorporated into the final rule. Outdated terms such as “electric transmission line” and “powerline,” which were used during development of the proposed rule, have been replaced with “powerline facility” to match recent revisions to the Agency’s special use regulations (36 CFR part 251). Additional examples requested by commenters covering changes to the terms and conditions of an authorization that require Forest Service approval have not been added to the final rule because these examples are outside the scope of the existing and consolidated CEs. The CE in paragraph (d)(11) has also not been limited to recreation special uses as requested by some commenters. The existing CEs encompass both recreation and

non-recreation special uses; limiting the consolidated CE to recreation special uses would undercut the Agency's efficiency goals.

Comment: Some commenters expressed support for the new CE at § 220.5(d)(12) of the proposed rule because it will increase NEPA efficiency related to recreation special use permits. Additionally, some commenters agreed that issuance of an outfitting and guiding permit where the use supported by the outfitter and guide is already allowed in the area should not have significant environmental effects and would be appropriate to cover under a CE. Many commenters requested that the final rule limit this CE to recreation special uses, provide further clarification on where activities covered by the CE could occur, and provide additional examples of activities covered by the CE. Some commenters also requested that the CE require a decision memo or interpreted the language related to land management plan consistency in the proposed CE to mean that a NEPA analysis would not occur. Some commenters more generally opposed issuance of special use permits being analyzed under a CE and that issuance of special use permits should always be subject to a higher level of environmental review and public input.

Response: The final rule retains this CE at § 220.6(d)(12) and makes some edits to the language used in the proposed rule. The final rule clarifies that the CE in paragraph (d)(12) is limited to recreation special uses. The final rule also revises the CE to clarify that it is limited to recreation special uses that occur on existing roads or trails, in existing facilities, at existing recreation sites, or in areas where the activities supported by recreation special uses are allowed. The intent of the CE is to facilitate issuance of recreation special use permits where the activities supported by those permits are already occurring or allowed on a noncommercial basis. In general, there is no difference in environmental impacts between recreational activities conducted by the general public and recreational activities led by an outfitter and guide. As a result, the final rule retains this CE under those administrative categories that do not require documentation in a decision memo. Agency proposed actions

that rely on this CE, like all of the agency's proposed actions subject to NEPA, must be consistent with the land management plan and all other laws, regulations, and policies. This includes compliance with the Endangered Species Act, Clean Water Act, and National Historic Preservation Act.

Comments on New and Expanded CEs Requiring Documentation in a Project or Case File and Decision Memo

Comment: Some commenters opposed the proposed rule's expansion of the existing special use authorization CE at § 220.6(e)(3) from 5 to 20 acres, on the grounds that this change would quadruple the existing acreage subject to the CE, which would result in significant effects. Some commenters stated that the rationale for expanding the CE was insufficient. Tribes and Tribal organizations expressed concern that this CE could adversely affect sacred and cultural sites. Several commenters supported expansion of the CE.

Response: At § 220.6(e)(3), the final rule retains the expansion of the CE from 5 to 20 acres and retains the removal of the words "contiguous" and "minor." These words were removed in the proposed rule to improve clarity and reduce confusion for Agency personnel in determining when the CE can be used. The final rule also modifies the list of examples for this CE to add clarity and reduce redundancy with other CEs. For example, subparagraph (vii) of the former version of the CE ("[a]pproving the continued use of land where such use has not changed and no change in the physical environment or facilities are proposed") largely was redundant with the two existing CEs now consolidated at § 220.6(d)(11). The types of activities covered under the expanded CE are very similar to those covered under the existing CE. The final supporting statement provides additional information justifying the Agency's conclusion that expanding the CE from 5 to 20 acres will not result in significant impacts. The Agency reviewed 62 EAs, findings of no significant impact, and decision notices for proposed actions like those that would be covered by this CE. The average acreage authorized by these decisions was 41.9 acres. The modest expansion to 20 acres is

well below this figure. Based on the agency's history with using the existing CE and the information presented in the supporting statement, the Forest Service has determined that the expansion of the CE is justified.

The Forest Service recognizes the importance of consultation and coordination with Tribes consistent with E.O. 13175, which imposes requirements independent of compliance with NEPA. The Forest Service also will continue to ensure that Tribal consultation occurs on individual projects as required by Agency policy. Additionally, American Indian and Alaska Native religious or cultural sites and archaeological sites or historic properties or areas will be considered as part of the extraordinary circumstances review applicable to all CEs. See 36 CFR § 220.6(b)(vi), (vii).

Comment: Some commenters opposed expansion of the existing CE at § 220.6(e)(20) because they believed that such an expansion would allow for closure of roads and trails without any public involvement. Other commenters requested notice, coordination, and consultation with county and local governments and raised concerns about compliance with the National Historic Preservation Act. Some commenters requested additional information regarding use of this CE in relation to the Forest Service's travel management rule at 36 CFR part 212. Other commenters expressed support for the expansion of the CE and agreed with the Agency's finding that the actions and environmental impacts for restoration of lands occupied by a NFS road or NFS trail are generally the same as when restoration occurs for lands occupied by an unauthorized road or unauthorized trail.

Response: The final rule retains the proposed rule's expansion of this CE at § 220.6(e)(20) to include decommissioning of NFS roads and NFS trails, as well as unauthorized roads and trails. The inclusion of NFS roads and NFS trails in the CE will help accomplish restoration objectives on national forests and grasslands, address road and trail maintenance backlogs, and help the Agency maintain compliance with long-standing policies that require decommissioning of unneeded roads and trails. Regardless of whether the

activity undertaken is the restoration of lands occupied by an NFS road or NFS trail or unauthorized road or trail, the actions and environmental impacts are generally the same and not significant.

Proposed actions covered by this CE would be developed in compliance with the travel analysis process and the travel management rule. The Agency uses travel analysis to identify the minimum road system, including unneeded NFS roads and NFS trails. Travel analysis is a dynamic, interdisciplinary, science-based process that examines ecological, social, cultural, and economic concerns. Information from the travel analysis process is used to inform future travel management decisions at the project level. In particular, travel management decisions identify whether a route needs to be added or removed, if an NFS trail or NFS road needs to be constructed, or if a route needs to be decommissioned.

Prior to determining if an NFS road or NFS trail could be decommissioned using this CE, the NFS road or NFS trail would need to be identified as unneeded and eligible for decommissioning through the travel analysis and travel management processes. Appropriate compliance with the requirements of the National Historic Preservation Act is independent of compliance with NEPA, and not dependent on whether a CE, EA, or EIS is prepared for the latter.

This CE will not be used to make access decisions about which roads and trails are to be designated open for public use, or which will be closed from public use. This CE will allow the Forest Service to restore, rehabilitate, or stabilize lands more efficiently where public access is not currently permitted, e.g., for roads and trails that are already closed. This approach is consistent with the initial development and establishment of this CE (*see* 78 FR 56157).

Comment: Some commenters supported the proposed rule's new CE regarding administrative sites because it would add efficiency to their overall management and help the Agency address deferred maintenance of administrative facilities. Some commenters stated

that the CE was written too broadly. Other commenters stated that the CE overlaps with an existing CE that does not require a decision memo and that this CE would result in unnecessary work and documentation.

Response: At § 220.6(e)(21), the final rule adopts the proposed rule's CE regarding administrative sites. The existing CE for repair and maintenance of administrative sites at 36 CFR 220.6(d)(3) of the final rule is unaffected by the new CE at 36 CFR 220.6(e)(21). The existing CE was established on September 18, 1992 (57 FR 43180), and the **Federal Register** notice for the final rule states that the CE is intended for routine repair and maintenance. Current Forest Service directives define "maintenance" as "an activity that entails preserving, insofar as practical, the original condition of Forest Service-owned buildings and related facilities" (Forest Service Handbook (FSH) 7309.11, Zero Code). Repair is defined as "the refurbishment or replacement of existing facility components with the same kind of materials for the purpose of maintaining the original condition and function while returning the facility to a sound state" (FSH 7309.11, Zero Code).

The new CE in paragraph (e)(21) allows activities beyond routine repair and maintenance at existing administrative sites. Many of the Forest Service's administrative facilities need reconstruction or major repair, could be decommissioned, or may be subject to disposal. The new CE will increase NEPA efficiency associated with improving existing facilities to provide for both employee and public safety and decommissioning or disposing of administrative facilities to reduce the Agency's footprint. The CE in the final rule is limited to activities within an existing administrative site as defined in section 502(1) of Public Law 109-54 (119 Stat. 559; 16 U.S.C. 580d note). Proposed actions covered by this CE will also be subject to established Agency processes for facilities management, including facility master planning.

Comment: Several commenters expressed opposition to the proposed rule's recreation sites CE at § 220.5(e)(22) on the grounds that it is too broad, that the actions covered could

result in significant effects, and that changes to recreation sites should require public input and review. Some commenters argued that certain activities covered under this CE should require analysis under an EA or EIS to ensure consideration of social needs through analysis of multiple alternatives.

Response: The final rule retains the new recreation site CE at § 220.6(e)(22). The Forest Service provides access to roughly 29,700 recreation sites. This CE will increase efficiency in NEPA compliance for proposed actions to improve existing recreation sites that are in decline or pose safety or resource concerns.

The CE is limited to existing recreation sites and covers construction, reconstruction, decommissioning, or disposal of buildings, infrastructure, or existing improvements, including infrastructure or improvements that are adjacent or connected to an existing recreation site and provide access or utilities for that site. The CE does not cover development of new recreation sites. The CE would be used alongside other established Agency processes for recreation and facilities planning.

CEQ regulations define a CE as a category of actions that the agency has determined normally do not have a significant effect on the human environment. CEQ regulations further explain that social effects are not intended by themselves to require preparation of an EIS (40 CFR 1502.16(b)). However, social needs are considered during the recreation site planning process and development of a recreation site design narrative, which precede development of a specific proposed action for which this CE potentially would apply. Additionally, as noted above, this CE is limited to activities at existing recreation sites and does not encompass development of new recreation sites.

During development of this CE, the Forest Service reviewed previously analyzed projects that focused on recreation management and evaluated similar CEs in use by other agencies that manage public recreation sites and facilities. The Agency has determined that

the activities covered by this CE will not result in significant effects. Further information and rationale are provided in the supporting statement.

Comment: Comments on the proposed rule's road construction CE at § 220.5(e)(24) were mixed. Those commenters in favor of the CE highlighted the beneficial effects of increasing access and public safety and addressing the Agency's backlog of road reconstruction and rehabilitation. Some of these commenters requested that the CE not have any mileage limitation. Other commenters supported certain road-related activities, such as realignment and culvert and bridge rehabilitation, but only if those activities benefitted fish and aquatic species.

Some commenters stated that the activities covered by the road construction CE would cause erosion and sedimentation and impacts on water quality and aquatic habitats. Commenters also stated that including construction of new roads in a CE would hamper the Agency's ability to maintain its existing roads. Some of these commenters requested reducing the mileage limits for all road activities.

More generally, commenters requested that the Agency clarify public involvement associated with projects that would be supported by this CE, coordination with state agencies, the CE's relation to travel management, the meaning of terms of like "open" and "close" in this context and the difference between the proposed CE and the existing CE for repair and maintenance of roads.

Response: The proposed rule included a CE for construction or realignment of up to 5 miles of NFS roads, reconstruction of up to 10 miles of NFS roads and associated parking areas, opening or closing an NFS road, and culvert or bridge rehabilitation or replacement along NFS roads. The inclusion of two mileage limits with a single list of examples created confusion. As a result, the final rule divides the proposed rule's roads CE into two separate CEs at §§ 220.6(e)(23) and (24). Each of these CEs applies only to NFS roads. The CE in paragraph (e)(23) covers up to 8 miles of certain road management activities and cannot be

used for construction and realignment. The CE in paragraph (e)(24) covers road construction and realignment on up to 2 miles of NFS roads and associated parking areas.

The reduced road mileages in these two CEs are the result of consideration of public comment and additional review conducted by the Agency. As the Agency developed these two CEs, it narrowed the focus of its analysis of previously completed projects from broad, general project purposes to more specific project activities. Specifically, the Agency conducted an additional search of its NEPA database for previously completed projects to define appropriate mileage limitations for each of the CEs. This additional analysis is described in greater detail in the supporting statement.

Also based on additional review and analysis and in response to public comments, the Agency removed the example of opening or closing a road. Additionally, the Agency removed references to culvert rehabilitation and replacement because those activities are covered under the existing CE at 36 CFR 220.6(e)(18) of the final rule. The data used to establish these CEs is included in the supporting statement.

The Forest Service has an existing CE at 36 CFR 220.6(d)(4) of the final rule for repair and maintenance of roads, trails, and landline boundaries. That CE is intended to be used for routine maintenance of NFS roads and includes no mileage limit and no requirement for documentation in a decision memo. The new CEs established in the final rule cover NFS road management activities that go beyond routine repair and maintenance but have been demonstrated by the Agency's experience not to have significant effects.

In addition to adhering to the mileage limitations, determining that extraordinary circumstances do not exist, and requiring documentation in a decision memo, the responsible official incorporates design features as a standard operating procedure to avoid or minimize resource impacts. Examples of design features that are routinely incorporated are listed in the supporting statement. Design features to prevent impacts from erosion and sedimentation may include requiring road locations to be reviewed by an Agency watershed specialist,

requiring erosion control measures in accordance with state department of transportation requirements, or minimizing erosion and removing sediment by capturing and filtering runoff before it leaves the project limits. Additional examples of design features have been added to the supporting statement.

All proposed actions covered under the CEs in paragraphs (e)(23) and (24) must be consistent with applicable travel management decisions. The travel management rule at 36 CFR part 212, subpart A, was promulgated in 2005 and established requirements for administration of the forest transportation system. The Forest Service uses travel analysis to identify the minimum road system. Travel analysis is a dynamic, interdisciplinary, science-based process that examines ecological, cultural, social, and economic concerns. Information from the travel analysis process is used to inform future travel management decisions at the project level. Travel analysis is used to identify whether a road needs to be added to the forest transportation system or decommissioned.

The CEs do not apply to decisions to add roads to the forest transportation system. Rather, once the Agency has determined that a road needs to be constructed during the travel management decision process, a CE could be used to comply with NEPA for the actual road construction. As explained above, the final rule does not address or reduce existing Agency public involvement practices concerning CEs.

Restoration and Resilience CE Comments

Comment: The Agency received many comments covering a wide range of topics related to the restoration CE included in the proposed rule at § 220.5(e)(26). Some commenters supported the establishment of a restoration CE to help the Agency expedite activities to restore National Forest System lands and increase forest and grassland resilience. Other comments opposed the proposed restoration and resilience CE on general grounds or opposed specific elements of the CE.

Response: The Agency notes the general support or opposition regarding the restoration and resilience CE. The final rule retains a modified version of the CE covering restoration and resilience activities at § 220.5(d)(25). Specific comments and the resulting modifications from the proposed rule are addressed below.

Comment: Several comments on the proposed restoration and resilience CE concerned its scope or included activities. Some commenters requested that clearer examples be provided and that the Agency focus on practices instead of outcomes. Some supportive commenters requested removal of the limitation that commercial and non-commercial harvest activities be allowed only in conjunction with another restoration activity.

Some commenters expressed the general sentiment that the CE is too broad and needs narrowing definitions and limitations. Other commenters stated that the CE would allow activities not focused on restoration. Some commenters requested that either timber harvest generally, or salvage harvest in particular, should be prohibited because such activities are not always associated with restoration or scientific literature did not support such treatments use for restoration or resilience purposes.

Response: Following the public comment period, the Forest Service convened a group of Agency scientists to review the body of literature submitted in public comments specific to the proposed restoration CE. This review, combined with input from other Agency subject matter experts in the watershed, wildlife, and forest management program areas, resulted in changes to the restoration CE in the final rule.

In the final rule, the Agency has narrowed the scope of the category of permissible activities. The final rule requires all activities conducted under the CE have a primary purpose of meeting restoration objectives or increasing forest and grassland resilience. “Primary purpose” is a well understood operational term both within the Agency and by the public. This adjustment is responsive to concerns that the category focus on outcomes, as

well as concerns regarding the use of certain tools that may be used to achieve restoration and resilience goals.

The primary purpose requirement is further amplified in paragraph (ii)(B), which limits qualifying thinning and harvesting activities to those designed to achieve ecological restoration or resilience objectives. Permissible projects may generate secondary or ancillary multiple use benefits other than restoration and resilience. Such is the nature of multiple use management. However, restoration and resilience must be the project's primary objective. Because the final rule adopts a primary purpose requirement, the final rule removes the provision that would have required commercial or non-commercial timber harvest activities to be carried out in combination with at least one additional restoration activity.

The Agency will rely on its standard definition of restoration in applying the category. (Restoration is "the process of assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed. Ecological restoration focuses on reestablishing the composition, structure, pattern, and ecological processes necessary to facilitate terrestrial and aquatic ecosystems sustainability, resilience, and health under current and future conditions. Functional restoration focuses on the underlying processes that may be degraded, regardless of the structural condition of the ecosystem." (FSH 1909.12 and 36 CFR 219.19)).

The final rule clarifies the list of activities to meet restoration and resilience objectives at paragraph (i). These include 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. The restoration CE allows timber harvest because timber harvest is a general term that encompasses removal of trees for a variety of purposes. The restoration CE requires harvest activities to be designed to achieve ecological restoration objectives. The CE will not be available for projects designed primarily to achieve economic returns. The commercial sale of timber harvested via use of

the CE is permissible, but as discussed above, only where commercial value is a secondary or ancillary benefit to the primary restoration activity.

Similarly, the Agency has added a limitation to the vegetation thinning and timber harvesting activities provision disallowing salvage harvesting under the restoration and resilience CE. The Agency defines salvage harvest as the removal of dead trees or damaged or dying trees due to injurious agents other than competition, to recover value that would otherwise be lost (FSM 2470). The effects of salvage harvest and its relation to restoration and resilience depend on a variety of factors. The exclusion of salvage harvest from the restoration CE does not mean that salvage harvest cannot be used to achieve restoration or resilience objectives in other contexts or under other categorical exclusions (see, for example, the existing salvage harvest CE at § 220.6(e)(13)). Nor does it imply that the effects of salvage harvest are significant under NEPA.

Comment: Some commenters supported the acreage limits in the proposed restoration CE. Other commenters argued that the acreage limits in the proposed restoration CE would allow for potentially significant effects, questioned their basis, or argued that the supporting statement did not demonstrate that allowing 4,200 acres of commercial or noncommercial harvest would not result in significant effects. Still other commenters requested removing express acreage limits entirely or expanding the acreage limit for all listed activities to 7,300 acres.

Response: The proposed restoration CE would have allowed activities to improve ecosystem health, resilience, and other watershed conditions on up to 7,300 acres. If commercial/non-commercial timber harvest activities were proposed, those aspects of the project were not to exceed 4,200 of the 7,300 acres.

The Agency reviewed information submitted in public comments, conducted a science review, and reviewed the original project data on which the limitations in the proposed rule were based. Based on that review, the final rule's restoration CE at §

220.6(e)(25) allows activities to improve ecosystem health, resilience, and other watershed conditions on up to 2,800 acres. This revision is described in more detail below in the discussion of the supporting statement for the CE. In general, the 2,800-acre limitation better accounts for the effects of outliers in the sampled EA data set, better reflects the average size of projects from the sampled EAs, and also aligns with average acreages of specific activities in the sampled EA data set for which some commenters had concerns regarding the degree of impacts (such as commercial timber harvest).

Comment: Some commenters supported establishment of the proposed CE and the analysis set forth in the supporting statement associated with the proposed rule and stated that the Agency had provided a strong rationale for the CE. Other commenters questioned the findings that the CE will not result in significant adverse impacts, stating that the supporting statement was insufficient and not supported by science or other benchmarks. Some of these commenters questioned the adequacy of the monitoring information presented, disagreed with reliance on forest plan standards and best management practices to prevent significant effects, questioned how agency experts or cited research papers were used to develop the CE, and argued that the Agency's analysis of sampled EAs did not support the size of the restoration CE in the proposed rule.

Response: The Agency has carefully considered all comments submitted concerning the proposed restoration and resilience CE and made adjustments that refine the terms and parameters for the category. The agency has revised its supporting statement to include more details related to the acreage data and monitoring information. The Agency has revised its acreage calculations to address sampled EAs in order to account for projects with multiple activities occurring per acre. The revised calculations more accurately reflect a net project acreage versus gross total activity acres. The supporting statement now includes a table clearly identifying the source of the acreage data. The appendix of previously implemented projects has also been updated to demonstrate how acreages were calculated.

In response to public comment, the supporting statement for the final rule now includes additional discussion of the project development process and the interactions between proposal development, responsible official engagement, best management practices, design features, extraordinary circumstances, and forest plan compliance. The supporting statement also includes examples of design features that are typically incorporated into a proposed action for activities covered under the CE. The supporting statement also includes additional information related to monitoring and how professional experts were engaged in the development of the CE.

Comment: Some commenters requested that a public participation or collaboration element should be added to the restoration CE.

Response: The Agency has added a collaboration requirement to the restoration CE at § 220.6(e)(25)(ii)(A): “Projects shall be developed through a collaborative process that includes multiple interested persons representing diverse interests.” The Agency has had success working with various types of collaborative processes. This requirement is intended to be flexible, accommodate a variety of collaborative approaches, and does not require convening a formal collaborative group.

Comment: The Forest Service received a variety of comments regarding the road limitations in the proposed restoration and resilience CE. Comments included suggestions to increase the road mileages for construction of permanent and temporary roads, removing road construction from the CE, and questioning why the road mileage limitations for the restoration CE differed from those in the CE proposed rule’s road construction CE at 36 CFR 220.5(e)(24).

Response: In the final rule, § 220.6(e)(25) includes adjusted road mileage limitations and addressed reconstruction within the framework of construction limits. The restoration CE allows construction and reconstruction of permanent roads up to 0.5 miles; and construction of temporary roads up to 2.5 miles. The restoration and resilience CE requires all temporary

roads to be decommissioned no later than 3 years after the date the project is completed. The final rule also clarifies that the category allows repair and maintenance of NFS roads and trails to prevent or address resource impacts.

Some commenters were confused about the road limitations of the CE and how they compare to the limitations of other CEs. A frequent comparison was the limitation of construction of permanent roads of 0.5 miles when the proposed rule also included a proposed CE that would allow five miles of permanent road construction.

The proposed rule's use of different road mileage limitations reflected the purpose of the individual CE and the agency's experience in managing those activities categories. These two CEs were developed independently based on different supporting data and have different focuses. The restoration and resilience CE was developed with a focus on activities that improve overall ecosystem health and restore national forests and grasslands. The roads management CE was developed with a focus on road management activities to address access issues and resource impacts; it has a narrower scope than the restoration CE. In the final rule the road management CE was also modified, and the mileage limitations have been lowered to 2 miles for permanent road construction.

Forest Service CEs are independently established, as has been the case with historical agency practice concerning development and use of CEs. The activities covered by, or limitations in, a particular CE do not constrain or limit the operation of any other CE. Likewise, more than one CE may apply to an activity. Integrated, multiple-use management activities, which are designed to accomplish management goals that often cross administrative program boundaries, can fit within multiple CEs.

Regulatory Certifications

National Environmental Policy Act

The final rule amends agency regulations for implementing NEPA. Forest Service NEPA procedures assist in the fulfillment of agency responsibilities under NEPA but are not

the agency's final determination of what level of NEPA analysis is required for a particular proposed action. This rule would not authorize any activity or commit resources to a project that may affect the environment. This rule does not have any reasonably foreseeable impact on the environment, nor does the rule authorize or prohibit any action that would have any effect on the environment. The CEQ set forth the requirements for establishing agency NEPA procedures in its regulations at 40 CFR 1507.3. The CEQ regulations do not require agencies to prepare a NEPA analysis before establishing or updating agency 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).

Energy Effects

The final rule has been reviewed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that the final rule does not constitute a significant energy action as defined in the Executive Order.

Consultation and Coordination with Indian Tribal Governments

The Forest Service considered this final rule in compliance with E.O. 13175, Consultation and Coordination with Indian Tribal Governments. On June 13, 2019, the agency initiated a 120-day consultation period. This period was extended an additional 26 days, based on requests from some Tribes. The Forest Service also considered input from Tribes received after this period. Twenty-eight federally and non-federally recognized Tribes submitted written comments and/or participated in regional tribal meetings.

While some Tribes expressed support for the proposed rule, many Tribes expressed concern over how the rule would impact the Agency's responsibility to consult with Tribes on federal actions. Specifically, many were concerned that the proposed rule's addition of

CEs and elimination of the scoping requirement for CEs and EAs would reduce opportunities for tribal engagement.

In response, the Forest Service maintains and reiterates its commitment to ensuring that Tribal consultation occurs for individual projects as appropriate pursuant to Forest Service Manual 1560 and Forest Service Handbook 1509.13. This regulatory revision makes no change to Tribal consultation. Further as discussed above, the final rule is of limited scope and amends the Forest Service NEPA regulations to include only new and expanded CEs and the DNA provision. Projects and activities supported by environmental assessments remain subject to project-level pre-decisional administrative review process (“objections” process) at 36 CFR part 218, which requires notice and a designated opportunity for comments.

The Agency acknowledges that it shares a government-to-government relationship with Tribes that differs from its relationship with the general public. The final rule does not change the Forest Service’s Tribal consultation obligations.

Executive Order 12866

This rule has been reviewed under USDA procedures and Executive Order (E.O.) 12866 issued September 30, 1993, on regulatory planning and review. The Office of Management and Budget (OMB) has determined that this is a significant rule as defined by E.O. 12866 and therefore subject to interagency review.

A more timely and efficient process will reduce administrative costs. There are many benefits and costs associated with the rule; however, they are not quantifiable with available data. Benefits (or cost reductions) derived from timely and focused environmental analysis, flexibility in preparation of environmental documents, and improved decision-making indicate a positive net benefit of the rule. The direct benefits of the rule are, therefore, reduced costs and time spent on environmental analysis.

For example, by implementing the Determination of NEPA Adequacy (DNA) provision, the Agency anticipates reductions in time and cost as a result of reducing

redundant analyses. These efficiencies may reduce total Agency costs and decision-making time. These concepts, however, will take some time to become well established and widely used; potential benefits will occur over time.

The rule also establishes 5 new CEs that require a decision memo. Focusing on the new CEs, the Agency assumes for the purpose of this analysis, based on average use of its existing CEs, that each new CE may be used an average of 1 to 30 times per year. Under these assumptions, the rule may potentially result in 5 to 150 decision memos per year being completed in lieu of a decision notice.

From Fiscal Years 2014 to 2019, the Agency's average annual environmental analysis workload included approximately 1,588 CE determinations and 266 EAs. This six-year span includes the most recent data available. The average time to decision for CEs was 204 days and for EAs was 707 days. As a result, the Agency may complete NEPA analysis on proposed actions using the new CEs an average of 1 to 17 months earlier, per proposed action. In practice, these figures will vary dependent upon the proposed action and the particular CE being applied.

The Forest Service has combined and modified some existing CEs with this rulemaking to reduce confusion and better capture Agency proposed actions that do not normally have significant environmental effects. This, in turn, allows for timelier decision-making. Specifically, combining CEs at § 220.6(d)(10) (not requiring a decision memo) and § 220.6(e)(15) (requiring a decision memo) of the existing regulations, which both covered administrative actions on special use permits, eliminates confusion among Agency staff over which CE applies and reduces administrative workload by not requiring a decision memo. Expanding the acreage of special uses on which the existing CE at § 220.6(e)(3) can be applied from 5 acres to 20 acres, as well as expanding the roads and trails on which the existing CE at § 220.6(e)(20) can be applied, are practical, common sense changes that increase Agency NEPA efficiency.

While CEs replace the more costly use of EAs, several factors contribute to the determination of the most appropriate form of NEPA analysis. In general, qualifying projects that in the past would have been analyzed under an EA may now rely upon the new CEs, but responsible officials retain discretion to use another form of NEPA analysis.

DNAs will further reduce the number of EAs undertaken each year, as Agency staff make use of this tool rather than defaulting to preparing a second EA. However, the Agency expects that use of the DNA provision will be modest at least in the first several years of its establishment.

The Agency anticipates use of DNAs and of the new CEs to slowly increase over time, taking into account time for adoption across the agency as has been observed during implementation of new CEs, statutory categorical exclusions and exceptions over the course of the past several years.

Executive Order 13771

The final rule has been reviewed in accordance with E.O. 13771 on reducing regulation and controlling regulatory costs and is considered an E.O. deregulatory action. The impacts of the final rule are as discussed above.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ‘major rule’, as defined by 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, and Executive Order 13272 require an agency to prepare a regulatory flexibility analysis of a rule if the rule is subject to notice and comment under the Administrative Procedure Act. The final rule directly affects only the Forest Service. Forest Service NEPA procedures assist in the fulfillment of agency responsibilities under

NEPA; the final rule does not impose any requirements on small entities. While small entities represent some applicants for special use authorizations that would now be covered by the CEs at §§ 220.6(d)(11) and (12) and 220.6(e)(3), this is a negligible indirect effect only to certain small entities. Not all applicants are small entities and, moreover, the timing of a special use authorization depends on several factors beyond NEPA compliance, including compliance with other laws and incomplete information provided by the applicant.

Therefore, the USDA Under Secretary for Natural Resources and Environment certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Federalism

The Agency has considered this final rule under the requirements of Executive Order 13132, Federalism. The Agency has concluded that the rule conforms with the federalism principles set out in this Executive Order; will not impose any compliance costs on the states; and will not have substantial direct effects on the States or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary.

No Takings Implications

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that the rule does not pose the risk of a taking of protected private property.

Civil Justice Reform

This final rule has been reviewed under E.O. 12988, Civil Justice Reform. Under the final rule, (1) all State and local laws and regulations that conflict with this final rule or impede its full implementation will be preempted; (2) no retroactive effect is given to this

final rule; and (3) the rule will not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates Reform Act

Pursuant to Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1531–1538), the Agency has assessed the effects of the final rule on State, local, and Tribal governments, and the private sector. This final rule would not compel the expenditure of \$100 million or more by any State, local, or Tribal government, or anyone in the private sector. Therefore, this final rule is not subject to the requirements of section 202 and 205 of the UMRA.

Controlling Paperwork and Burdens on the Public

This final rule does not contain any additional recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law, or are not already approved for use, and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 220

Administrative practices and procedures, Environmental impact statements, Environmental protection, National forests, Science and technology.

Therefore, for the reasons set forth in the preamble, part 220 of title 36 of the Code of Federal Regulations is amended as follows:

PART 220—NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

COMPLIANCE

1. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; E.O. 11514; 40 CFR parts 1500-1508; 7 CFR part 1b.

2. Amend § 220.4 by adding paragraph (j) to read as follows:

§ 220.4 General requirements.

* * * * *

(j) *Determination of NEPA Adequacy (DNA)*. (1) An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety for a new proposed action if the Responsible Official determines that the existing NEPA analysis adequately assesses the environmental effects of the proposed action and reasonable alternatives. The responsible official must determine and document that each of the following elements is met:

(i) The new proposed action is substantially the same as a previously analyzed proposed action or alternative analyzed in detail in the existing NEPA analysis.

(ii) The range of alternatives analyzed in the existing NEPA document(s) is appropriate with respect to the new proposed action.

(iii) Any new information or circumstances relevant to environmental concerns would not substantially change the analysis in an existing NEPA document(s).

(iv) The environmental effects that would result from implementation of the new proposed action are similar to those analyzed in the existing NEPA document(s).

(2) A DNA for a new proposed action shall be included in the project record for the new proposed action. Proposed actions undergoing a DNA review shall:

(i) Be included on the SOPA;

(ii) Be subject to scoping;

(iii) Be subject to pre-decisional administrative review, if applicable; and

(iv) Include issuance of a new decision document (decision memo, decision notice, or record of decision) when approved.

3. Amend § 220.6 by:

a. Removing and reserving paragraph (d)(10);

- b. Adding paragraphs (d)(11) and (12);
- c. Removing “through (17)” and adding “through (25)” in its place in paragraph (e) introductory text;
- d. Revising paragraph (e)(3);
- e. Removing and reserving paragraphs (e)(10) and (15);
- f. Revising paragraph (e)(20); and
- g. Adding paragraphs (e)(21) through (25).

The additions and revisions read as follows:

§ 220.6 - Categorical exclusions.

* * * * *

(d) * * *

(11) Issuance of a new special use authorization to replace an existing or expired special use authorization, when such issuance is to account only for administrative changes, such as a change in ownership of authorized improvements or expiration of the current authorization, and where there are no changes to the authorized facilities or increases in the scope or magnitude of authorized activities. The applicant or holder must be in compliance with all the terms and conditions of the existing or expired special use authorization. Subject to the foregoing conditions, examples include but are not limited to:

(i) Issuing a new authorization to replace a powerline facility authorization that is at the end of its term;

(ii) Issuing a new permit to replace an expired permit for a road that continues to be used as access to non-NFS lands; and

(iii) Converting a transitional priority use outfitting and guiding permit to a priority use outfitting and guiding permit.

(12) Issuance of a new authorization or amendment of an existing authorization for recreation special uses that occur on existing roads or trails, in existing facilities, in existing

recreation sites, or in areas where such activities are allowed. Subject to the foregoing condition, examples include but are not limited to:

(i) Issuance of an outfitting and guiding permit for mountain biking on NFS trails that are not closed to mountain biking;

(ii) Issuance of a permit to host a competitive motorcycle event;

(iii) Issuance of an outfitting and guiding permit for backcountry skiing;

(iv) Issuance of a permit for a one-time use of existing facilities for other recreational events; and

(v) Issuance of a campground concession permit for an existing campground that has previously been operated by the Forest Service.

(e) * * *

(3) Approval, modification, or continuation of special uses that require less than 20 acres of NFS lands. Subject to the preceding condition, examples include but are not limited to:

(i) Approving the construction of a meteorological sampling site;

(ii) Approving the use of land for a one-time group event;

(iii) Approving the construction of temporary facilities for filming of staged or natural events or studies of natural or cultural history;

(iv) Approving the use of land for a utility corridor that crosses a national forest;

(v) Approving the installation of a driveway or other facilities incidental to use of a private residence; and

(vi) Approving new or additional communication facilities, associated improvements, or communication uses at a site already identified as available for these purposes.

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(20) Activities that restore, rehabilitate, or stabilize lands occupied by roads and trails, including unauthorized roads and trails and National Forest System roads and National

Forest System trails, to a more natural condition that may include removing, replacing, or modifying drainage structures and ditches, reestablishing vegetation, reshaping natural contours and slopes, reestablishing drainage-ways, or other activities that would restore site productivity and reduce environmental impacts. Examples include but are not limited to:

(i) Decommissioning a road to a more natural state by restoring natural contours and removing construction fills, loosening compacted soils, revegetating the roadbed and removing ditches and culverts to reestablish natural drainage patterns;

(ii) Restoring a trail to a natural state by reestablishing natural drainage patterns, stabilizing slopes, reestablishing vegetation, and installing water bars; and

(iii) Installing boulders, logs, and berms on a road segment to promote naturally regenerated grass, shrub, and tree growth.

(21) Construction, reconstruction, decommissioning, relocation, or disposal of buildings, infrastructure, or other improvements at an existing administrative site, as that term is defined in section 502(1) of Public Law No. 109-54 (119 Stat. 559; 16 U.S.C. 580d note). Examples include but are not limited to:

(i) Relocating an administrative facility to another existing administrative site;

(ii) Construction, reconstruction, or expansion of an office, a warehouse, a lab, a greenhouse, or a fire-fighting facility;

(iii) Surface or underground installation or decommissioning of water or waste disposal system infrastructure;

(iv) Disposal of an administrative building; and

(v) Construction or reconstruction of communications infrastructure.

(22) Construction, reconstruction, decommissioning, or disposal of buildings, infrastructure, or improvements at an existing recreation site, including infrastructure or improvements that are adjacent or connected to an existing recreation site and provide access or utilities for that site. Recreation sites include but are not limited to campgrounds and

camping areas, picnic areas, day use areas, fishing sites, interpretive sites, visitor centers, trailheads, ski areas, and observation sites. Activities within this category are intended to apply to facilities located at recreation sites managed by the Forest Service and those managed by concessioners under a special use authorization. Examples include but are not limited to:

- (i) Constructing, reconstructing, or expanding a toilet or shower facility;
- (ii) Constructing or reconstructing a fishing pier, wildlife viewing platform, dock, or other constructed feature at a recreation site;
- (iii) Installing or reconstructing a water or waste disposal system;
- (iv) Constructing or reconstructing campsites;
- (v) Disposal of facilities at a recreation site;
- (vi) Constructing or reconstructing a boat landing;
- (vii) Replacing a chair lift at a ski area;
- (viii) Constructing or reconstructing a parking area or trailhead; and
- (ix) Reconstructing or expanding a recreation rental cabin.

(23) Road management activities on up to 8 miles of NFS roads and associated parking areas. Activities under this category cannot include construction or realignment. Examples include but are not limited to:

- (i) Rehabilitating an NFS road or parking area where management activities go beyond repair and maintenance;
- (ii) Shoulder-widening or other safety improvements within the right-of-way for an NFS road; and
- (iii) Replacing a bridge along an NFS road.

(24) Construction and realignment of up to 2 miles of NFS roads and associated parking areas. Examples include but are not limited to:

- (i) Constructing an NFS road to improve access to a trailhead or parking area;

(ii) Rerouting an NFS road to minimize resource impacts; and

(iii) Improving or upgrading the surface of an NFS road to expand its capacity.

(25) Forest and grassland management activities with a primary purpose of meeting restoration objectives or increasing resilience. Activities to improve ecosystem health, resilience, and other watershed and habitat conditions may not exceed 2,800 acres.

(i) Activities to meet restoration and resilience objectives may include, but are not limited to:

(A) Stream restoration, aquatic organism passage rehabilitation, or erosion control;

(B) Invasive species control and reestablishment of native species;

(C) Prescribed burning;

(D) Reforestation;

(E) Road and/or trail decommissioning (system and non-system);

(F) Pruning;

(G) Vegetation thinning; and

(H) Timber harvesting.

(ii) The following requirements or limitations apply to this category:

(A) Projects shall be developed or refined through a collaborative process that includes multiple interested persons representing diverse interests;

(B) Vegetation thinning or timber harvesting activities shall be designed to achieve ecological restoration objectives, but shall not include salvage harvesting as defined in Agency policy; and

(C) Construction and reconstruction of permanent roads is limited to 0.5 miles. Construction of temporary roads is limited to 2.5 miles, and all temporary roads shall be decommissioned no later than 3 years after the date the project is completed. Projects may include repair and maintenance of NFS roads and trails to prevent or address resource

impacts; repair and maintenance of NFS roads and trails is not subject to the above mileage limits.

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James E. Hubbard,
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