

**DEPARTMENT OF AGRICULTURE****Forest Service****36 CFR Part 220**

RIN 0596-AC49

**National Environmental Policy Act Procedures**

AGENCY: USDA Forest Service.

ACTION: Final rule.

**SUMMARY:** The Department of Agriculture is moving the Forest Service's National Environmental Policy Act (NEPA) codifying procedures from Forest Service Manual (FSM) 1950 and Forest Service Handbook (FSH) 1909.15. In addition to codifying the procedures, the Department is clarifying and expanding them to incorporate Council on Environmental Quality (CEQ) guidance and to better align Forest Service NEPA procedures with its decision processes.

This rule gives Forest Service NEPA procedures more visibility, consistent with the transparent nature of the Forest Service's environmental analysis and decision making. Also, the additions to the Forest Service NEPA procedures in this rule are intended to provide an environmental analysis process that better fits with modern thinking on decisionmaking, collaboration, and adaptive management by describing a process for incremental alternative development and development of adaptive management alternatives. Maintaining Forest Service explanatory guidance in the FSH will facilitate timely responses to new ideas, new information, procedural interpretations, training needs, and editorial changes to assist field units when implementing the NEPA process.

**DATES:** *Effective Date:* These NEPA procedures are effective July 24, 2008.

**ADDRESSES:** The Forest Service NEPA procedures are set out in 36 CFR part 220, which is available electronically via the World Wide Web/Internet at <http://www.gpoaccess.gov/cfr/index.html>. Single paper copies are available by contacting Martha Twarkins, Forest Service, USDA, Ecosystem Management Coordination Staff (Mail Stop 1104), 1400 Independence Avenue, SW., Washington, DC 20250-1104. Additional information and analysis can be found at <http://www.fs.fed.us/emc/nepa>.

**FOR FURTHER INFORMATION CONTACT:** Martha Twarkins, Ecosystem Management Staff, (202) 205-2935, Forest Service, USDA. Individuals who

use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m. Eastern Daylight Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** Council on Environmental Quality (CEQ) regulations at 40 CFR 1507.3 require Federal agencies to adopt procedures as necessary to supplement the requirements of the CEQ's regulations implementing the National Environmental Policy Act (NEPA). The regulation further encourages agencies to publish agency explanatory guidance for CEQ's regulations and agency procedures. In 1979, the Forest Service chose to combine its implementing procedures and explanatory guidance in Forest Service directives FSM 1950 and FSH 1909.15.

Descriptions of Forest Service NEPA authority, objectives, policy, and responsibilities remain in FSM 1950. Forest Service explanatory guidance interpreting CEQ and Forest Service procedures in regulation remain in FSH 1909.15. For an explanation of NEPA and the NEPA process, see CEQ's "A Citizen's Guide to the NEPA—Having Your Voice Heard" at [http://ceq.eh.doe.gov/nepa/Citizens\\_Guide\\_Dec07.pdf](http://ceq.eh.doe.gov/nepa/Citizens_Guide_Dec07.pdf).

This rule gives Forest Service NEPA procedures more visibility, consistent with the transparent nature of the Forest Service's environmental analysis and decision making.

Maintaining Forest Service explanatory guidance in directives will facilitate quicker responses to new ideas, new information, procedural interpretations, training needs, and editorial changes to assist field units when implementing the NEPA process.

Since the last major update of Forest Service NEPA policy in 1992, CEQ has issued guidance that the Department believes is appropriate to incorporate into Forest Service NEPA procedures with this regulation. The Department also believes it is appropriate to incorporate several concepts that the Forest Service currently uses, but for which explicit provisions in its current procedures are lacking.

Finally, this rule will allow for better integration of NEPA procedures and documentation into the current Forest Service decisionmaking processes, including collaborative and incremental decisionmaking.

On August 16, 2007, the Forest Service published a proposed rule to move its NEPA procedures from FSH 1909.15 to 36 CFR part 220 (72 FR 45998). The majority of implementing

procedures found in FSH 1909.15 transfer to 36 CFR part 220 and remain intact. Forest Service explanatory guidance remains in the revised FSH 1909.15 being published concurrently with this rule and available at [http://www.fs.fed.us/cgi-bin/Directives/get\\_dirs/fsh?1909.15](http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?1909.15). Key changes in this final rule:

- Clarify actions subject to NEPA by summarizing the relevant CEQ regulations in one place.
- Recognize Forest Service obligations to take immediate emergency responses and emphasize the options available for subsequent proposals to address actions related to the emergency when normal NEPA processes are not possible.
- Incorporate CEQ guidance language regarding what past actions are "relevant and useful" to a cumulative effects analysis.
- Clarify that an alternative(s), including the proposed action, may be modified through an incremental process.
- Clarify that adaptive management strategies may be incorporated into an alternative(s), including the proposed action.

• Incorporate CEQ guidance that states environmental assessments (EAs) need to analyze alternatives to the proposed action if there are unresolved conflicts concerning alternative uses of available resources as specified by section 102(2)(E) of NEPA.

The CEQ was consulted on the proposed and final rule. CEQ has issued a letter stating CEQ has reviewed this rule and found it to be in conformity with NEPA and CEQ regulations (per 40 CFR 1507.3 and NEPA section 102(2)(B)). This letter is available at <http://www.fs.fed.us/emc/nepa>.

To improve clarity, this final rule received numerous corrections to punctuation, grammar, abbreviations, and citations. These edits did not change the substance or meaning of any of the rule's provisions. Substantive changes from the proposed to this final rule are discussed in the responses to comments that follow.

**Comments on the Proposal**

The proposed rule was published in the **Federal Register** on August 16, 2007, for a 60-day comment period. The Forest Service received 10,975 responses, consisting of letters, e-mails, web based submissions, and faxes. Of those, approximately 200 contained original substantive comments; the remaining responses were organized response campaign (form) letters. Comments were received from the public, from within the Forest Service,

and from other agencies. The Department considered all the comments and made a number of changes in response. A summary of comments received and the Department's responses follow.

#### General Comments

Generally, respondents favored the Forest Service's efforts to make the NEPA process run more efficiently for all interested parties. Many respondents like the idea of having Forest Service NEPA procedures in more readily accessible regulations, instead of in directives. They also like the concept that the Forest Service would like to work more closely with stakeholders. Respondents feel that the CFR is more readily available to the public, making it easier for the public and interested parties to engage the Forest Service during decisionmaking and to ensure they are following the regulations. In addition, many respondents feel that moving the NEPA procedures to regulation ensures they are part of the Federal Government's official regulations, enhancing the opportunities to legally enforce the requirements. Generally, most respondents support the proposed rule, but have concerns with some details, which are outlined below.

*Response.* The Forest Service appreciates the comments. It should be clarified however that the Forest Service believes that the move from internal procedures to published regulations and handbook should not change the judicial interpretations of these procedures.

#### NEPA

*Comments.* Although most respondents agree with moving NEPA procedures to regulation, some asked the question, "What problem is the Forest Service trying to solve by moving its regulations?" Also, a few respondents cite *Western Radio Services Co. v. Espy*, 79 F.2d 896, 901 (9th Cir. 1996), stating that the Forest Service must explain the rationale for moving NEPA procedures. Many respondents are concerned that the proposed rule would weaken or undermine NEPA, which in turn would damage public lands, water, wildlife, and air. One individual stated that only Congress has the authority to change NEPA.

Respondents are also concerned that the proposed rule would give special interest groups an opportunity to develop, extract, and log public lands without regulation or accountability to the general public. Many individuals commented about the proposed rule being "another attempt by the current administration to circumvent

environmental regulations." One conservation organization believes that "the Forest Service 'decision process' \* \* \* is highly subject to political pressure, particularly from the natural resource extraction industry, which views natural resources on Federal lands as theirs for the taking."

Another individual views the proposal as "the agency giving itself too much discretion to avoid implementing the Act, possibly undermining NEPA's purpose."

*Response.* The Department is moving Forest Service procedures from internal directives to regulation to give its NEPA procedures more visibility, consistent with the transparent nature of the Forest Service's environmental analysis and decision making. The Forest Service procedures supplement the CEQ regulations and placing Forest Service NEPA procedures in regulation underscores their importance. The final rule incorporates existing Forest Service procedures and existing CEQ guidance. This final rule also incorporates existing Forest Service practices such as collaboration and adaptive management as options for the responsible official to use.

The Department does not interpret the Ninth Circuit's decision in *Western Radio Services Co. v. Espy* as requiring a rationale for moving NEPA procedures. That case was about compliance with special use permitting regulations; on the page cited by the commenters the Ninth Circuit held that directives did not have independent force and effect of law. For this rule, the Department provides its rationale for moving the procedures to regulation.

The Forest Service procedures supplement the CEQ and U.S. Department of Agriculture (USDA) regulations for implementing NEPA procedural provisions; they neither supplant nor diminish those requirements. This final rule states under section 220.1(b), "This part supplements and does not lessen the applicability of the CEQ regulations, and is to be used in conjunction with the CEQ regulations and U.S. Department of Agriculture regulations at 7 CFR part 1b." The Department is not changing NEPA nor providing deference to one group over another. Groups for, against, or neutral on any proposed actions including logging have equal access to the Forest Service decision making process as described in sections 220.4(c), (d), and (e). Section 220.1(b) makes it explicitly clear that this final rule does not "circumvent" or "avoid" the Forest Service commitment to, and responsibility for, implementing NEPA.

*Comments.* Some respondents commented that the Forest Service needs to produce an environmental impact statement (EIS) for the proposed rule. In addition, respondents stated that the proposed rule constitutes revised agency rules and regulations and violates 40 CFR 1502.4(b), which highlights when an EIS must be prepared. CEQ regulation at 40 CFR 1502.4(b) states 'Environmental impact statements may be prepared, and are sometimes required, for broad federal actions such as the adoption of new agency programs or regulations (1508.18).' Some respondents feel that the NEPA procedures described in this rule should be characterized as the adoption of new agency regulations, thus requiring an EIS.

*Response.* CEQ does not direct agencies to prepare a NEPA analysis or document before establishing agency NEPA procedures. Agency NEPA procedures are procedural guidance to assist agencies 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. As stated in the preamble to the proposed rule, "The rule would not directly impact the environment." (72 FR 46002). The regulations do not authorize or prohibit any action or have any effect on the environment. The requirements for establishing agency NEPA procedures are set forth at 40 CFR parts 1505.1 and 1507.3. Additionally, the Forest Service NEPA procedures presented in this rule are established procedures described in the Forest Service directive system, allowed under the existing Forest Service procedures, or are existing CEQ guidance and are not considered new agency regulations.

Regulations establishing agency NEPA procedures do not require NEPA analysis and documentation. See, e.g., *Heartwood, Inc. v. U.S. Forest Service*, 230 F.3d 947, 954-55 (7th Cir. 2000).

*Comments.* Several individuals are concerned that moving the Forest Service's procedures to the CFR's could encourage other agencies to do the same, for example, the Bureau of Land Management. One individual is concerned that the proposed change would affect judicial interpretations of the Forest Service's NEPA obligations, therefore increasing the Forest Service's susceptibility to lawsuits.

*Response.* The majority of Federal agencies currently have their NEPA procedures in the CFR, and the Department believes it is appropriate to place the Forest Service's NEPA procedures in regulation. In addition, it will place the Forest Service's NEPA

procedures in one easily accessible place, incorporate current CEQ guidance and place the procedures in line with current Forest Service decision making. The Forest Service believes that the move from internal procedures to published regulations and handbook should not change the judicial interpretations of these procedures and therefore should not increase uncertainty due to litigation. As for whether a regulation would make the Forest Service more susceptible to lawsuits, the Forest Service has an obligation to comply with NEPA and the CEQ regulations whether these procedures are specified in regulations or internal procedures. Furthermore, if the Forest Service's application of the regulation is challenged in court, the Department believes that the courts will give appropriate deference to the CEQ's interpretation of NEPA, as embodied in these regulations.

#### *Public Comment on Projects*

*Comments.* Many respondents are concerned that the proposed rule would take away the public's ability to comment on projects. Individuals ask the Forest Service to not limit public comment.

*Response.* This final rule will not take away or limit the public's ability to comment on projects compared with current practice. The final rule supplements, but does not supercede the CEQ regulations, which contain public involvement requirements. Moreover, the final rule retains the proposed rule requirements for responsible officials to consider public and agency comments in decisionmaking and to include such comments and responses in the administrative record (section 220.4(c)).

#### *Collaboration*

*Comments.* Many respondents like the idea of collaboration and urge the Forest Service to involve the public as much as possible. One individual would like to see all agencies, States and local governments, organizations, and individuals included in the collaborative process identified in the NEPA documents, along with an indication of when they joined the process.

Some respondents recommend the Forest Service make collaboration an optional process and if collaboration is undertaken, a strict timeline should be imposed. One individual was concerned that the proposed changes would "allow domination by whichever special interest group has the ear of those in authority."

Respondents feel that the Forest Service should integrate collaboration and adaptive management into the existing NEPA framework rather than implementing new changes "which lack the checks and balances NEPA provides."

*Response.* Given the concerns regarding collaboration being within the regulation, the Department removed the references to collaboration that were in the proposed section 220.5(e)(1), which is now section 220.5(e)(2). The proposed language stated "To facilitate collaborative processes and sound decisions, the responsible official may collaborate with interested parties to modify the proposed action and alternative(s) \* \* \*." The proposed language was interpreted by many as providing that the incremental development and modification of alternatives may only be done when the Forest Service collaborates with the public or that collaboration may only be done in a process involving the incremental development and modification of alternatives. Neither collaboration nor the incremental development and modification of alternatives are required in every case, nor is one a prerequisite for the other.

Collaboration is a tool that enables the Forest Service to focus on issues that matter. The Department recognizes that collaboration may not be appropriate in every case (see CEQ publication, "Collaboration in NEPA—A Handbook for NEPA Practitioners," available at [http://ceq.eh.doe.gov/nepa/nepapubs/Collaboration\\_in\\_NEPA\\_Oct2007.pdf](http://ceq.eh.doe.gov/nepa/nepapubs/Collaboration_in_NEPA_Oct2007.pdf)). The final rule does not set collaboration requirements, including timelines or documentation of when parties become involved in the process. Collaboration processes, like public involvement and scoping, will vary depending on the need and circumstances. Some situations will require a lot of time and others will not. Adaptive management is addressed in the final rule at section 220.5(e)(2).

#### *Section 220.3 Definitions*

*Comments.* Many respondents are concerned that the definition for "reasonably foreseeable future actions," in section 220.3 is too narrow. They suggest the proposed rule definition could eliminate from consideration a large number of activities on National Forest System lands that are clearly foreseeable. Respondents believe that if the proposed rule is approved, the Forest Service would be ignoring the CEQ provision regarding "reasonably foreseeable future actions." Of particular concern was the phrase "activities not yet undertaken."

Another concern was that the proposed rule suggests an improper focus on activities taking place primarily on NFS lands, and fails to include other agencies or private landowners with lands adjacent to NFS lands.

*Response.* The final rule defines "reasonably foreseeable future actions" to explain a term in CEQ's definition for "cumulative impact" at 40 CFR 1508.7. The CEQ definition of "cumulative impact" includes both Federal and non-Federal actions for consideration of cumulative effects, including reasonably foreseeable future actions. To clarify that Federal and non-Federal actions are to be considered, in the final rule the words "Federal or non-Federal" are added to the definition of "Reasonably Foreseeable Future Actions." The phrase: "activities not yet undertaken" is to distinguish foreseeable actions from past and present actions and does not alter CEQ's regulatory definition for cumulative impact (See 40 CFR 1508.7). The CEQ definition for cumulative impact includes past and present actions. Ongoing activities such as grazing and oil and gas development would be considered present activities and thereby accounted for in the description of the current state of the environment (the "Affected Environment") and the future state of the environment in the absence of the proposed action (the "no-action alternative"), as well as in the cumulative effects analysis. The Department has struck a balance between speculation about activities that are not yet planned and remain speculative and those that are reasonably foreseeable and have evolved to the point of being a proposal capable of meaningful NEPA analysis (for example, based on other development in the area when there has been some decision, funding, or development of a proposal (see 40 CFR 1508.23)).

*Comments.* Several individuals are concerned that "interested parties and agencies" is used throughout the entire proposed rule, but is not defined. They suggest that "interested parties and agencies" be defined to lend clarity on what individuals represent those groups.

*Response.* This final rule supplements, but does not replace the CEQ regulations. Accordingly, the Forest Service is still subject to the CEQ public involvement requirements at 40 CFR 1501.4, 1501.7, 1503.1, and 1506.6, which include informing "persons and agencies who may be interested or affected" by agency proposals. The CEQ regulation at 40 CFR 1506.6 further requires agencies to "make diligent

efforts to involve the public in preparing and implementing their NEPA procedures," which would include public involvement in preparing environmental assessments and environmental impact statements. The Department believes the meaning of "interested" and "affected parties and agencies" is sufficiently defined in current NEPA usage and the courts' and CEQ's interpretation of these terms.

*Comments.* The proposed rule defined preliminary environmental impact statement (PEIS). The regulations later went on to describe that if PEISs are prepared they would be available to those interested and affected persons and agencies for comment.

Many respondents agree the development of a PEIS is good in that it makes the Forest Service's decisionmaking process transparent. However, respondents are concerned that the Forest Service does not indicate what this process will look like in practice and at what level the public will participate. Concern was raised that there could be inconsistency across the Forest Service in how the PEIS would be used which could confuse people. Also, the proposed rule does not indicate when the public must comment in order to maintain standing to appeal.

One respondent feels the proposed rule violates CEQ regulation 40 CFR 1506.8 by adding an additional stage in the NEPA process. Some respondents question what role the PEIS will play, and how the PEIS and scoping process will interact. The same people ask what level of detail will be required in a PEIS. Moreover, if the responsible official chooses to use a PEIS, it is unknown whether there will be an opportunity to challenge the Forest Service to provide more information.

There are concerns that the collaborative process and PEIS would "over-complicate the planning process," "unduly burden the public and other government agencies," and "unfairly" place those who cannot fully participate at a "disadvantage." Others who commented felt that 40 CFR 1506.10, and 1502.19 should apply to all EISs the Forest Service produces for comment.

*Response.* Due to the confusion and concern surrounding the PEIS the Department felt it was best to remove this provision. The definition in the proposed rule found at section 220.3 and description in section 220.5 have been removed in the final rule. As discussed previously in the proposed rule preamble, collaboration with the public is already allowed and will continue as an option for the responsible official. The PEIS is simply an optional tool and its removal from

the final rule will not remove that option. The responsible official will still be free to involve and inform the public above and beyond the regulations in a manner that best meets the public and government good. The provisions in the final rule at section 220.5(f) regarding circulating and filing draft and final environmental impact statements remain unchanged from the proposal.

#### *Section 220.4(b) Emergency Responses*

*Comments.* Section 220.4(b)(2) of the proposed rule provided "the responsible official may take emergency actions necessary to control the immediate impacts of the emergency to mitigate harm to life, property, or important resources." Overall, respondents generally agree that some emergency actions should be allowed, for example when an action is needed to mitigate harm to human life or property. However, some respondents feel that by not clearly defining what an important resource is, the Forest Service could use the emergency response clause as a way to permit "salvage logging" or other "high impact projects" on the national forests. Several respondents suggest that the Forest Service re-word the emergency response provision to something like "The responsible official may take emergency actions necessary to control the immediate impacts of the emergency to mitigate harm to human life, property, or rare natural resources."

*Response.* The final rule, at section 220.4(b)(1), replaces "other important resources" with "important natural or cultural resources" to more clearly identify the type of resources impacted by the emergency.

Under section 220.4(b)(1), timber salvage activities solely to reduce economic loss are not emergency actions as such activity is not necessary to control the immediate impacts to life, property, or important natural or cultural resources. Some confusion and/or concern may have arisen with the use of the word "important" because the Forest Service appeal regulations at 36 CFR 215 includes provisions for "emergency situations", a term that may include the concept of economic loss: "A situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed." (emphasis added). The appeal regulations cover a different process from the proposed NEPA procedures.

The appeal rule covers a broader range of harms which might occur during the processing of an administrative appeal. The emergency stay determination in the appeal rule allows the Forest Service to consider harms that may result from this delay in implementation. In contrast, an emergency response under this final rule is limited to actions necessary to control the immediate effects of an emergency, not the economic effects of delay brought about by an appeal.

*Comments.* Respondents wrote that an emergency response should not be used to constitute a special use permit request or to circumvent NEPA compliance for controversial projects.

*Response.* The final rule at section 220.4(b) does not create new permits or circumvent existing permits; it simply allows limited actions under narrowly defined emergency circumstances. As an example, any situations involving the use of emergency procedures under these regulations are nonetheless subject to the separate requirements of existing special use regulations at 36 CFR 251.50(b), which allow for the temporary occupancy of NFS lands without a special use authorization when necessary for the protection of life and property in emergencies.

*Comment.* Some people also questioned whether the emergency provision at § 220.4(b) would replace the Forest Service's efforts to assess the impacts of its fire retardant program.

*Response.* The Forest Service has completed an assessment of the impacts of the aerial application of fire retardant in an EA which is unaffected by this final rule. The title for that assessment is *Aerial Application of Fire Retardant Environmental Analysis, October 2007*. <http://www.fs.fed.us/fire/retardant/>.

*Comments.* Respondents were concerned about specific details of the "emergency response" provision. For example, what constitutes an emergency? Who determines the emergency, and how is it reported and documented for public review? Respondents are concerned that the looseness of the provision could provide an easy way to "slide projects through under the radar without having to do a proper analysis."

*Response.* There is no special meaning intended for the term "emergency" beyond its common usage as "an unforeseen combination of circumstances or the resulting state that calls for immediate action" (*Webster's Third New International Dictionary Of The English Language* 1961 and *Merriam-Webster's Collegiate Dictionary* (11th ed. 2004)); "a sudden, urgent, usually unexpected occurrence or

occasion requiring immediate action” (*Random House Dictionary of the English Language* (2ed. 1987)); “a state of things unexpectedly arising, and urgently demanding immediate action” (*The Oxford English Dictionary* 2ed. 1991) and “[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures \* \* \*” (*Black’s Law Dictionary* 260, 562 (8th ed. 2004)). The proposed regulation, as revised in this final rule, recognizes that responsible officials can take immediate actions to control the immediate impacts of an emergency to mitigate harm to life, property, or important natural or cultural resources.

As stated in the preamble of the proposed regulations, only such actions required to address the “immediate impacts of the emergency that are urgently required to mitigate harm to life, property, or important natural or cultural resources” may be taken without regard to the procedural requirements of NEPA, the CEQ regulations, or the proposed agency regulations. Thus, there are no NEPA documentation requirements for these types of situations and the final rule requires NEPA to apply to any and all subsequent proposed actions that address the underlying emergency (220.4(b)(2) and (3)). The provisions of 220.4 codify the existing Forest Service practice and CEQ guidance for emergency actions.

In the past the Forest Service has acted to protect lives, property, and important natural or cultural resources without this rule by adhering to CEQ regulations and guidance found in the CEQ *Memorandum for Federal NEPA Contacts on Emergency Actions and NEPA*, along with its associate attachments [http://ceq.hss.doe.gov/nepa/Memo\\_to\\_NEPA\\_Contacts\\_September\\_8\\_05](http://ceq.hss.doe.gov/nepa/Memo_to_NEPA_Contacts_September_8_05). For example, search and rescue or fire suppression operations responding to specific emergency situations caused by events such as flood, fire, landslides, storms, and explosions.

Sections 220.4(b)(2) and (b)(3) address emergency situations where the Forest Service puts forth proposals to address actions where “alternative arrangements” or routine NEPA requirements will be followed.

#### *Section 220.4(d) Schedule of Proposed Actions*

*Comments.* A concern was expressed that 220.4(d) contains a great deal of guidance rather than procedure language.

*Response.* The final rule removes the explanatory guidance related to the

schedule of proposed actions (SOPA). The final rule adds a definition of “Schedule of Proposed Actions (SOPA)” in section 220.3. The final rule, in section 220.4(d), establishes the duty of the responsible official to make the SOPA available to the public. FSH 1909.15 contains the explanatory guidance associated with this requirement.

*Comments.* A few respondents are concerned that the SOPA is used as the sole or only scoping mechanism. Respondents would like to see the Forest Service clarify that scoping must not be limited to the SOPA mechanism.

*Response.* Since its inception, the SOPA has not been intended to be used as the only scoping mechanism as stated in previous Forest Service NEPA procedures and in the proposed rule. The final rule retains this clarification and explicitly states “the SOPA shall not be used as the *sole* scoping mechanism for a proposed action.” (220.4(e)(3)) (emphasis added).

*Comment.* Several individuals mentioned that the Forest Service does not produce a SOPA for categorical exclusions (CE), which leads to projects being implemented before the public is informed.

*Response.* Forest Service categorical exclusions are organized in two groups: Actions requiring a supporting record and a decision memo documenting the decision to proceed, and actions where a supporting record and a decision memo are not required, but may be prepared at the discretion of the responsible official (see section 220.6). The first group of categorically excluded actions, for which a decision memo has been or will be prepared, are included in the SOPA (see definition at section 220.3). The Forest Service believes the latter group of actions, not requiring documentation, to be of low public interest and, therefore, not appropriate for inclusion in the SOPA (such as mowing the lawn). It is important to note that the rule states, “the SOPA shall not be used as the *sole* scoping mechanism for a proposed action.” (220.4(e)(3)).

#### *Section 220.4(f) Cumulative Effects Considerations of Past Actions*

*Comments.* Section 220.4(f) of the proposed rule addresses the consideration of past actions in cumulative effects analysis. Many respondents feel that in order to complete an effective cumulative effects analysis, the Forest Service must consider past projects. Some people are concerned that the rule would weaken the requirements to look at past actions and future actions and would streamline

the decisionmaking process for potentially destructive projects. On that same note, people believe that it is imperative to fully disclose all potential impacts a project might have or could have down the road, claiming that without full disclosure natural resources could be in danger. They asked how field personnel know what effects from past actions are relevant to current decisionmaking unless all such actions and their impacts were first considered.

Another concern expressed by some respondents was that the proposed rule would change the baseline condition of the landscape to what condition the landscape is considered to be in at the time an action is proposed, rather than the landscape condition at the time the Forest Service first started “managing” it.

Other individuals are concerned that any reduction in the scope of an agency’s responsibility to conduct cumulative impact analyses will undermine CEQ guidance and regulations. A respondent stated that the CEQ itself has recognized evidence that “the most devastating environmental effects may result \* \* \* from the combination of individually minor effects of multiple actions over time.”

One respondent said the proposal was an illegal attempt to get around court rulings on what must be considered. The respondent points out that regulations are supposed to be complying with the CEQ regulations, not creating some guidance that attempts to get around the regulations. Because of the importance of national forests and their ecological and social benefits to people, wildlife, and plants, one respondent encouraged Forest Service personnel to consider all cumulative impacts.

*Response.* At section 220.4(f), this final rule incorporates verbatim, the language for the analysis of cumulative effects from the June 24, 2005 CEQ *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis*, which may be found at [http://ceq.eh.doe.gov/nepa/regs/Guidance\\_on\\_CE.pdf](http://ceq.eh.doe.gov/nepa/regs/Guidance_on_CE.pdf). This provision is to be used with existing CEQ regulations, which use the terms effects and impacts synonymously and define cumulative impact as the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions (40 CFR 1508.7). The Forest Service agrees that it must consider past actions to determine cumulative effects, however, there is no requirement under NEPA or the CEQ regulations to arrive at a description of the state of the environment at some distant point in

the past when the Forest Service first began managing the land.

The focus of the CEQ guidance incorporated in this final rule is on the consideration of useful and relevant information related to past actions when determining the cumulative effects of proposals and alternatives. The Forest Service will conduct cumulative effects analyses necessary to inform decisionmaking and disclose environmental effects in compliance with NEPA.

To clarify the Forest Service's commitment to follow the quoted CEQ guidance concerning consideration of past actions, the first sentence in the final rule at section 220.4(g) is revised to state, "Cumulative effects analysis shall be carried out in accordance with 40 CFR 1508.7 and in accordance with "The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis" dated June 24, 2005:"

#### *Section 220.4(h) Incorporation by Reference*

*Comments.* Several conservation organizations have concerns about the incorporation by reference provision in the proposed rule: "Consistent with 40 CFR 1502.21, material may be incorporated by reference into any environmental or decision document." They are concerned the material will not be available to the public for review in a timely manner or included in the administrative record.

One conservation group feels the following needs to be added to section 220.4(h), "No material may be incorporated by reference unless it is available for inspection by potentially interested persons within the time allowed for comment." Another conservation group proposed the addition of "this material must be reasonably available to the public within the time allowed for comment and its content briefly described in the environmental document."

*Response.* Referring to material incorporated by reference, the proposed rule at section 220.4(h) explicitly stated, "This material must be reasonably available to the public and its contents briefly described in the environmental or decision document." This language is retained in the final rule and meets the Forest Service responsibilities and obligations under NEPA and the CEQ NEPA regulations to have the materials readily available during the comment period.

#### *Section 220.5(a) Classes of Actions Requiring Environmental Impact Statements*

*Comments.* Section 220.5(a)(1) details the classes of actions "normally" requiring preparation of an EIS. Given that "normally" was not previously found in this provision of Forest Service procedures, many respondents are concerned that the word "normally" would allow the Forest Service to use its discretion to avoid preparing an EIS for environmentally damaging actions. A concern was raised that the examples given in classes of actions normally requiring an EIS are extreme and fail to acknowledge the fact that far less extreme activities will occur which will cause "significant environmental impacts." A question was raised as to whether or not the requirements for these classes may be met by the appropriate use of program environmental impact statements and tiered site-specific environmental documents. A comment also noted that the requirements for a notice of intent to prepare an EIS at 220.5(b) should provide for situations where there is a lengthy period between the agency's decision to prepare an environmental impacts statement and the time of actual preparation pursuant to 40 CFR 1507.3(e).

*Response.* As many respondents note, previous Forest Service procedures identified "Classes of Actions Requiring Environmental Impact Statements." The proposed rule at section 220.5 added the word "normally", thus identifying classes of actions for which EISs are typically, but not always, required. This addition was made to comply with CEQ regulations for agency NEPA procedures that require agencies to identify typical classes of action "Which normally do require environmental statements" (40 CFR 1507.3(b)(2)(i)). It will be rare to not prepare an EIS given the circumstances described in the classes. The responsible official may prepare an EA in situations where an EIS is "normally" prepared if, in their professional judgment, they have complied with the standards for determination of significance as specified in the CEQ regulations at 40 CFR 1508.27. This standard is also articulated in the handbook being published concurrently with these regulations. Therefore, the final rule retains the word "normally" in section 220.5.

In the list of classes at section 220.5(a)(2), the final rule changes the reference to "inventoried roadless area" to "inventoried roadless area or potential wilderness area". Forest

Service land management planning procedures in FSH 1909.12, chapter 70, describe a facet of the land management planning process whereby potential wilderness areas are identified. Once completed, the identification of potential wilderness areas would be a more contemporary inventory than the previously-conducted roadless area inventory. Some units of the National Forest System have completed the identification of potential wilderness areas and no longer maintain an inventory of roadless areas, while others have not yet completed identification of potential wilderness areas and, therefore, still maintain a roadless area inventory. The intent of the revised language at 220.5(a)(2) is to account for either scenario.

Acreages were removed from the Class 2 examples in the proposed rule section 220.5(a) in response to concerns that the examples of actions for which EISs would normally be required represent extreme cases. The word "substantial" replaces the acreage in the first example (220.5(a)(i)) in the final rule to be consistent with the description of Class 2. The following new language has been included in the final rule at section 220.5(a): "Examples include but are not limited to:" To emphasize that the stated examples are not all-inclusive. The Department feels that the examples reflect Forest Service experience implementing NEPA and provide the context for each class.

The 3rd Class of Action listed in the proposed rule, "Other proposals to take major Federal actions that may significantly affect the quality of the human environment" was deleted in this final rule because it did not describe a proposal but only rephrased the requirement for when to prepare an EIS.

Program environmental impact statements will continue to satisfy the requirements of this section. Such impact statements document analyses of broad actions or programs. Site-specific environmental impact statements or environmental assessments for actions that fall within the scope of a program environmental impact statement need only summarize the issues discussed in the program statement and incorporate discussions from the program statement by reference, concentrating on the issues specific to the subsequent action. (See 40 CFR 1502.20)

Finally, the requirements for the notice of intent at 220.5(b) have been changed in the final rule to include the following sentence: "Where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual

preparation, the notice of intent may be published at a reasonable time in advance of preparation of the draft statement.”

#### Section 220.5(e) Alternatives

*Comments.* A concern was raised that the proposed rule language “reasonable alternatives should meet the purpose and need,” would preclude alternatives that do not fully meet the purpose and need for the proposal. The respondent felt the statement is unduly restrictive and should be modified to provide a justifiable range of reasonableness.

*Response.* The word “should” is retained in this provision in the final rule because it provides focus for the development and design of alternatives and continues to allow for reasonable variations, which encompass a reasonable range.

*Comments.* The proposed rule provision for documenting consideration of the no-action alternative by contrasting the current condition and expected future condition should the proposed action not be undertaken, raised a number of concerns that the Forest Service would no longer consider a no-action alternative. Some respondents are concerned that without the no-action alternative being documented and considered as traditionally done, the effects of doing nothing will not be adequately expressed. Some expressed that not considering a no-action alternative would be illegal.

*Response.* The intent of the proposed regulation is to continue to require consideration of the no-action alternative as required by 40 CFR 1502.14(d), yet the wording caused some to think the no action alternative would not be considered. To avoid confusion as to the Forest Service’s commitment always to consider and document the no-action alternative in an EIS, the proposed rule language is not in the final rule.

*Comments.* Proposed rule section 220.5(e)(3) recognizes how adaptive management may be incorporated into a proposal and alternatives. Some respondents are supportive of adaptive management and feel that if adjustments are made during implementation, the action would be acceptable so long as the adjustments were fully described and their effects disclosed in the EIS. Others however feel the rule is self-defeating because it still requires that adjustments be “clearly articulated and pre-specified” and “fully analyzed.” They would like to see the Forest Service’s final rule “clarify that adaptive management is intended to deal with

uncertainty, and that the goal is to use adaptation to achieve a desired result.”

Others expressed concern that a defined process for making adjustments with adaptive management has not been described. They ask, for example, who would be in charge of making the decision, how is the public informed, and how will the adjustments be monitored and reported. Several respondents feel that before an “adjustment” or substantial change is made, a supplemental EIS would be needed.

*Response.* Section 220.5(e)(3) of the proposed rule is retained in the final rule at section 220.5(e)(2). The intent of the adaptive management option in the proposed regulation is to allow for possible changes in an action to achieve the desired effect without having to reanalyze the proposal and reconsider the decision. When proposing an action the responsible official may identify possible adjustments that may be appropriate during project implementation. Those possible adjustments must be described and their effects analyzed in the EIS. The decision may then allow for those adjustments during project implementation.

The requirements for supplemental EISs at 40 CFR 1502.9(1) continues to apply under the final rule (see 220.1(b)). NEPA and the CEQ regulations do not specify how the Forest Service uses adaptive management, and it is the responsibility of the Forest Service to specify roles, responsibilities, and procedures for implementing adaptive management adjustments in the documents available for public notice and comment as part of NEPA and other statutes. If the responsible official identifies possible adjustments in the decision, the official will also identify any monitoring and/or public notification requirements as part of the NEPA and decisionmaking process. The need described under the CEQ regulations for a supplemental EIS on an adjustment is dependent on the degree to which the adjustment was specified and analyzed in the analyses. The responsible official is the person who is responsible for implementing the decision and making any adjustments during implementation. If the responsible official identified possible adjustments in the decision, the official will also identify any monitoring and/or public notification requirements as part of the NEPA and decisionmaking process.

#### Section 220.5(g) Circulating and Filing Draft and Final Environmental Impact Statements

Section 220.5(f)(2) of the final rule adds the reference “40 CFR 1506.9” to other citations related to requirements for filing and circulating EISs. The omission of this reference in the proposed rule was an oversight.

#### Section 220.6 Categorical Exclusions

*Comments.* Many respondents are concerned about a number of the categories set out in the proposed rule, for various reasons. Some conservation groups argue that the proposed rule is a continuation of the “administration’s disturbing and unfortunate trend toward undermining NEPA, from categorically excluding both forest planning and project-level decisions from NEPA analysis and documentation.” Many respondents feel the categorical exclusions should be eliminated from the rule; various people suggest some categories are illegal. Many respondents argue that certain categorically excluded actions would create significant impacts and should go through the NEPA process.

Some respondents reference *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007), stating the proposed rule is illegal in light of this ruling.

Additionally, some conservation groups are concerned about the Forest Service’s proposal to allow an internal review to determine whether an extraordinary circumstance will cause a proposed action to have a significant impact on the environment. Citing *Rhodes v. Johnson*, 153 F.3d 785, 790 (7th Cir 1998), they state that the environmental assessment is the process required to make the determination if the proposed action will have a significant impact on the environment. The group believes that the wording of the proposed rule at 220.6(b), regarding the determination whether there are extraordinary circumstances, should be changed from “Resource conditions that should be considered” to “Resource conditions that shall be considered \* \* \*”. They also believe that the list of resource conditions provided in the proposed rule should not be exhaustive, and that other items should be added such as inventoried roadless areas, steep slopes, highly erosive soils, state listed species, karst topography, caves, and proposed wild and scenic river corridors. The regulations should require an analysis addressing any extraordinary circumstance listed in the regulations or identified in public comments, according to the respondent.

*Response.* This final rule is moving established categories and language on extraordinary circumstances from the Forest Service NEPA procedures previously located in FSH 1909.15 to 36 CFR 220.6. These categories and requirements were established following public review and comment, in consultation with CEQ and with CEQ's concurrence. The final rule does not add any new categories, nor does it substantively alter existing requirements regarding extraordinary circumstances. The Department did not propose any changes to the categorical exclusions or associated requirements and does not believe any changes are warranted in this final rule.

Regarding the allegation that the court ruling in *Citizens for Better Forestry v. U.S. Dept. of Agriculture* makes this rule illegal: In an order dated March 30, 2007, the United States District Court enjoined the USDA from implementing and utilizing the 2005 land management planning rule at 36 CFR part 219 until it takes additional steps to comply with the court's opinion regarding the Administrative Procedure Act (APA), Endangered Species Act (ESA), and NEPA. The Court stated, "In particular, the agency must provide notice and comment on the 2005 Rule as required by the APA since the court concludes that the rule was not a 'logical outgrowth' of the 2002 Proposed Rule. Additionally, because the 2005 Rule may significantly affect the quality of the human environment under NEPA, and because it may affect listed species and their habitat under ESA, the agency must conduct further analysis and evaluation of the impact of the 2005 Rule in accordance with those statutes." This ruling on the forest planning regulations (which have been revised and reissued in 2008) in no way invalidates this final rule regarding Forest Service NEPA obligations and responsibilities for proposed forest plans.

The court ruling cited by some respondents in *Rhodes v. Johnson* concerned an interpretation of the Forest Service's procedures for determining whether extraordinary circumstances exist. The ruling was made in 1998. In 2002, the Forest Service clarified its procedures for consideration of extraordinary circumstances, in consultation with CEQ and following public review and comment. The clarification specified that the mere presence of one or more of the listed resource conditions does not preclude use of a categorical exclusion; rather it is the degree of potential effect of a proposed action on the resource conditions that determines

whether or not extraordinary circumstances exist. Furthermore, the provision at § 220.6(c) states that uncertainty over the significance of effects of a proposed action requires preparation of an EA.

If a proposed action is within a categorical exclusion identified in Forest Service procedures, the responsible official must determine that there are no extraordinary circumstances in which a normally excluded action may have a significant environmental effect. The responsible official relies on many sources of information in making a determination concerning extraordinary circumstances, including public comment, specialist reports, and consultation with other agencies.

The extraordinary circumstances requirements include a list of resource conditions that "should" be considered. "Should" is used instead of "shall" because "should" underscores that the list is not intended to be exhaustive. The list of resource conditions is intended as a starting place and does not preclude consideration of other factors or conditions by the responsible official with the potential for significant environmental effects.

While some Forest Service categorical exclusions of limited scope do not require a decision memo or project record, a majority of the Forest Service's categories do require preparation of a decision memo and a supporting record. The project record and decision memo both document the determination that no extraordinary circumstances exist (§ 220.6(e) and (f)).

Reviewers should note that the United States Court of Appeals for the Ninth Circuit has invalidated the categorical exclusion for hazardous fuels reduction activities (§ 220.6(e)(10)). *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007). A motion for rehearing is pending for that case. Because judicial proceedings are ongoing the category will be retained subject to the Chief's December 19, 2007 instructions that Forest Service officials must refrain from use of this category while the litigation remains unresolved. See [http://www.fs.fed.us/emc/nepa/nepa\\_procedures/index.htm](http://www.fs.fed.us/emc/nepa/nepa_procedures/index.htm). The Forest Service will fully comply with all judicial orders and instructions. Once the judicial process has been concluded, the category will either remain or be removed, depending upon the litigation's outcome. If, at a later date, the Department determines changes need to be made to section 220.6, those proposed changes will be made in consultation with CEQ and made available to the public for review and comment.

The Department moved existing Forest Service categories and associated language directly from its NEPA procedures previously found in FSH 1909.15 chapter 30 to the proposed rule. The only changes made were minor editorial changes for clarity. In transmitting and formatting the existing categorical exclusions for the proposed regulation, the following statement about "decision memos" in the existing procedures was inadvertently left out of the proposed regulation: "If the proposed action is approval of a land management plan, plan amendment, or plan revision, the plan approval document required by 36 CFR 219.7(c) satisfies the decision memo requirements of this section." The statement is intended to avoid duplicate decision documents for land management plans. Thus, the final rule includes this statement.

#### *Section 220.7 Environmental Assessments*

*Comments.* One conservation group is concerned about the length of EAs. This group believes the Forest Service is producing lengthy EAs, which should be EISs. They state that the CEQ has advised agencies to keep the length for an EA to 10–15 pages. They feel that the Forest Service may incorporate material by reference to reduce the length of the document. The group suggests that the Forest Service should add page requirements to its proposed rule, to avoid lengthy EAs.

*Response.* The final rule includes incorporation by reference in section 220.4, General Requirements, subsection (h) 'Incorporation by Reference', section 220.7 'Environmental Analysis and Decision Notice', subsections (a), (b)(2)(iii) and (iv). Section 220.7, 'Environmental Analysis and Decision Notices' emphasizes brief, succinct documentation. Existing guidance emphasizes the use of incorporation by reference as a tool for the responsible official to use, and grants the flexibility needed to provide the documentation necessary for the analysis but keeps the page limits within what is required for adequate disclosure. Consequently, there is no need to set specific page limits.

*Comments.* Many respondents commented on section 220.7(b)(iii) of the proposed rule, which would allow consideration of a no-action alternative to be shown by contrasting the impacts of the proposal and alternatives with the current condition and expected future conditions if the proposed action were not implemented. Many respondents expressed the importance of not allowing such a "no-action alternative"

to lead to a decreased analysis and consideration of “no-action.” They emphasize that informed and meaningful consideration of alternatives, including the no-action alternative, is an integral part of the NEPA process.

*Response.* After consideration of the comments, the Department has chosen to keep the provision in the final rule. There is no specific CEQ requirement to include a no-action alternative in an EA and the language follows CEQ’s EA guidance *Preparing Focused, Concise and Timely Environmental Assessments* (see [http://ceq.eh.doe.gov/nepa/regs/Preparing\\_Focused\\_Concise\\_and\\_Timely\\_EAs.pdf](http://ceq.eh.doe.gov/nepa/regs/Preparing_Focused_Concise_and_Timely_EAs.pdf)). By contrasting the impacts of the proposal and alternatives with the current condition and expected future condition of the environment, the effects of a no-action alternative are considered. This provision is provided as an option for responsible officials to use if in their best judgment it serves the need of the analysis.

*Comments.* Respondents want the Forest Service to provide a definition for “unresolved conflicts” and to present examples of such actions. Others want to know who decides whether there are “no unresolved conflicts concerning alternative uses of available resources.”

*Response.* The term “unresolved conflicts” comes directly from NEPA (42 U.S.C. 4332(2)(E)). Typically, most Forest Service proposals will have alternatives; however, the final rule specifically recognizes that in some situations there may be no conflicts regarding a proposed action and in such cases alternatives would not be required.

On September 8, 2005, the CEQ issued EA guidance to federal agencies entitled *Preparing Focused, Concise and Timely Environmental Assessments*, that explained language at section 102(2)(E) of NEPA “unresolved conflicts concerning alternative uses of available resources” (42 U.S.C. 4332(2)(E)). The CEQ guidance states: “When there is consensus about the proposed action based on input from interested parties, you can consider the proposed action and proceed without consideration of additional alternatives. Otherwise, you need to develop reasonable alternatives to meet project needs” (Attachment to September 8, 2005, Memorandum for Federal NEPA Contacts [http://ceq.eh.doe.gov/nepa/regs/Preparing\\_Focused\\_Concise\\_and\\_Timely\\_EAs.pdf](http://ceq.eh.doe.gov/nepa/regs/Preparing_Focused_Concise_and_Timely_EAs.pdf)). Ultimately, the responsible official must decide on whether alternatives to the proposed action are appropriate, “based on input from interested parties.”

## Regulatory Certification

### *National Environmental Policy Act*

The final rule would move existing procedures for implementing the National Environmental Policy Act (NEPA) from the Forest Service handbook to 36 CFR part 220 and provide additional direction. The rule would not directly impact the environment. Forest Service NEPA procedures are procedural guidance to 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. The CEQ set forth the requirements for establishing agency NEPA procedures in its regulations at 40 CFR 1505.1 and 1507.3. The CEQ regulations do not require agencies to conduct NEPA analyses or prepare NEPA documentation when establishing 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).

### *Regulatory Impact*

This final rule has been reviewed under USDA procedures and Executive Order 12866 issued September 30, 1993, as amended by Executive Order 13422 on regulatory planning and review and the major rule provisions of the Small Business Regulatory Enforcement and Fairness Act (5 U.S.C. 800). It has been determined that this is not an economically significant action. This action to issue agency regulations will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor state or local governments. This action will not interfere with an action taken or planned by another agency. This action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. However, because of the extensive interest in National Forest System (NFS) planning and decision-making, this final rule to establish agency implementing procedures for NEPA in the Code of Federal Regulations (CFR) has been designated as significant and, therefore, is subject to Office of Management and Budget (OMB) review under Executive Order 12866.

In accordance with the OMB Circular A–4, “Regulatory Analysis,” a cost/benefit analysis was conducted. The

analysis compared the costs and benefits associated with the current condition of having agency implementing procedures combined with agency explanatory guidance in Forest Service Handbook (FSH) and this final condition of having implementing direction in regulation and explanatory guidance in FSH.

Many benefits and costs associated with the rule are not quantifiable. Benefits, including collaborative and participatory public involvement to more fully address public concerns, timely and focused environmental analysis, flexibility in preparation of environmental documents, and improved legal standing indicate a positive effect of the new rule.

Moving implementing NEPA procedures from the FSH to regulation is expected to provide a variety of potentially beneficial effects. This rule gives Forest Service NEPA procedures more visibility, consistent with the transparent nature of the Agency’s environmental analysis and decision-making.

Maintaining agency explanatory guidance in the FSH would facilitate timely agency responses to new ideas, new information, procedural interpretations, training needs, and editorial changes to addresses and internet links to assist field units when implementing the NEPA process. Finally, the changes to the Forest Service NEPA procedures are intended to provide the Forest Service specific options to meet the intent of NEPA through collaboration, the establishment of incremental alternative development, and the use of adaptive management principles.

Based on the context of this analysis, no one factor creates a significant factor, but taken together does create the potential for visible improvements in the agency’s NEPA program.

Moreover, this final rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial small entities flexibility assessment has been made and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by SBREFA.

### *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.

#### *Consultation and Coordination With Indian Tribal Governments*

Pursuant to Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments, the Agency has assessed the impact of this rule on Indian Tribal governments and has determined that it does not significantly or uniquely affect communities of Indian Tribal governments. The rule deals with requirements for NEPA analysis and has no direct effect regarding the occupancy and use of NFS land.

The Agency has also determined that this rule does not impose substantial direct compliance costs on Indian Tribal governments or preempt Tribal law. Therefore, it has been determined that this rule does not have Tribal implications requiring advance consultation with Indian Tribes.

#### *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 rule has been reviewed under Executive Order 12988 of February 7, 1996, Civil Justice Reform. After adoption of this rule, (1) all State and local laws and regulations that conflict with this rule or that would impede full implementation of this rule would be preempted; (2) no retroactive effect would be given to this rule; and (3) the rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

#### *Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Agency has assessed the effects of this final rule

on State, local, and Tribal governments and the private sector. This rule does not compel the expenditure of \$100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

#### *Energy Effects*

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

#### *Controlling Paperwork Burdens on the Public*

This 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 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, the Department of Agriculture amends chapter II of Title 36 of the Code of Federal Regulations by adding part 220 to read as follows:

#### **PART 220—NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) COMPLIANCE**

Sec.	
220.1	Purpose and scope.
220.2	Applicability.
220.3	Definitions.
220.4	General requirements.
220.5	Environmental impact statement and record of decision.
220.6	Categorical exclusions.
220.7	Environmental assessment and decision notice.

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

#### **§ 220.1 Purpose and scope.**

(a) *Purpose.* This part establishes Forest Service, U.S. Department of Agriculture (USDA) procedures for compliance with the National

Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500 through 1508).

(b) *Scope.* This part supplements and does not lessen the applicability of the CEQ regulations, and is to be used in conjunction with the CEQ regulations and USDA regulations at 7 CFR part 1b.

#### **§ 220.2 Applicability.**

This part applies to all organizational elements of the Forest Service. Consistent with 40 CFR 1500.3, no trivial violation of this part shall give rise to any independent cause of action.

#### **§ 220.3 Definitions.**

The following definitions supplement, by adding to, the terms defined at 40 CFR parts 1500–1508.

*Adaptive management.* A system of management practices based on clearly identified intended outcomes and monitoring to determine if management actions are meeting those outcomes; and, if not, to facilitate management changes that will best ensure that those outcomes are met or re-evaluated. Adaptive management stems from the recognition that knowledge about natural resource systems is sometimes uncertain.

*Decision document.* A record of decision, decision notice or decision memo.

*Decision memo.* A concise written record of the responsible official's decision to implement an action categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA).

*Decision notice.* A concise written record of the responsible official's decision when an EA and finding of no significant impact (FONSI) have been prepared.

*Environmentally preferable alternative.* The environmentally preferable alternative is the alternative that will best promote the national environmental policy as expressed in NEPA's section 101 (42 U.S.C. 4321). Ordinarily, the environmentally preferable alternative is that which causes the least harm to the biological and physical environment; it also is the alternative which best protects and preserves historic, cultural, and natural resources. In some situations, there may be more than one environmentally preferable alternative.

*Reasonably foreseeable future actions.* Those Federal or non-Federal activities not yet undertaken, for which there are existing decisions, funding, or identified

proposals. Identified proposals for Forest Service actions are described in § 220.4(a)(1).

*Responsible official.* The Agency employee who has the authority to make and implement a decision on a proposed action.

*Schedule of proposed actions (SOPA).* A Forest Service document that informs the public about those proposed and ongoing Forest Service actions for which a record of decision, decision notice or decision memo would be or has been prepared. The SOPA also identifies a contact for additional information on any proposed actions.

#### § 220.4 General requirements.

(a) *Proposed actions subject to the NEPA requirements.* As required by 42 U.S.C. 4321 *et seq.*, a Forest Service proposal is subject to the NEPA requirements when all of the following apply:

(1) The Forest Service has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated (*see* 40 CFR 1508.23);

(2) The proposed action is subject to Forest Service control and responsibility (*see* 40 CFR 1508.18);

(3) The proposed action would cause effects on the natural and physical environment and the relationship of people with that environment (*see* 40 CFR 1508.14); and

(4) The proposed action is not statutorily exempt from the requirements of section 102(2)(C) of the NEPA (42 U.S.C. 4332(2)(C)).

(b) *Emergency responses.* When the responsible official determines that an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis and any required documentation in accordance with the provisions in §§ 220.5, 220.6, and 220.7 of this part, then the following provisions apply.

(1) The responsible official may take actions necessary to control the immediate impacts of the emergency and are urgently needed to mitigate harm to life, property, or important natural or cultural resources. When taking such actions, the responsible official shall take into account the probable environmental consequences of the emergency action and mitigate foreseeable adverse environmental effects to the extent practical.

(2) If the responsible official proposes emergency actions other than those actions described in paragraph (b)(1) of this section, and such actions are not likely to have significant environmental

impacts, the responsible official shall document that determination in an EA and FONSI prepared in accord with these regulations. If the responsible official finds that the nature and scope of proposed emergency actions are such that they must be undertaken prior to preparing any NEPA analysis and documentation associated with a CE or an EA and FONSI, the responsible official shall consult with the Washington Office about alternative arrangements for NEPA compliance. The Chief or Associate Chief of the Forest Service may grant emergency alternative arrangements under NEPA for environmental assessments, findings of no significant impact and categorical exclusions (FSM 1950.41a). Consultation with the Washington Office shall be coordinated through the appropriate regional office.

(3) If the responsible official proposes emergency actions other than those actions described in paragraph (b)(1) of this section and such actions are likely to have significant environmental impacts, then the responsible official shall consult with CEQ, through the appropriate regional office and the Washington Office, about alternative arrangements in accordance with CEQ regulations at 40 CFR 1506.11 as soon as possible.

(c) *Agency decisionmaking.* For each Forest Service proposal (§ 220.4(a)), the responsible official shall coordinate and integrate NEPA review and relevant environmental documents with agency decisionmaking by:

(1) Completing the environmental document review before making a decision on the proposal;

(2) Considering environmental documents, public and agency comments (if any) on those documents, and agency responses to those comments;

(3) Including environmental documents, comments, and responses in the administrative record;

(4) Considering the alternatives analyzed in environmental document(s) before rendering a decision on the proposal; and

(5) Making a decision encompassed within the range of alternatives analyzed in the environmental documents.

(d) *Schedule of proposed actions (SOPA).* The responsible official shall ensure the SOPA is updated and notify the public of the availability of the SOPA.

(e) *Scoping (40 CFR 1501.7).* (1) Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further

analysis and documentation in an EA or an EIS (§ 220.6).

(2) Scoping shall be carried out in accordance with the requirements of 40 CFR 1501.7. Because the nature and complexity of a proposed action determine the scope and intensity of analysis, no single scoping technique is required or prescribed.

(3) The SOPA shall not be used as the sole scoping mechanism for a proposed action.

(f) *Cumulative effects considerations of past actions.* Cumulative effects analysis shall be carried out in accordance with 40 CFR 1508.7 and in accordance with “The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis” dated June 24, 2005. The analysis of cumulative effects begins with consideration of the direct and indirect effects on the environment that are expected or likely to result from the alternative proposals for agency action. Agencies then look for present effects of past actions that are, in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its alternatives. CEQ regulations do not require the consideration of the individual effects of all past actions to determine the present effects of past actions. Once the agency has identified those present effects of past actions that warrant consideration, the agency assesses the extent that the effects of the proposal for agency action or its alternatives will add to, modify, or mitigate those effects. The final analysis documents an agency assessment of the cumulative effects of the actions considered (including past, present, and reasonable foreseeable future actions) on the affected environment. With respect to past actions, during the scoping process and subsequent preparation of the analysis, the agency must determine what information regarding past actions is useful and relevant to the required analysis of cumulative effects.

Cataloging past actions and specific information about the direct and indirect effects of their design and implementation could in some contexts be useful to predict the cumulative effects of the proposal. The CEQ regulations, however, do not require agencies to catalogue or exhaustively list and analyze all individual past actions. Simply because information about past actions may be available or obtained with reasonable effort does not mean that it is relevant and necessary to inform decisionmaking. (40 CFR 1508.7)

(g) *Classified information.* To the extent practicable, the responsible official shall segregate any information that has been classified pursuant to Executive order or statute. The responsible official shall maintain the confidentiality of such information in a manner required for the information involved. Such information may not be included in any publicly disclosed documents. If such material cannot be reasonably segregated, or if segregation would leave essentially meaningless material, the responsible official must withhold the entire analysis document from the public; however, the responsible official shall otherwise prepare the analysis documentation in accord with applicable regulations. (40 CFR 1507.3(c))

(h) *Incorporation by reference.* Material may be incorporated by reference into any environmental or decision document. This material must be reasonably available to the public and its contents briefly described in the environmental or decision document. (40 CFR 1502.21)

(i) *Applicants.* The responsible official shall make policies or staff available to advise potential applicants of studies or other information foreseeably required for acceptance of their applications. Upon acceptance of an application as provided by 36 CFR 251.54(g) the responsible official shall initiate the NEPA process.

#### § 220.5 Environmental impact statement and record of decision.

(a) *Classes of actions normally requiring environmental impact statements.*

(1) *Class 1:* Proposals to carry out or to approve aerial application of chemical pesticides on an operational basis. Examples include but are not limited to:

(i) Applying chemical insecticides by helicopter on an area infested with spruce budworm to prevent serious resource loss.

(ii) Authorizing the application of herbicides by helicopter on a major utility corridor to control unwanted vegetation.

(iii) Applying herbicides by fixed-wing aircraft on an area to release trees from competing vegetation.

(2) *Class 2:* Proposals that would substantially alter the undeveloped character of an inventoried roadless area or a potential wilderness area. Examples include but are not limited to:

(i) Constructing roads and harvesting timber in an inventoried roadless area where the proposed road and harvest units impact a substantial part of the inventoried roadless area.

(ii) Constructing or reconstructing water reservoir facilities in a potential wilderness area where flow regimens may be substantially altered.

(iii) Approving a plan of operations for a mine that would cause considerable surface disturbance in a potential wilderness area.

(b) *Notice of intent.* Normally, a notice of intent to prepare an EIS shall be published in the **Federal Register** as soon as practicable after deciding that an EIS will be prepared. Where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent may be published at a reasonable time in advance of preparation of the draft statement. A notice must meet the requirements of 40 CFR 1508.22, and in addition, include the following:

(1) Title of the responsible official(s);

(2) Any permits or licenses required to implement the proposed action and the issuing authority;

(3) Lead, joint lead, or cooperating agencies if identified; and

(4) Address(es) to which comments may be sent.

(c) *Withdrawal notice.* A withdrawal notice must be published in the **Federal Register** if, after publication of the notice of intent or notice of availability, an EIS is no longer necessary. A withdrawal notice must refer to the date and **Federal Register** page number of the previously published notice(s).

(d) *Environmental impact statement format and content.* The responsible official may use any EIS format and design as long as the statement is in accord with 40 CFR 1502.10.

(e) *Alternative(s).* The EIS shall document the examination of reasonable alternatives to the proposed action. An alternative should meet the purpose and need and address one or more significant issues related to the proposed action. Since an alternative may be developed to address more than one significant issue, no specific number of alternatives is required or prescribed. The following procedures are available to the responsible official to develop and analyze alternatives:

(1) The responsible official may modify the proposed action and alternative(s) under consideration prior to issuing a draft EIS. In such cases, the responsible official may consider the incremental changes as alternatives considered. The documentation of these incremental changes to a proposed action or alternatives shall be included or incorporated by reference in accord with 40 CFR 1502.21.

(2) The proposed action and one or more alternatives to the proposed action

may include adaptive management. An adaptive management proposal or alternative must clearly identify the adjustment(s) that may be made when monitoring during project implementation indicates that the action is not having its intended effect, or is causing unintended and undesirable effects. The EIS must disclose not only the effect of the proposed action or alternative but also the effect of the adjustment. Such proposal or alternative must also describe the monitoring that would take place to inform the responsible official during implementation whether the action is having its intended effect.

(f) *Circulating and filing draft and final environmental impact statements.*

(1) The draft and final EISs shall be filed with the Environmental Protection Agency's Office of Federal Activities in Washington, DC (*see* 40 CFR 1506.9).

(2) Requirements at 40 CFR 1506.9 "Filing requirements," 40 CFR 1506.10 "Timing of agency action," and 40 CFR 1502.19 "Circulation of the environmental impact statement" shall only apply to the last draft and final EIS and not apply to material produced prior to the draft EIS or between the draft and final EIS which are filed with EPA.

(3) When the responsible official determines that an extension of the review period on a draft EIS is appropriate, notice shall be given in the same manner used for inviting comments on the draft.

(g) *Distribution of the record of decision.* The responsible official shall notify interested or affected parties of the availability of the record of decision as soon as practical after signing.

#### § 220.6 Categorical exclusions.

(a) *General.* A proposed action may be categorically excluded from further analysis and documentation in an EIS or EA only if there are no extraordinary circumstances related to the proposed action and if:

(1) The proposed action is within one of the categories established by the Secretary at 7 CFR part 1b.3; or

(2) The proposed action is within a category listed in § 220.6(d) and (e).

(b) *Resource conditions.* (1) Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS are:

(i) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;

(ii) Flood plains, wetlands, or municipal watersheds;  
 (iii) Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas;  
 (iv) Inventoried roadless area or potential wilderness area;  
 (v) Research natural areas;  
 (vi) American Indians and Alaska Native religious or cultural sites; and  
 (vii) Archaeological sites, or historic properties or areas.

(2) The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion (CE). It is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

(c) *Scoping*. If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS.

(d) *Categories of actions for which a project or case file and decision memo are not required*. A supporting record and a decision memo are not required, but at the discretion of the responsible official, may be prepared for the following categories:

(1) Orders issued pursuant to 36 CFR part 261—Prohibitions to provide short-term resource protection or to protect public health and safety. Examples include but are not limited to:

(i) Closing a road to protect bighorn sheep during lambing season, and  
 (ii) Closing an area during a period of extreme fire danger.

(2) Rules, regulations, or policies to establish servicewide administrative procedures, program processes, or instructions. Examples include but are not limited to:

(i) Adjusting special use or recreation fees using an existing formula;

(ii) Proposing a technical or scientific method or procedure for screening effects of emissions on air quality related values in Class I wildernesses;

(iii) Proposing a policy to defer payments on certain permits or contracts to reduce the risk of default;

(iv) Proposing changes in contract terms and conditions or terms and conditions of special use authorizations;

(v) Establishing a servicewide process for responding to offers to exchange land and for agreeing on land values; and

(vi) Establishing procedures for amending or revising forest land and resource management plans.

(3) Repair and maintenance of administrative sites. Examples include but are not limited to:

(i) Mowing lawns at a district office;

(ii) Replacing a roof or storage shed;

(iii) Painting a building; and

(iv) Applying registered pesticides for rodent or vegetation control.

(4) Repair and maintenance of roads, trails, and landline boundaries.

Examples include but are not limited to:

(i) Authorizing a user to grade, resurface, and clean the culverts of an established NFS road;

(ii) Grading a road and clearing the roadside of brush without the use of herbicides;

(iii) Resurfacing a road to its original condition;

(iv) Pruning vegetation and cleaning culverts along a trail and grooming the surface of the trail; and

(v) Surveying, painting, and posting landline boundaries.

(5) Repair and maintenance of recreation sites and facilities. Examples include but are not limited to:

(i) Applying registered herbicides to control poison ivy on infested sites in a campground;

(ii) Applying registered insecticides by compressed air sprayer to control insects at a recreation site complex;

(iii) Repaving a parking lot; and

(iv) Applying registered pesticides for rodent or vegetation control.

(6) Acquisition of land or interest in land. Examples include but are not limited to:

(i) Accepting the donation of lands or interests in land to the NFS, and

(ii) Purchasing fee, conservation easement, reserved interest deed, or other interests in lands.

(7) Sale or exchange of land or interest in land and resources where resulting land uses remain essentially the same. Examples include but are not limited to:

(i) Selling or exchanging land pursuant to the Small Tracts Act;

(ii) Exchanging NFS lands or interests with a State agency, local government, or other non-Federal party (individual or organization) with similar resource management objectives and practices;

(iii) Authorizing the Bureau of Land Management to issue leases on producing wells when mineral rights revert to the United States from private ownership and there is no change in activity; and

(iv) Exchange of administrative sites involving other than NFS lands.

(8) Approval, modification, or continuation of minor, short-term (1 year or less) special uses of NFS lands.

Examples include, but are not limited to:

(i) Approving, on an annual basis, the intermittent use and occupancy by a State-licensed outfitter or guide;

(ii) Approving the use of NFS land for apiaries; and

(iii) Approving the gathering of forest products for personal use.

(9) Issuance of a new permit for up to the maximum tenure allowable under the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b) for an existing ski area when such issuance is a purely ministerial action to account for administrative changes, such as a change in ownership of ski area improvements, expiration of the current permit, or a change in the statutory authority applicable to the current permit. Examples include, but are not limited to:

(i) Issuing a permit to a new owner of ski area improvements within an existing ski area with no changes to the master development plan, including no changes to the facilities or activities for that ski area;

(ii) Upon expiration of a ski area permit, issuing a new permit to the holder of the previous permit where the holder is not requesting any changes to the master development plan, including changes to the facilities or activities; and

(iii) Issuing a new permit under the National Forest Ski Area Permit Act of 1986 to the holder of a permit issued under the Term Permit and Organic Acts, where there are no changes in the type or scope of activities authorized and no other changes in the master development plan.

(10) Amendment to or replacement of an existing special use authorization that involves only administrative changes and does not involve changes in the authorized facilities or increase in the scope or intensity of authorized activities, or extensions to the term of authorization, when the applicant or holder is in full compliance with the terms and conditions of the special use authorization. Examples include, but are not limited to:

(i) Amending a special use authorization to reflect administrative changes such as adjustment to the land use fees, inclusion of non-discretionary environmental standards or updating a special use authorization to bring it into conformance with current laws or regulations (for example, new monitoring required by water quality standards), and

(ii) Issuance of a new special use authorization to reflect administrative changes such as, a change of ownership or control of previously authorized

facilities or activities, or conversion of the existing special use authorization to a new type of special use authorization (for example, converting a permit to a lease or easement).

(e) *Categories of actions for which a project or case file and decision memo are required.* A supporting record is required and the decision to proceed must be documented in a decision memo for the categories of action in paragraphs (e)(1) through (17) of this section. As a minimum, the project or case file should include any records prepared, such as: The names of interested and affected people, groups, and agencies contacted; the determination that no extraordinary circumstances exist; a copy of the decision memo; and a list of the people notified of the decision. If the proposed action is approval of a land management plan, plan amendment, or plan revision, the plan approval document required by 36 CFR part 219 satisfies the decision memo requirements of this section.

(1) Construction and reconstruction of trails. Examples include, but are not limited to:

(i) Constructing or reconstructing a trail to a scenic overlook, and  
(ii) Reconstructing an existing trail to allow use by handicapped individuals.

(2) Additional construction or reconstruction of existing telephone or utility lines in a designated corridor. Examples include, but are not limited to:

(i) Replacing an underground cable trunk and adding additional phone lines, and

(ii) Reconstructing a power line by replacing poles and wires.

(3) Approval, modification, or continuation of minor special uses of NFS lands that require less than five contiguous acres of land. 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 40-foot utility corridor that crosses one mile of a national forest;

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

(vi) Approving an additional telecommunication use at a site already used for such purposes;

(vii) Approving the removal of mineral materials from an existing community pit or common-use area; and

(viii) Approving the continued use of land where such use has not changed

since authorized and no change in the physical environment or facilities are proposed.

(4) [Reserved]

(5) Regeneration of an area to native tree species, including site preparation that does not involve the use of herbicides or result in vegetation type conversion. Examples include, but are not limited to:

(i) Planting seedlings of superior trees in a progeny test site to evaluate genetic worth, and

(ii) Planting trees or mechanical seed dispersal of native tree species following a fire, flood, or landslide.

(6) Timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction. Examples include, but are not limited to:

(i) Girdling trees to create snags;

(ii) Thinning or brush control to improve growth or to reduce fire hazard including the opening of an existing road to a dense timber stand;

(iii) Prescribed burning to control understory hardwoods in stands of southern pine; and

(iv) Prescribed burning to reduce natural fuel build-up and improve plant vigor.

(7) Modification or maintenance of stream or lake aquatic habitat improvement structures using native materials or normal practices. Examples include, but are not limited to:

(i) Reconstructing a gabion with stone from a nearby source;

(ii) Adding brush to lake fish beds; and

(iii) Cleaning and resurfacing a fish ladder at a hydroelectric dam.

(8) Short-term (1 year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than 1 mile of low standard road, or use and minor repair of existing roads. Examples include, but are not limited to:

(i) Authorizing geophysical investigations which use existing roads that may require incidental repair to reach sites for drilling core holes, temperature gradient holes, or seismic shot holes;

(ii) Gathering geophysical data using shot hole, vibroseis, or surface charge methods;

(iii) Trenching to obtain evidence of mineralization;

(iv) Clearing vegetation for sight paths or from areas used for investigation or support facilities;

(v) Redesigning or rearranging surface facilities within an approved site;

(vi) Approving interim and final site restoration measures; and

(vii) Approving a plan for exploration which authorizes repair of an existing road and the construction of 1/3 mile of temporary road; clearing vegetation from an acre of land for trenches, drill pads, or support facilities.

(9) Implementation or modification of minor management practices to improve allotment condition or animal distribution when an allotment management plan is not yet in place. Examples include, but are not limited to:

(i) Rebuilding a fence to improve animal distribution;

(ii) Adding a stock watering facility to an existing water line; and

(iii) Spot seeding native species of grass or applying lime to maintain forage condition.

(10) Hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres; and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. Such activities:

(i) Shall be limited to areas:

(A) In the wildland-urban interface; or

(B) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface.

(ii) Shall be identified through a collaborative framework as described in "A Collaborative Approach for Reducing Wildland Fire Risks to Communities and Environment 10-Year Comprehensive Strategy Implementation Plan";

(iii) Shall be conducted consistent with Agency and Departmental procedures and applicable land and resource management plans;

(iv) Shall not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness; and

(v) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and may include the sale of vegetative material if the primary purpose of the activity is hazardous fuels reduction.

(11) Post-fire rehabilitation activities, not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds), to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or to repair or replace minor facilities damaged by fire. Such activities:

(i) Shall be conducted consistent with Agency and Departmental procedures and applicable land and resource management plans;

(ii) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and

(iii) Shall be completed within 3 years following a wildland fire.

(12) Harvest of live trees not to exceed 70 acres, requiring no more than ½ mile of temporary road construction. Do not use this category for even-aged regeneration harvest or vegetation type conversion. The proposed action may include incidental removal of trees for landings, skid trails, and road clearing. Examples include, but are not limited to:

(i) Removal of individual trees for sawlogs, specialty products, or fuelwood, and

(ii) Commercial thinning of overstocked stands to achieve the desired stocking level to increase health and vigor.

(13) Salvage of dead and/or dying trees not to exceed 250 acres, requiring no more than ½ mile of temporary road construction. The proposed action may include incidental removal of live or dead trees for landings, skid trails, and road clearing. Examples include, but are not limited to:

(i) Harvest of a portion of a stand damaged by a wind or ice event and construction of a short temporary road to access the damaged trees, and

(ii) Harvest of fire-damaged trees.

(14) Commercial and non-commercial sanitation harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than ½ mile of temporary road construction, including removal of infested/infected trees and adjacent live uninfested/uninfected trees as determined necessary to control the spread of insects or disease. The proposed action may include incidental removal of live or dead trees for landings, skid trails, and road clearing. Examples include, but are not limited to:

(i) Felling and harvest of trees infested with southern pine beetles and immediately adjacent uninfested trees to control expanding spot infestations, and

(ii) Removal and/or destruction of infested trees affected by a new exotic insect or disease, such as emerald ash borer, Asian long horned beetle, and sudden oak death pathogen.

(15) Issuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are not changes to the authorized facilities or increases in

the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization.

(16) Land management plans, plan amendments, and plan revisions developed in accordance with 36 CFR part 219 *et seq.* that provide broad guidance and information for project and activity decisionmaking in a NFS unit. Proposals for actions that approve projects and activities, or that command anyone to refrain from undertaking projects and activities, or that grant, withhold or modify contracts, permits or other formal legal instruments, are outside the scope of this category and shall be considered separately under Forest Service NEPA procedures.

(17) Approval of a Surface Use Plan of Operations for oil and natural gas exploration and initial development activities, associated with or adjacent to a new oil and/or gas field or area, so long as the approval will not authorize activities in excess of any of the following:

(i) One mile of new road construction;

(ii) One mile of road reconstruction;

(iii) Three miles of individual or co-located pipelines and/or utilities disturbance; or

(iv) Four drill sites.

(f) *Decision memos.* The responsible official shall notify interested or affected parties of the availability of the decision memo as soon as practical after signing. While sections may be combined or rearranged in the interest of clarity and brevity, decision memos must include the following content:

(1) A heading, which must identify:

(i) Title of document: Decision Memo;

(ii) Agency and administrative unit;

(iii) Title of the proposed action; and

(iv) Location of the proposed action, including administrative unit, county, and State.

(2) Decision to be implemented and the reasons for categorically excluding the proposed action including:

(i) The category of the proposed action;

(ii) The rationale for using the category and, if more than one category could have been used, why the specific category was chosen;

(iii) A finding that no extraordinary circumstances exist;

(3) Any interested and affected agencies, organizations, and persons contacted;

(4) Findings required by other laws such as, but not limited to findings of consistency with the forest land and resource management plan as required by the National Forest Management Act; or a public interest determination (36 CFR 254.3(c));

(5) The date when the responsible official intends to implement the decision and any conditions related to implementation;

(6) Whether the decision is subject to review or appeal, the applicable regulations, and when and where to file a request for review or appeal;

(7) Name, address, and phone number of a contact person who can supply further information about the decision; and

(8) The responsible official's signature and date when the decision is made.

#### § 220.7 Environmental assessment and decision notice.

(a) *Environmental assessment.* An environmental assessment (EA) shall be prepared for proposals as described in § 220.4(a) that are not categorically excluded from documentation (§ 220.6) and for which the need of an EIS has not been determined (§ 220.5). An EA may be prepared in any format useful to facilitate planning, decisionmaking, and public disclosure as long as the requirements of paragraph (b) of this section are met. The EA may incorporate by reference information that is reasonably available to the public.

(b) *An EA must include the following:*

(1) Need for the proposal. The EA must briefly describe the need for the project.

(2) Proposed action and alternative(s). The EA shall briefly describe the proposed action and alternative(s) that meet the need for action. No specific number of alternatives is required or prescribed.

(i) When there are no unresolved conflicts concerning alternative uses of available resources (NEPA, section 102(2)(E)), the EA need only analyze the proposed action and proceed without consideration of additional alternatives.

(ii) The EA may document consideration of a no-action alternative through the effects analysis by contrasting the impacts of the proposed action and any alternative(s) with the current condition and expected future condition if the proposed action were not implemented.

(iii) The description of the proposal and alternative(s) may include a brief description of modifications and incremental design features developed through the analysis process to develop the alternatives considered. The documentation of these incremental changes to a proposed action or alternatives may be incorporated by reference in accord with 40 CFR 1502.21.

(iv) The proposed action and one or more alternatives to the proposed action

may include adaptive management. An adaptive management proposal or alternative must clearly identify the adjustment(s) that may be made when monitoring during project implementation indicates that the action is not having its intended effect, or is causing unintended and undesirable effects. The EA must disclose not only the effect of the proposed action or alternative but also the effect of the adjustment. Such proposal or alternative must also describe the monitoring that would take place to inform the responsible official whether the action is having its intended effect.

(3) Environmental Impacts of the Proposed Action and Alternative(s). The EA:

(i) Shall briefly provide sufficient evidence and analysis, including the environmental impacts of the proposed action and alternative(s), to determine whether to prepare either an EIS or a FONSI (40 CFR 1508.9);

(ii) Shall disclose the environmental effects of any adaptive management adjustments;

(iii) Shall describe the impacts of the proposed action and any alternatives in terms of context and intensity as described in the definition of "significantly" at 40 CFR 1508.27;

(iv) May discuss the direct, indirect, and cumulative impact(s) of the proposed action and any alternatives together in a comparative description or describe the impacts of each alternative separately; and

(v) May incorporate by reference data, inventories, other information and analyses.

(4) Agencies and Persons Consulted.

(c) *Decision notice.* If an EA and FONSI have been prepared, the responsible official must document a decision to proceed with an action in a decision notice unless law or regulation requires another form of decision documentation (40 CFR 1508.13). A decision notice must document the conclusions drawn and the decision(s) made based on the supporting record, including the EA and FONSI. A decision notice must include:

(1) A heading, which identifies the:

- (i) Title of document;
- (ii) Agency and administrative unit;
- (iii) Title of the project; and
- (iv) Location of the action, including county and State.

(2) Decision and rationale;

(3) Brief summary of public involvement;

(4) A statement incorporating by reference the EA and FONSI if not combined with the decision notice;

(5) Findings required by other laws and regulations applicable to the decision at the time of decision;

(6) Expected implementation date;

(7) Administrative review or appeal opportunities and, when such opportunities exist, a citation to the applicable regulations and directions on when and where to file a request for review or an appeal;

(8) Contact information, including the name, address, and phone number of a contact person who can supply additional information; and

(9) Responsible Official's signature, and the date the notice is signed.

(d) *Notification.* The responsible official shall notify interested and affected parties of the availability of the EA, FONSI and decision notice, as soon as practicable after the decision notice is signed.

Dated: July 14, 2008.

**Mark Rey,**

*Under Secretary, NRE.*

[FR Doc. E8-16499 Filed 7-23-08; 8:45 am]

**BILLING CODE 3410-11-P**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### 36 CFR Part 1228

**RIN 3095-AA81**

#### Agency Records Centers

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Correcting amendment.

**SUMMARY:** This document amends NARA's regulations related to the storage requirements for agency records, to correct language contained in final regulations that were published in the *Federal Register* of Thursday, December 2, 1999, (64 FR 67660).

**DATES:** Effective on July 24, 2008.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Davis Heaps at 301-837-1850.

#### SUPPLEMENTARY INFORMATION:

##### Background

The final regulations that are the subject of this correction updated the standards that records center storage facilities must meet to store Federal records. The regulation applies to all Federal agencies, including NARA, that establish and operate records centers, and to agencies that contract for the services of commercial records storage facilities.

##### Need for Correction

As published, the final regulations contain an error in Appendix B that needs to be clarified. The introductory paragraph erroneously referred to a

nonexistent paragraph o. and the correct designation was n.

#### List of Subjects in 36 CFR Part 1228

Archives and records.

■ Accordingly, 36 CFR part 1228 is corrected by making the following correcting amendments:

#### PART 1228—DISPOSITION OF FEDERAL RECORDS

■ 1. The authority citation for part 1228 continues to read as follows:

**Authority:** 44 U.S.C. chs. 21, 29, and 33.

■ 2. Revise the introductory sentence of paragraph 2 of Appendix B to Part 1228 to read:

#### Appendix B to Part 1228—Alternative Certified Fire-Safety Detection and Suppression System(s)

\* \* \* \* \*

2. *Specifications for NARA facilities using 15 foot high records storage.* NARA fire-safety systems that incorporate all components specified in paragraphs 2.a. through n. of this appendix have been tested and certified to meet the requirements in § 1228.230(s) for an acceptable fire-safety detection and suppression system for storage of Federal records.

Dated: July 21, 2008.

**Allen Weinstein,**

*Archivist of the United States.*

[FR Doc. E8-17080 Filed 7-23-08; 8:45 am]

**BILLING CODE 7515-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 10

[PS Docket No. 07-287; FCC 08-99]

#### Commercial Mobile Alert System

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission or FCC) adopts technical rules necessary to enable Commercial Mobile Service (CMS) alerting capability for CMS providers who elect to transmit emergency alerts to their subscribers. By adopting these rules, the Commission takes the next step in its satisfaction of the requirements of the Warning, Alert and Response Network (WARN) Act. The Commission adopts an architecture for the Commercial Mobile Alerting System (CMAS) based on the recommendations of the Commercial Mobile Service Alert Advisory Committee (CMSAAC).

**DATES:** Effective September 22, 2008.