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NEPA Services Group
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**RE: American Mountain Guides Association Comments on USDA Forest Service
Proposed Rule on National Environmental Policy Act Compliance**

United States Forest Service Officials,

The American Mountain Guides Association welcomes this opportunity to submit comments on the United States Forest Service (USFS) Proposed Rule on National Environmental Policy Act Compliance, published at 84 FR 27544 (June 13, 2019).

The American Mountain Guides Association (AMGA) is a 501(c)(3) educational non-profit organization that provides training and certification for climbing instructors, mountain guides, and backcountry skiing guides throughout the United States. Founded in 1979, the AMGA has trained over 13,000 climbing and skiing guides who provide outdoor experiences for the public on public lands. As the American representative to the International Federation of Mountain Guide Associations (IFMGA), the AMGA institutes international standards for the mountain guiding profession in the United States and serves as an educational body for land management agencies, guide services, outdoor clubs, and others. Of additional relevance to this NEPA revision, our membership includes outfitters and guides who have been operating on public lands since the inception of the modern commercial recreation permitting system. We have extensive experience with public land management systems, philosophies, and permitting, and we look forward to contributing to this effort to increase the efficiency and effectiveness of the Forest Service environmental analysis and decision-making process.

In 2018, the AMGA entered into a Memorandum of Understanding (MOU) with the U.S. Forest Service (USFS) to create a formal line of communication for the AMGA and USFS to cooperate on mutually-beneficial programs, projects, and activities. The MOU facilitates conversations between the mountain guiding community and USFS officials to coordinate stewardship projects, engage in planning efforts, and serve as a resource on matters related to guided climbing and backcountry skiing. The USFS proposed revision of NEPA is particularly relevant to the collaboration anticipated by this MOU because the mountain guiding community is uniquely positioned to understand and provide input on the specific outcomes and consequences of the proposals in the rulemaking.

I. AMGA Goals for the Rulemaking

The AMGA supports the principles outlined in the National Environment Policy Act (NEPA) and we believe a “hard look” environmental review is a fundamental component of the land management decision-making process. Environmental reviews ensure the National Forest System remains healthy and appealing for a variety of uses, and safeguards the public’s opportunity to participate in decisions about how National Forests are managed. Accordingly, we encourage the agency to be cautious in revising its environmental analysis and decision-making procedures. Streamlining should not be pursued at the expense of healthy ecosystems, meaningful recreation opportunities, or public notice and participation.

Fortunately, we believe there are a number of good opportunities for the agency to make revisions that will improve efficiency while continuing to uphold the intent and requirements of NEPA. In particular, there is an opportunity for the agency to streamline the environmental review process as it relates to the issuance of special use authorizations for outfitting and guiding. As a class of actions, these activities are unlikely, either individually or cumulatively, to have significant impacts and therefore present a unique opportunity to improve efficiency within the bounds of NEPA.

In our comments on the Advanced Notice of Proposed Rulemaking, we recommended the USFS revise existing categorical exclusions (CEs) or establish new CEs that would allow the agency to (1) issue new temporary permits for a term greater than one year, (2) increase the number of authorized service days for an existing permittee, and (3) authorize an existing permittee to conduct new uses. We also recommended the agency take a landscape-scale approach to environmental reviews for recreation special use permitting to consider outfitter-guide activities on a larger geographic scale and approve multiple requests within a single analysis and decision. Collectively, these measures would lessen the administrative burden on the agency, reduce the current backlog of recreation special use permit applications, and result in more opportunities for people from all walks of life to visit National Forests.

We are pleased to see the proposed rule includes some of our recommendations. However, we are also concerned that some components of the proposed rule are overbroad and could result in lasting, negative impacts to recreation landscapes that outfitters and guides depend upon. In the following sections, we describe the elements of the proposed rule which we support and we recommend ways in which the proposed rule could be improved.

II. Comments on Section 220.4(d) - Scoping and Public Notification

The AMGA believes scoping is a fundamental component of NEPA compliance that ensures the public has the opportunity to participate in agency decision making early in the development of a proposed action. The change presented in section 220.4(d)(2) of the proposed rule would eliminate the scoping requirement for actions that fall under a categorical exclusion or environmental assessment (EA). This change would result in over 90% of agency actions moving forward with no public scoping.¹ The scoping process helps the agency gather additional information about a project, identify potential concerns, and address issues in the early stages of

¹ Based on data obtained by Southern Environmental Law Center under the Freedom of Information Act, between 2006 and 2016, 80.1% of the Forest Service’s 29,746 decisions were analyzed with a CE, 17.6% were analyzed with an EA, and 2.3% were analyzed with an EIS.

project development. These preliminary steps enable a project to proceed smoothly and avoid future roadblocks, conflicts, or litigation. Taking these considerations into account, scoping often helps improve agency efficiency, not reduce it.

In section 220.4(d)(1), it appears the Forest Service is proposing to depend solely upon the Schedule of Proposed Actions (SOPA) as the venue for public notification. The SOPA is not a suitable substitute for scoping because it is large and technical, making it difficult for the public to sort through the many projects and determine which are relevant to their interests. In addition, posting to SOPA is a passive form of public notice that requires the public to monitor the database and draw their own conclusions about project relevance. In contrast, scoping is a proactive form of notice that often includes dedicated outreach to stakeholder groups who may be affected by a project. The current rule is written specifically to avoid the pitfalls of posting to SOPA alone. In section 220.4(e)(2-3) the current rule states:

Because the nature and complexity of a proposed action determines the scope and intensity of analysis, no single scoping technique is required or prescribed. The *SOPA shall not be used as the sole scoping mechanism for a proposed action* [emphasis added].

Undergoing scoping in addition to posting on the SOPA is a much more proactive approach to public notification and it helps to ensure stakeholders will be notified when a project is of relevance to them. This is a valuable public service provided by the agency and a NEPA requirement that should be retained.

We are also concerned that removal of the scoping requirement for CEs that do not require a decision memo would eliminate public notification of these actions entirely. With no scoping, and no decision memo, there would be little evidence of agency decision making and no public notification at all. We urge the Forest Service to retain the current scoping requirements and revise section 220.4(d)(2) of the proposed rule accordingly.

III. Comments on Section 220.4(i) - Determination of NEPA Adequacy

Before discussing Determination of NEPA Adequacy (DNA), we would like to point out that a meaningful opportunity exists to improve efficiency in the issuance of outfitter-guide permits through the increased use of programmatic environmental reviews and tiering. By conducting large-scale programmatic environmental review at the outset of a project, the agency could approve multiple outfitting and guiding proposals under one analysis and decision. This would eliminate the need to perform individual environmental reviews for each proposal on a case-by-case basis. This approach would lead to significant, measurable gains in efficiency in the permitting process.

We recognize there may be circumstances where additional efficiencies could be gained by incorporating an Interior Department tool termed “Determination of NEPA Adequacy (DNA).” In principle, we agree with the concept of applying a previous analysis to a current proposed action when the previous analysis is relevant and appropriate. However, we have seen DNAs be used by other agencies to approve a new action under an outdated or irrelevant analysis that never contemplated or analyzed the specific impacts of the new proposed action. This is unacceptable under the requirements of NEPA and we recommend the Forest Service exercise caution when considering DNAs to ensure they are not misused.

If the Forest Service would like to incorporate DNAs into its environmental review toolbox, it should establish clear criteria that must be met for a DNA to apply. This will provide clear direction to responsible officials and will ensure the tool is utilized in a manner consistent with NEPA requirements. The considerations listed in section 220.4(i)(1)(i-iv) of the proposed rule are a starting point. However, rather than asking the responsible official to *evaluate* those considerations, we recommend the language be changed to indicate the responsible official must *verify* the listed criteria are met in order for a previous analysis to be used. In addition, the verification should be recorded in the decision memo, decision notice, or record of decision that accompanies the action in order to clearly document how each of the requirements are met.

To incorporate these improvements into the proposed rule, section 220.4(i)(1) should state:

In making this determination, the responsible official must *verify*:

- (i) The new proposed action is essentially similar to a previously analyzed proposed action or alternative analyzed in detail in previous NEPA analysis,
- (ii) The range of alternatives previously analyzed are adequate under present circumstances,
- (iii) There is no significant new information or circumstances relevant to environmental concerns that would substantially change the analysis in the existing NEPA document, and
- (iv) The direct, indirect, and cumulative effects that would result from implementation of the new proposed action are similar (both quantitatively and qualitatively) to those analyzed in the existing NEPA document.

If all of the following criteria are met and can be clearly documented in the associated decision memo, decision notice, or record of decision, the previous analysis may be applied to the new action.

The AMGA believes programmatic review and tiering are valuable tools for streamlining the outfitter and guide permitting process. We support the agency's interest in augmenting these tools with a Determination of NEPA Adequacy, provided there are explicit criteria for the use of the DNA as outlined above.

IV. Comments on Section 220.5(b) – Extraordinary Circumstances

The current Forest Service rule in section 36 CFR 220.6(a) states that CEs may only be used when no “extraordinary circumstances” exist. It goes on to describe that extraordinary circumstances exist when there is “a cause-effect relationship between a proposed action and the potential effect on [the listed] 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.”² These provisions in the existing rule serve as an important backstop on the use of CEs. If a proposed action could have a potential effect on the resource conditions listed, a CE may not be used and an environmental analysis is required. This process ensures extraordinary circumstances are truly accounted for when identifying the amount of environmental review required.

Under the proposed rule, the presence of an extraordinary circumstance would trigger an environmental analysis only if there is a “likelihood of *substantial* adverse effects”³ to one of the

² 36 CFR 220.6(2).

³ USFS Proposed Revisions to the National Environmental Policy Act, published at 84 FR 27544, Section 220.5(b)(2).

resource conditions. The addition of “substantial” is significant. It could raise the threshold for when an environmental analysis is required and may result in more projects being approved with a CE, even when a cause-and-effect relationship exists between a proposed action and an effect on the resource condition. In addition, and perhaps most important, the lack of a definition for the term “substantial” in the proposed rule leaves considerable room for misinterpretation and misapplication. We can foresee problems arising in the future when individual line officers make their own interpretations of what is meant by “substantial.”

To address these concerns, we recommend the agency define the term “substantial” with clear sideboards and make certain it does not increase the threshold for when extraordinary circumstances apply, but rather serves to clarify when extraordinary circumstances exist.

V. Comments on the Proposed CEs for Special Uses

We are very pleased to see the agency is proposing several new and revised CEs that would increase efficiency in the outfitter-guide permitting process. As evidenced by the large backlog in recreation special use permit requests, these measures are long overdue and much needed. In addition, recreational outfitting and guiding is an optimal class of actions for streamlining due to recreation special uses being unlikely, either individually or cumulatively, to have significant impacts. That said, we believe several modifications as noted below would enhance understanding and further improve the proposed CEs in sections 220.5(d)(11) and 220.5(d)(12). We do not support the changes proposed in section 220.5(e)(3).

1. Proposed Special Use CE #1 - Section 220.5(d)(11)

Proposed special use CE #1 combines two existing CEs, one of which requires a decision memo and one which does not, into a single CE that does not require a decision memo. The proposed CE would combine existing 220.6(d)(10) with 220.6(e)(15) and establish a single CE (to be codified at 36 CFR 220.5(d)(11)) for the issuance of a new special use authorization to replace an existing or expired special use authorization when such issuance is a purely clerical action to account for administrative changes and where there are no changes to the authorized facilities or increases in the scope or intensity of authorized activities. The applicant or holder must be in compliance with all terms and conditions of the existing or expired special use authorization.

Historically, the two existing CEs in sections 220.6(d)(10) and 220.6(e)(15) have accomplished the same result and therefore we support the concept of combining them into one CE for clarity and ease of use. However, if this CE is to be used without a requirement to produce a decision memo, it further reinforces the necessity of scoping as a means of notifying the public of the action. Provided scoping is retained for categorical exclusions that don't require a decision memo, we support this proposed CE as it is written.

2. Proposed Special Use CE #2 - Section 220.5(d)(12)

The proposed special use CE at 220.5(d)(12) would establish an entirely new CE for the issuance of a new authorization or amendment of an existing authorization for activities that occur on existing roads and trails, in existing facilities, or in areas where activities are consistent with the applicable land management plan or other documented decision.

We strongly support this proposed CE as it applies to recreation special use permitting and we believe it would substantially increase efficiency in the recreation special use permitting process. It would reduce the backlog of recreation special use permit applications, eliminate unnecessary administrative burdens on agency staff, and make the National Forest System more accessible to those who benefit from the assistance of an outfitter, guide, youth camp, adaptive program, or outdoor education center. Furthermore, because recreation special uses are unlikely to have significant impacts beyond already approved noncommercial public use, these activities are particularly suitable for categorical exclusion. As noted in the *Supporting Statement for Proposed Categorical Exclusions for Certain Special Uses Projects*, “[m]any of these recreation special uses occur on existing NFS roads or NFS trails or in existing facilities that are designed and managed for those uses and have no more impacts than noncommercial public use.”⁴

However, to improve clarity and promote understanding, the scope of the proposed CE should be clearly defined and sideboards should be added. In addition, if a decision memo will not be required, we believe it is imperative for the current scoping requirements to be retained so the public is notified of the action. We recommend the following adjustments:

- The scope of the proposed CE at 220.5(d)(12) should be limited to recreation special uses. All of the examples provided in the proposed rule relate to recreation, however, it is unclear if the CE could be applied to other forms of special uses. If applied to other forms of special uses it could be much too broad. We strongly recommend language be added to indicate the CE is applicable only to recreation-related special uses.
- Sideboards should be added to further clarify the conditions in which the CE may be appropriately used. For example, the use of the CE should be limited to proposals for recreation activities that:
 - Take place on established infrastructure in areas that are open to the general public;
 - Are the same or substantially similar to existing recreational uses currently taking place in the same general location; and/or
 - Do not exceed carrying capacity limits (if those limits have been determined).

With the adjustments detailed above, and so long as the public will be notified of the action through scoping, we support the implementation of the proposed categorical exclusion in section 220.5(d)(12).

3. Proposed Special Use CE #3 – Section 220.5(e)(3)

The proposed special use CE in section 220.5(e)(3) introduces two significant changes from the existing CE at 36 CFR 220.6(e)(3). First, the proposed CE increases the allowable acreage to be categorically excluded from 5 acres to 20 acres. Second, the proposed CE eliminates the term “contiguous.” By increasing the acreage to 20 acres and simultaneously allowing that acreage to be calculated among non-contiguous parcels of land, we are concerned that viewsheds could be damaged, wildlife corridors could be fragmented, and longstanding recreation routes could be interrupted or negatively modified.

⁴ <https://www.fs.fed.us/emc/nepa/revisions/includes/docs/SpecialUsesCEsSupportingStatement.pdf>

The *Supporting Statement for Proposed Categorical Exclusions for Certain Special Uses Projects*⁵ states that USFS reviewed the NEPA documentation for 62 projects related to actions associated with the proposed CE. It is unclear how these projects were selected and whether they are representative of a majority of similar projects. It is also not stated how many similar projects have been conducted in recent years, making it difficult to ascertain if 62 projects is a sufficient sample size. Lacking this information, we are uncertain if the proposed CE is in fact consistent with a majority of similar actions that did not have significant impacts. Due to this uncertainty around the potential for significant impacts, we recommend the agency withdraw the proposed CE in section 220.5(e)(3). If the agency wishes to expand the current CE at 220.6(e)(3), a more comprehensive explanation for the expansion should be provided, along with a sufficiently large data set, to demonstrate that the size and scope of the proposed CE is consistent with past actions that did not have significant impacts.

VI. Comments on Proposed CEs for Infrastructure and Ecosystem Restoration

We are concerned about the new CEs for infrastructure and ecosystem restoration projects that are being contemplated by the proposed rule. We believe several of these CEs could cause lasting harm to landscapes that hold significant recreational value. Given the rise of the recreation economy into a powerhouse of revenue generation and job creation, this value cannot be understated. Additionally, recreation is quickly becoming a primary way in which the public connects with the National Forest System and is therefore a key mechanism for the agency to build public support for its initiatives and funding. If recreation opportunities are impaired, a considerable economic opportunity will be missed and the USFS could lose one of its best avenues to cultivate future supporters and stewards. Of all the infrastructure and ecosystem restoration CEs proposed, we have the greatest concern about the potential impact of the following two CEs:

- Proposed section 220.5(e)(24) would authorize without an environmental analysis the construction of five miles of new road or reconstruction of ten miles of existing road.
- Proposed section 220.5(e)(26) would authorize without an environmental analysis “ecosystem restoration and/or resilience activities” on up to 7,300 acres, with up to 4,200 acres of commercial logging, including construction of permanent roads up to .5 miles and construction of temporary roads up to 2.5 miles.

Projects authorized under these CEs could have long-lasting, adverse effects on the landscapes that outfitting and guiding businesses depend upon to provide their services. For example, logging projects on parcels up to 7,300 acres could easily interrupt cross-country travel routes used by backpackers and mountaineers. Projects of this size and intensity could also have a dramatic effect on viewsheds. What would the summit view look like for a mountaineer if the landscape below is a patchwork of discontinuous forest? Similarly, exempting five miles of new road construction from environmental analysis, as proposed under section 220.5(e)(24), could have significant effects on forest health, wildlife habitat, and the quality of backcountry recreation experiences.

Furthermore, the Advanced Notice of Proposed Rulemaking stated the agency is seeking to identify, “[c]lasses of actions that are unlikely, either individually or cumulatively, to have

⁵ <https://www.fs.fed.us/emc/nepa/revisions/includes/docs/SpecialUsesCEsSupportingStatement.pdf>

significant impacts and therefore should be categorically excluded from NEPA’s environmental assessment and environmental impact statement requirements.”⁶ We believe the proposed CEs under sections 220.5(e)(24) and 220.5(e)(26) may not meet these requirements. For example, the *Supporting Statement for Proposed Categorical Exclusions For Certain Infrastructure Projects*⁷ indicates a total of 311 road management projects were completed using an EA, DN, and FONSI during fiscal years 2012-2016. Of these projects, USFS interdisciplinary staff reviewed a “representative sample” of 62 projects. It is unclear from the statement how the 62 selected projects were deemed to be representative of the total. It is also unclear what statistical analysis methods were utilized to determine that 62 out of 311 projects is a sufficient sample size. In addition, it is unclear how the analysis of the sampled projects resulted in the conclusion that 5 miles of new, permanent road should be the amount categorically excluded. Why not 2 miles, or 10 miles?

We understand the Forest Service has identified a need for new categorical exclusions for certain activities, including the construction of new roads. However, based on the information provided, we are uncertain as to whether the proposal in section 220.5(e)(24) is in fact aligned with a large majority of similar actions that resulted in a FONSI. A similar conclusion can be drawn from the information provided for the formulation of the proposed CE in section 220.5(e)(26).

For these reasons, we recommend the proposed CEs in sections 220.5(e)(24) and 220.5(e)(26) be withdrawn. If the agency wishes to create new categorical exclusions for road construction and restoration in a future proposal, the agency should provide more insight into the analytical methods used, and the conclusions reached, in order to demonstrate the size and scope of the proposed CE is consistent with past actions that did not have significant impacts.

* * *

The American Mountain Guides Association appreciates the opportunity to comment on the USFS Proposed Rule on National Environmental Policy Act Compliance, published at 84 FR 27544. The proposals for new and revised categorical exclusions in sections 220.5(d)(11) and 220.5(d)(12) as they relate to recreation special use authorizations for outfitting and guiding will result in significant benefits to the public, the outfitter-guide community, and the Forest Service, and we support their inclusion in the final rule with the modifications noted herein.

Other components of the proposed rule could result in detrimental consequences for outdoor recreation businesses and enthusiasts. Most notably, the elimination of scoping for CEs and EAs would dramatically reduce public involvement in consequential agency decision making, and the proposed CEs in sections 220.5(e)(24) and 220.5(e)(26) could have lasting negative implications for recreation landscapes and the economies they support.

With the modifications we have recommended, we believe this proposal can accomplish the goal of increasing efficiency in the environmental analysis and decision-making process while also satisfying the agency’s responsibility to environmental stewardship and NEPA. We look forward

⁶ USFS Advanced Notice of Proposed Rulemaking on National Environmental Policy Act Compliance, published at 83 F.R. 302.

⁷ <https://www.fs.fed.us/emc/nepa/revisions/includes/docs/InfrastructureCEsSupportingStatement.pdf>

to continuing our work with the agency to promote the appropriate use of the National Forest System while protecting world class recreation and natural resources at the same time.

Sincerely,



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Matt Wade
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