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July 4, 2019

NEPA Services Group
c/o Amy Barker
USDA Forest Service
125 S. State St., Suite 1705
Salt Lake City, Utah 84138

RE: Proposed NEPA Rule (RIN 0596-AD31, 84 FR 27544 et seq., June 13, 2019)

Dear NEPA Services Group:

The Sustainable Trails Coalition (STC) hereby comments on the above-captioned rulemaking proposal.

STC wishes to compliment the NEPA Services Group for a clearly written and succinct proposal. We have a few suggestions.

I. The Basis for STC's Interest in the Proposal

STC is a nonprofit organization with donors in the thousands and supporters in the tens of thousands nationwide—primarily human-powered mountain bikers. We are working to restore the Wilderness Act of 1964, 16 U.S.C. § 1131 et seq., and agency interpretations of the Act to its two original purposes: conservation and rugged, self-reliant recreation. The latter includes human-powered mountain biking.

NEPA considerations will become important if STC is able to achieve its substantive goals. Over-application of NEPA procedures could stymie mountain biking access for many years following legislative or administrative resolution of access questions, postponing those outcomes on the ground even though the government and mountain bikers agree on them. The proposed rulemaking would make that outcome less likely. STC therefore welcomes the proposal.

II. Background Considerations Applying to the Proposal

STC thanks the Forest Service for stating plainly the difficulties that have given rise to the proposal. We agree with the following agency remarks (84 FR 27544, 27545):

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

Recreationists who spend enough time in the National Forest System are well aware of that resources-allocation problem.

- In part because the Forest Service “spends considerable financial and personnel resources on NEPA analyses and documentation,” it “is not fully meeting agency expectations, nor the expectations of the public, partners, and stakeholders, to improve the health and resilience of forests and grasslands, create jobs, and provide economic and recreational benefits.”

Too often, the problem is dubious NEPA-based lawsuits and unreasonable NEPA-based demands by groups that wish to block agency action. We will discuss one example, involving national forests in Colorado, at page 5 below.

- “The proposed rule outlines an approach for ‘right-sizing’ the public engagement and scoping processes to each proposed action.”

We agree.

III. Our Recommendations

STC offers these suggestions for a few minor changes:

A. Specify That Nonmotorized, Human-Powered Changes in Trail Use Are Rebuttably Presumed to Be Categorically Exempt

The proposal states, “Categorical exclusions are categories of actions that normally will not result in individual or cumulative significant impacts on the quality of the human environment and, therefore, do not require analysis or documentation in either an EA or EIS.” (84 FR 27546.)

A Forest Service decision to add or remove a human-powered recreational activity to an existing trail or road normally will have no significant impact on the quality of the human environment. This includes mountain biking. Scientific studies have established this fact comprehensively. “All of the existing scientific studies indicate that while mountain biking, like all forms of recreational activity, can result in measurable impacts to vegetation, soil, water resources, and wildlife, the environmental effects of well-managed mountain biking are minimal. [¶] Furthermore, while the impact mechanics and forces may be different from foot traffic, mountain biking impacts are little different from hiking.” (<http://www.environment.nsw.gov.au/resources/commercial/ttf/190semc4.doc>.)

To be sure, if any user group overruns a quiet area because of changed access rules, it may cause a significant environmental impact. A decision memorandum or other management action may preclude that possibility by limiting the amount of visitor activity in an area.

However, the proposed provision most closely linked to this topic categorically excludes only “special” one-time events allowed by a permit. (84 FR 27547, 27555.)

STC therefore recommends amending proposed 36 CFR 220.5(d)(12) by adding language shown in italics here:

“(12) Issuance of a new authorization or amendment of an existing authorization for activities that occur on existing roads or trails, in existing facilities, or in areas where activities are consistent with the applicable land management plan or other documented decision. Subject to the foregoing condition, examples include but are not limited to:

“

“(vi) Issuance of an authorization, or modification or removal of an existing authorization, for human-powered, nonmotorized activities on an existing trail. An example would be authorizing mountain biking on a trail previously restricted to foot and packstock uses, or removing or modifying mountain biking authorization on a trail on which it was previously allowed.”

Because this would be a presumptively long-lasting decision, and not a one-time authorization, STC would understand if the foregoing language were moved to proposed subsection 36 CFR 220.5(e), i.e., “Categories of actions for which a project or case file and decision memo are required.” (84 FR 27555, italics deleted.) We only request that it be adopted somewhere in the proposed rule.

The proposed rule recognizes that sometimes a categorical exclusion should not apply. “Categorical exclusions do not apply where there are extraordinary circumstances in which a normally excluded action may have a significant environmental effect (40 CFR 1508.4).” (84 FR 27547.) In other words, a categorical exclusion is rebuttably but not conclusively presumed to apply in light of Forest Service experience with environmental impacts. The Forest Service may wish to incorporate such language in the rule, in keeping with the quoted passage, which already establishes it.

B. Specify That Machine-Employing Trail Maintenance Practices Are Rebuttably Presumed to Be Categorically Exempt

We recommend that proposed 36 CFR 220.5(d)(4) be slightly modified to provide, via the italicized language below:

“(4) Repair and maintenance of roads, trails, and landline boundaries. Examples include but are not limited to:

“

“(iv) Pruning vegetation, *clearing fallen trees*, and cleaning culverts along a trail and grooming the surface of the trail, *including by small-scale mechanical devices like wheelbarrows and chainsaws.*”

A recent lawsuit shows how NEPA is abused by parties with unrealistic or dogmatic views about trail maintenance.

By way of introduction, the Forest Service has a default policy of not maintaining its Wilderness trails with any kind of device, motorized or nonmotorized, that has a moving part. This includes not only motorized equipment like chainsaws, but even rudimentary equipment like wheelbarrows. STC believes this policy is counterproductive and is not required by the Wilderness Act of 1964 (see 16 U.S.C. § 1133(c) [certain equipment prohibited in Wilderness “except as necessary to meet minimum requirements for the administration of the area”]). We gather that the National Park Service uses a more workable procedure for its Wilderness areas. (See https://www.nps.gov/seki/planyourvisit/upload/20130326_SEKI-MRA_Instructions_Final.pdf.)

But that is a discussion for another day. Germane to the proposed rule is that groups that believe Wilderness trails should be maintained only with ancient, primitive tools are able to file NEPA-based lawsuits when a Forest Service manager, desperate to reopen or restore trails that have grown over and are too expensive to maintain with only such tools, wants to use an efficient, cost-effective tool like a chainsaw.

Recently, the *Durango Herald* reported, “The Forest Service planned to use chain saws [in the Weminuche and South San Juan Wildernesses] because beetle-killed trees are falling so quickly across the forest it can’t keep trails clear using crosscut saws.” (<https://durangoherald.com/articles/280938-forest-services-axes-decision-to-use-chain-saws-in-wilderness-for-now>.)

Soon after the Forest Service announced this reasonable, minimally environmentally impactful action, a lawsuit was filed, unsurprisingly, with plaintiffs invoking NEPA as a basis for their claims. (See <https://www.sanjuancitizens.org/wp-content/uploads/2019/05/1-Complaint.pdf>.)

The Forest Service scrubbed its announced maintenance action and the resource will remain unattended to for an indeterminate time, thanks to this lawsuit.

This is, of course, typical of the kind of nuisance litigation that for decades has put a stranglehold on Forest Service efforts to maintain its lands. Maintaining trails with chainsaws, wheelbarrows, or other small-scale equipment with moving parts normally has no significant environmental impact. It probably improves the area’s environmental sustainability, fire resistance, and safety for visitors and adjoining landowners. It should not be subject to meritless NEPA-based litigation, and 36 CFR 220.5(d)(4), with STC’s proposed modification, can end these abuses.

C. There May Be an Inconsistency Between Some of the Proposed Trail Maintenance Provisions

Proposed 36 CFR 220.5(d) would provide that the following activities do not require a decision memorandum:

“(4) Repair and maintenance of roads, trails, and landline boundaries. Examples include but are not limited to:

“

“(iv) Pruning vegetation and cleaning culverts along a trail and grooming the surface of the trail” (84 FR 27554.)

On the other hand, proposed 36 CFR 220.5(e)(20) would provide that a decision memorandum is required for:

“(20) Activities that restore, rehabilitate, or stabilize lands occupied by roads and trails, including unauthorized roads and trails and NFS roads and NFS trails, to a more natural condition that may include removing, replacing, or modifying drainage structures and ditches, reestablishing vegetation, reshaping natural contours and slopes, reestablishing drainageways, or other activities that would restore site productivity and reduce environmental impacts. Examples include but are not limited to”:

“

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

It could be difficult for Forest Service staff to determine if maintenance for an authorized trail falls under 36 CFR 220.5(d)(4), requiring no decision memorandum, or instead under 36 CFR 220.5(e)(2) and (e)(20)(ii), which do.

IV. Conclusion

STC welcomes the Forest Service’s NEPA proposal generally and hopes it can be modified as we suggest.

Very truly yours,



Sustainable Trails Coalition
By: Ted Stroll, board president