

FOREST SERVICE (FS) NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) COMPLIANCE REQUIREMENTS

Applicable Law: Title 36 Code of Federal Regulations (CFR), Part 220

Prepared by Dan Wagman, PhD, CSCS

- **The purpose of this citizen activity** is to highlight where the FS has violated federal law, to compel the Agency to open the illegally closed roads, and to then follow the processes outlined by federal law should the Agency still wish to close these roads.
- **Why this is important:** Because federal law requires detailed analysis and review of FS activity (such as closing a road) via scoping* and NEPA and, perhaps most importantly, the involvement of the public in the decision-making process. All of this has been circumvented with the closure of Forest Service Roads (FSR) 300, 322A, and 371.
- Proposed activities (the FS calls this “actions”) subject to NEPA include (all must apply, §220.4):
 1. The FS 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
 2. The proposed action is subject to FS control and responsibility
 3. The proposed action would cause effects on the natural and physical environment and the relationship of people with that environment
 4. The proposed action is not statutorily exempt from the requirements of section 102(2)(C) of the NEPA.

ANALYSIS AND LEGAL REVIEW

The seasonal closure of Forest Service Road (FSR) 300 and the complete closure of FSR 322A and 371 meet all of the above criteria thus, necessitating the implementation of NEPA procedures. This was not implemented by the FS, thus constituting a violation of federal law.

However, regardless of whether the action requires NEPA procedures or not, scoping* processes that include, among other things, public notice and public commenting, must be observed (§220.4.e). This was not done for the roads in question and therefore constitutes another violation of federal law.

RE FSR 371: In a writing dated 7/2/2008, the FS states that one of the reasons for closing this road is the protection of a Forester Sensitive Species. This, according to §220.6.b.i automatically triggers NEPA, yet it was not observed.

Why is applying NEPA so important? Because doing so requires the FS to document their proposed action(s) (such as closing a road) via an Environmental Assessment (EA), Findings of No Significant Impact (FONSI), and/or an Environmental Impact Statement (EIS) via a scoping* period, where the involvement of the public is mandated. (40 CFR §1501)

Based on documentation obtained from the FS via multiple Freedom of Information Act requests, the closure of FSR 322A and 371 produced none of these documents, no scoping* was observed, and no public commenting period was offered.

For the seasonal closure of FSR 300, none of these documents were created but instead a Decision Memo was issued for the general area. However, a Decision Memo is defined as “a concise written record of the responsible official's decision to implement an action categorically excluded from further analysis and documentation in an EIS or EA” (§ 220.3). Closing these roads, however, is NOT categorically excluded; moreover, according to that Decision Memo, the public comment period was for only two weeks, when federal law requires it to be 30 days for an EA and 45 days for an EIS (§215.6.a.1.i and ii).

- So is the closure of this and the other roads categorically excluded?
- And what does categorical exclusion actually mean?

Defining categorical exclusion: "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..." (§ 220.6.a). Reference is also made to 7 CFR § 1b.3.a, which states that activities "that have been determined not to have a significant individual or cumulative effect on the human environment are excluded from the preparation of EA's or EIS's." It goes on to list examples, which do NOT include the closure of a FSR.

§ 220.6.b provides for the FS to "identify in their own procedures the activities which normally would not require an EA or EIS." Closing a road is NOT part of a categorical exclusion unless it is for short-term (less than one year) protection of resources or public health and safety. If it is for more than one year, as is the case with FSR's 300, 322A, and 371, then NEPA must be followed along with the associated documentation, public comment, etc.

The definition of categorical exclusion also refers to "extraordinary circumstances" that do not require NEPA procedures. What might constitute an extraordinary circumstance? That is defined in § 220.6.b and does NOT include the closure of a FSR.

FINAL DETERMINATION

The closure of FSR's 300, 322A, and 371 did not follow those processes outlined by law, the public was excluded from the process, and therefore these roads need to be reopened until such time as the proper procedures have been followed.

Special note regarding FSR 300: The decision to close this road (and all roads in the South Platte Ranger District) expires 4/29/2009 at which "time it will be reviewed and extended or rescinded." The time is NOW to get the FS to comply with federal law in the event this road shall remain seasonally closed.

* "Scoping is required for ALL FS proposed actions, **including those that would appear to be categorically excluded from further analysis and documentation** in an EA or an EIS" (§220.4.e).

Defining Scoping: "There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." The FS is then required to publish a Notice of Intent [for the activity] in the Federal Register as the public is supposed to be part of this process (40 CFR §1501.7).