



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596-AD38

Land Uses; Special Uses; Streamlining Processing of Communications Use Applications

AGENCY: Forest Service, USDA.

ACTION: Proposed rule.

SUMMARY: The U.S. Department of Agriculture, Forest Service (Agency), is proposing to amend its existing regulations to implement part of Title VIII, Subtitle G, Section 8705, of the Agriculture Improvement Act of 2018, which requires regulations that streamline the Agency's procedures for evaluating applications to locate or modify communications facilities on National Forest System (NFS) lands.

DATES: Comments must be received in writing by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send comments, identified by RIN 0596-AD38, via one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for sending comments.
2. Email: SM.FS.WO_LandStaff@usda.gov.
3. Mail: Director, Lands Staff, 201 14th Street, SW, Washington, DC 20250-1124.
4. Hand Delivery/Courier: Director, Lands Staff, 1st Floor Southeast, 201 14th Street, SW, Washington, DC 20250-1124.

All comments, including names and addresses when provided, will be placed in the

record and will be available for public inspection and copying. The public may inspect comments received at the Office of the Director, Lands, 1st Floor Southeast, Sidney R. Yates Federal Building, 201 14th Street, SW, Washington, DC, during normal business hours. Visitors are encouraged to call ahead at 202-205-3563 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Joey Perry, Lands Staff, 530-252-6699, joey.perry@usda.gov. Individuals who use telecommunication devices for the deaf may call the Federal Relay Service at 800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The Forest Service is responsible for managing Federal lands that are adjacent to rural and urban areas. The Forest Service authorizes the occupancy and use of NFS lands for communications facilities (buildings, towers and ancillary improvements) and fiber optic lines, which provide critical communications services, including television, radio, cellular, emergency services and broadband, to these areas. The Forest Service administers over 3,700 special use authorizations for communications uses at 1,530 communications sites and more than 400 communications use authorizations for fiber optic lines on NFS lands.

The Secretary of Agriculture’s Rural Prosperity Task Force Report of 2017 identified connecting rural communities across the United States as a strategic priority for USDA because “[i]n today’s information-driven global economy, e-connectivity is not simply an amenity—it has become essential.”

On January 8, 2018, the President signed Executive Order 13821, *Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America*, which states that

“Americans need access to reliable, affordable broadband internet service to succeed in today’s information-driven, global economy” (83 FR 1507). The Executive Order directs Federal agencies “to use all viable tools to accelerate the deployment and adoption of affordable, reliable, modern high-speed broadband connectivity to rural America. . . .” *Id.* Agencies are encouraged to reduce barriers to capital investments, remove obstacles to broadband services, and more efficiently employ Government resources. *Id.*

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, as amended by section 606(a), division P, Consolidated Appropriations Act, 2018, also known as the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act), requires the Forest Service within 270 days of receipt of an application for a communications facility or a communications use to grant or deny the application and to notify the applicant of the grant or denial.

Need for Proposed Rule

The President signed the Agriculture Improvement Act of 2018 (the Farm Bill) into law on December 20, 2018. Title VIII, Subtitle G, Section 8705, of the Farm Bill requires the Forest Service to issue regulations that streamline the process for evaluating applications for communications facilities on NFS lands and that require charging a programmatic administrative fee for communications use authorizations to cover the cost of the Forest Service’s communications site program. Specifically, Section 8705(b) and (c) requires the Forest Service to issue regulations that:

(1) Streamline the process for evaluating applications to locate or modify communications facilities on NFS lands;

- (2) Ensure, to the maximum extent practicable, that the process is uniform and standardized across the Forest Service;
- (3) Require that the applications for communications uses on NFS lands be evaluated and granted on a competitively neutral, technologically neutral, and non-discriminatory basis;
- (4) Include procedures for tracking applications for communications uses;
- (5) Include a minimum term of 15 years for communications use authorizations;
- (6) Require that a processing fee be charged for an application for a communications use;
- (7) Provide for prioritizing or streamlining evaluation of applications for communications uses on previously disturbed NFS lands; and
- (8) Require that a programmatic administrative fee be charged for communications use authorizations to cover the costs of administering the Forest Service's communications site program. The Forest Service will publish a subsequent document in the *Federal Register* for a proposed rule to implement the programmatic administrative fee. The programmatic administrative fee is not going to be collected pursuant to the currently enacted authority at this time.

In addition, Section 8705(d) of the Farm Bill requires that in promulgating the regulations, the Forest Service consider how multiple communications facility applications can be considered simultaneously and how to eliminate overlapping requirements among organizational units in authorizing communications facilities on NFS lands.

Current Forest Service regulations at 36 CFR part 251, subpart B, govern the processing of special use applications and issuance of special use authorizations for uses of NFS lands, including communications uses. Forest Service Handbook (FSH) 2709.11, Chapter 10, provides direction for processing special use applications and issuing special use authorizations.

FSH 2709.11, Chapter 90, provides direction for communications site management, including processing of communications use applications and administration of communications use authorizations.

A description of proposed regulatory revisions and compliance with the statutory requirements follows.

Proposed Revisions to Existing Regulations

Section 251.54 of the current regulations sets forth the procedures by which the Agency reviews proposals and processes applications for special use authorizations. As required by Section 8705(b)(1) through (b)(3) of the Farm Bill, existing §251.54(g) contains numerous requirements for evaluating and granting special use applications, including applications for communications uses, in a uniform, standardized manner that is competitively and technologically neutral and non-discriminatory. Specifically, existing §251.54(g)(2)(i) through (g)(2)(iii) requires all special use applications to be evaluated in accordance with applicable law, including the National Environmental Policy Act (NEPA), and requires the Forest Service to defer to relevant findings of another Federal agency. Existing §251.54(g)(4) requires the Forest Service to evaluate all special use applications based on the information provided by the applicant and other relevant information such as environmental findings. These requirements are reinforced by Forest Service directives in FSH 2709.11, Chapter 10, section 11.14, paragraph 1, which prohibits discrimination against a proponent because of race, color, religion, sex, age, disability, marital status, or national origin; sections 11.25, 12.51, and 12.52, which address compliance with applicable environmental law; and section 11.3, paragraph 1a, which encourages use of the standard special use application form, Standard Form 299.

In addition, as required by Section 8705(c)(4) of the Farm Bill, existing regulations at 36 CFR 251.54(g)(4) provide for streamlining evaluation of applications for communications uses on previously disturbed NFS lands. In particular, §251.54(g)(4) provides that a group of applications for similar uses having minor environmental impacts may be evaluated with one analysis and approved in one decision. This provision allows for evaluation of applications for similar communications uses with minor environmental impacts, which may often be the case for proposed uses on previously disturbed NFS lands, to be streamlined in one analysis and one decision. Existing §251.54(g)(4) is also consistent with the requirement in Section 8705(d) of the Farm Bill that in promulgating the regulations, the Forest Service consider how multiple communications facility applications can be considered simultaneously and how to eliminate overlapping requirements among organizational units in authorizing communications facilities on NFS lands.

Proposed revisions to the Forest Service's NEPA regulations at 36 CFR part 220 (84 FR 27544) would further streamline evaluation of communications use applications by facilitating reliance on a categorical exclusion from documentation in an environmental assessment or environmental impact statement (CE). The proposed revisions to the Agency's NEPA regulations would expand the current CE for special use authorizations at §220.5(e)(3) from 5 to 20 acres and would remove the qualifier "minor" to cover placement of additional communications facilities like towers and generators. The proposed NEPA rule would also establish a new CE at §220.5(d)(11) that does not require a project or case file and decision memo for reissuance of special use authorizations, which would reduce the backlog of expired and expiring authorizations.

Consistent with the MOBILE NOW Act, existing directives at FSH 2709.11, Chapter 90, section 90.3, paragraph 5, provide that within 270 days of acceptance of a proposal as an application for a new communications facility or co-location of a new communications use in or on a facility managed by the Forest Service, or within 270 days of receipt of an application for modification of an existing communications facility or co-located communications use on a facility managed by the Forest Service, the authorized officer must grant or deny the application and notify the applicant in writing of the grant or denial.

The Forest Service proposes to reinforce existing regulatory requirements implementing Section 8705 of the Farm Bill and the MOBILE NOW Act by adding two subparagraphs to §251.54(g)(4), which governs evaluation of special use applications. The first new subparagraph would implement the streamlining provisions for communications use applications by incorporating the requirement for the Agency to grant or deny an application for a communications use within 270 days of receipt and to notify the applicant in writing of the grant or denial. The second new subparagraph would provide for establishment of a process in the Forest Service's directive system for tracking applications for communications uses that provides for (a) identifying the number of applications received, approved, and denied; (b) for applications that are denied, describing the reasons for denial; and (c) describing the amount of time between receipt of an application and grant or denial of the application.

The Forest Service proposes to further implement Section 8705 of the Farm Bill by adding two subparagraphs to §251.54(g)(5), which governs issuance of special use authorizations. Existing regulations do not address the term for communications use authorizations. Consistent with Section 8705(c)(2) of the Farm Bill, new paragraph (g)(5)(ii)

would establish a term for communications use authorizations of 30 years, unless case-specific circumstances warrant a shorter term.

As noted, the Forest Service will publish a subsequent document in the *Federal Register* for a proposed rule to implement Section 8705(c)(3)(B) of the Farm Bill, which requires regulations to implement a new programmatic administrative fee for communications use authorizations to cover the costs of administering the Forest Service's communications site program. The programmatic administrative fee is not going to be collected pursuant to the currently enacted authority at this time.

Proposed Revisions to Forest Service Directives

FSH 2709.11, Chapter 90

The Forest Service is proposing revisions to its directives at FSH 2709.11, Chapter 90, concurrently with this rulemaking. Consistent with Section 8705(b) and (c)(1) of the Farm Bill and the proposed revisions to the Agency's regulations, the proposed directives would amend Chapter 90, section 90.4, to establish responsibility for the tracking system for communications use applications; section 92 to provide for a 30-day review period by communications use authorizations holders of new or modified communications site management plans; section 94.1 to implement procedures that would expedite requests to co-locate communications uses in or on existing communications facilities; and section 94.3 to establish procedures for inputting data needed to track communications use applications.

A separate document will be published in the *Federal Register* announcing the availability of the proposed directives and list information on how to comment on the proposed directives. When the document is published, the proposed directives and a copy of the *Federal Register* document will be posted at https://www.fs.fed.us/specialuses/special_comm.shtml.

Other Streamlining Efforts Implementing Section 8705 of the Farm Bill

The Forest Service is developing an online mapping tool of communications sites on NFS lands. This mapping tool will provide basic information concerning the communications sites, such as their geographical location, site designation, and local contact information. This information will enable the public and stakeholders to locate communications sites on NFS lands and complete an initial feasibility assessment prior to submitting a proposal and application for use and occupancy of NFS lands. Once implemented, the online mapping tool will reinforce existing and proposed regulatory and directive requirements implementing the streamlining provisions in Section 8705(b)(1) of the Farm Bill. Implementation of the online mapping tool is not subject to public notice and comment under applicable law.

Regulatory Certifications

Executive Order 12866

Executive Order (EO) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13771

This proposed rule has been reviewed in accordance with EO 13771 on reducing regulation and controlling regulatory costs and has been designated as an “other action” for purposes of the EO.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

The proposed rule would establish procedures for streamlining the Forest Service's evaluation of applications to locate or modify communications facilities on NFS lands. Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment or environmental impact statement rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions. The Agency has concluded that the proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Flexibility Act Analysis

The Agency has considered the proposed rule under the requirements of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This proposed rule would not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The proposed rule would not impose recordkeeping requirements on small entities; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Forest Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Agency has considered the proposed rule under the requirements of EO 13132, *Federalism*. The Agency has determined that the proposed rule conforms with the federalism principles set out in this executive order; would not impose any compliance costs on the states; and would not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the

various levels of government. Therefore, the Agency has concluded that the proposed rule does not have Federalism implications.

Consultation with Tribal Governments

The Agency has determined that national tribal consultation is not necessary for the proposed rule. The proposed rule, which would update the Forest Service's administrative procedures for reviewing applications and issuing authorizations for communications uses, is programmatic and would not have any direct effects on tribes. Tribal consultation will occur as appropriate in connection with specific applications for communications facilities on NFS lands.

No Takings Implications

The Agency has analyzed the proposed rule in accordance with the principles and criteria in EO 12630, *Governmental Actions and Interference with Constitutionally Protect Property Rights*. The Agency has determined that the proposed rule would not pose the risk of a taking of private property.

Energy Effects

The Agency has reviewed the proposed rule under EO 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Agency has determined that the proposed rule would not constitute a significant energy action as defined in EO 13211.

Civil Justice Reform

The Forest Service has analyzed the proposed rule in accordance with the principles and criteria in EO 12988, *Civil Justice Reform*. After adoption of the proposed rule, (1) all state and local laws and regulations that conflict with the proposed rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to the proposed

rule; and (3) it would not require administrative proceedings before parties may 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), signed into law on March 22, 1995, the Agency has assessed the effects of the proposed rule on state, local, and tribal governments and the private sector. The proposed rule would not compel the expenditure of \$100 million or more by any state, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public

The proposed rule does not contain any 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. 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 251

Electric power, Mineral resources, National forests, Rights-of-way, and Water resources.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend part 251, subpart B, of title 36 of the Code of Federal Regulations as follows:

PART 251—LAND USES

Subpart B—Special Uses

1. The authority citation for part 251, subpart B, continues to read as follows:

Authority: 16 U.S.C. 460l-6a, 460l-6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761-1771.

2. In §251.54, revise paragraphs (g)(4) and (g)(5) to read as follows:

§ 251.54 Proposal and application requirements and procedures.

* * * * *

(g) * * *

(4) *Response to all other applications*—(i) *General*. Based on evaluation of the information provided by the applicant and other relevant information such as environmental findings, the authorized officer shall decide whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use. A group of applications for similar uses having minor environmental impacts may be evaluated with one analysis and approved in one decision.

(ii) *Communications use applications*. Within 270 days of acceptance of a proposal as an application for a new communications facility or co-location of a new communications use in or on a facility managed by the Forest Service, or within 270 days of receipt of an application for modification of an existing communications facility or co-located communications use on a facility managed by the Forest Service, the authorized officer shall grant or deny the application and notify the applicant in writing of the grant or denial.

(iii) *Tracking of communications use applications*. The Forest Service shall establish a process in its directive system (36 CFR 200.4) for tracking applications for communications uses that provides for:

(A) Identifying the number of applications received, approved, and denied;

(B) For applications that are denied, describing the reasons for denial; and

(C) Describing the amount of time between receipt of an application and grant or denial of the application.

(5) *Authorization of a special use—(i) General.* Upon a decision to approve a special use or a group of similar uses, the authorized officer may issue one or more special use authorizations as defined in §251.51 of this subpart.

(ii) *Minimum term for communications use authorizations.* The term for a communications use authorization shall be 30 years, unless case-specific circumstances warrant a shorter term.

Dated: September 6, 2019.

Daniel James Jiron,

Acting Deputy Under Secretary,

Natural Resources and Environment.

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