Forest Service Response to Public Comments on
Forest Service Handbook 1109.12 Chapter 30

On January 16, 2020, the Forest Service published a proposed directive for public comment implementing revisions to 36 CFR Part 216, which requires public notice and opportunity to comment for Forest Service directives that formulate standards, criteria, or guidelines applicable to forest service programs. The Forest Service (Agency) received comments from 10 respondents, including members of the public, nonprofit organizations, an industry organization, and state and local government. Two of the responses received were not germane to the proposed directive and therefore are not addressed in this response. The others are addressed below, organized by section of the proposed directive. If a section is not discussed below, no comments were received on that section, and it has been incorporated into the final directive as proposed. The final directive will be issued in Forest Service Handbook 1109.12, Chapter 30.

General Comments on the Proposed Directive

Several commenters supported the Agency’s efforts to be transparent and promote its mission by expanding opportunity for public participation in the development of directives that formulate standards, criteria, or guidelines applicable to Forest Service programs. The Agency welcomes this support and the suggestions that accompanied it.

Comments: Two commenters suggested that all directives issued by the Agency should be published in the Federal Register for public comment.

Response: Forest Service regulations at 36 CFR Part 216, and their governing statute, section 14(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (FRRRPA), 16 U.S.C. 1612(a), require public notice and opportunity to comment on formulation of standards, criteria, and guidelines applicable to Forest Service programs. Consistent with these authorities, the proposed and final directives implementing 36 CFR Part 216 provide that only Forest Service directives that meet this standard must be published for public comment. The Agency has discretion to publish directives for public comment when doing so is not required. The Agency will publish a notice in the Federal Register of all directives proposed and interim directives. The Federal Register notice will include a link to the Agency’s website where the proposed and interim directives, background material, and comments on the proposed and interim directives will be posted. Section 14(a) of the FRRRPA and 36 CFR Part 216 do not require the text of Agency directives that are subject to public notice and comment to be published in the Federal Register.

Comment: One commenter stated that having the public periodically check the Forest Service website for updates to directives is an outdated method of providing public notice of revisions and would not adequately inform interested parties. The commenter recommended that the directives affecting particular forests or regions be posted on the websites for those forests or regions. The commenter also recommended a method by which groups or individuals who have requested information about directives be notified of changes to them instead of having to obtain the information.

Response: Public notification methods will include places other than the Forest Service policy webpage. Advance notice of proposed and interim directives will be published quarterly in the Federal Register. In addition, notice of availability of proposed and interim directives for public
comment will be published in the Federal Register. Interested parties may request to receive notice of availability of proposed and interim directives for public comment through the Agency’s e-mail subscription service.

Comment: A commenter stated that the Agency needs to hear from non-special interest groups, permit holders, lessees, and business entities that may be affected by a proposed directive more than 30 days before it goes into effect.

Response: The Agency provides advance notice of proposed directives and has several methods for providing notice to the public of availability of proposed directives for public comment, including notice, upon request, through the Agency’s e-mail subscription service. The comment period for significant proposed directives is at least 60 days. The comment period for non-significant proposed directives is at least 30 days. The Agency may provide a longer comment period, if needed.

Section 31.1

Comment: One commenter requested the Agency to specify who will decide whether public notice and opportunity for comment should be provided when they are not required.

Response: The final directive states that the Deputy Chief for the program area covered by a directive has the authority to determine whether public notice and opportunity for comment should be provided when they are not required.

Section 31.12

Comment: Multiple commenters requested that the Agency provide additional examples of directives that do not require public notice and opportunity to comment.

Response: The Agency believes it has provided sufficient examples of directives that do not require public notice and opportunity to comment under 36 CFR Part 216. Determination of whether a directive will require public notice and opportunity to comment will depend on the content of the directive.

Comment: Another commenter suggested revising proposed section 31.12, paragraph 1a, to provide an opportunity for public comment on directives implementing a court order for those who disagree with the agency’s interpretation of the order.

Response: Proposed section 31.12, paragraph 1a, provides that public notice and opportunity to comment are not required for a directive implementing a court order that the Forest Service lacks discretion to interpret. There is no need to make the revision suggested by the commenter because the court orders covered by this section are not subject to Agency interpretation.

Comment: One commenter suggested including a definitive test in the final directive for whether a directive subject to public notice and comment directly impacts the public and urged the Agency to be liberal in applying the test.

Response: FSH 1109.12, Chapter 30, implements 16 U.S.C. 1612(a) and Forest Service regulations at 36 CFR Part 216, which require public notice and opportunity to comment for Forest Service directives that formulate standards, criteria, or guidelines applicable to Forest Service programs. There is no requirement in 16 U.S.C. 1612(a) or 36 CFR Part 216 to identify directives that directly impact the public.
Comment: One commenter suggested that directives that reinforce policy, practice, or procedure in existing directives should always be published for public comment and that any effect a directive may have on marinas, lodges, campgrounds, youth camps, and other entities that profit from the use of National Forest System lands should never be considered negligible.

Response: Directives that merely reinforce the Forest Service’s preexisting interpretation of an existing rule or directive or that have no or negligible effect on a Forest Service program do not formulate standards, criteria, and guidelines applicable to Forest Service programs and do not require public notice and comment under 16 U.S.C. 1612(a) and 36 CFR Part 216. The Agency has the discretion to provide public notice and opportunity to comment even when they are not required. Determination of whether a directive will require public notice and opportunity to comment will depend on the content of the directive.

Comment: One commenter stated that directives pertaining to Agency budget and finance should be subject to public notice and comment, as appropriate.

Response: Consistent with 16 U.S.C. 1612(a) and Part 216, which require public notice and opportunity to comment on formulation of standards, criteria, and guidelines applicable to Forest Service programs, the proposed and final directives provide that public notice and opportunity to comment are not required for directives that do not apply to Forest Service programs, including Agency administrative support activities such as budget and finance.

Comment: One commenter requested clarification as to when a directive would not require public notice and comment because the directive is implementing a memorandum of understanding (MOU) which the Agency lacks discretion to interpret.

Response: MOUs are not legally binding and do not establish a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation. Rather, MOUs document the parties’ understanding of how they will work together to implement existing statutes, regulations, policies, or technical issues. As such, directives implementing MOUs do not formulate standards, criteria, and guidelines applicable to Forest Service programs and therefore do not require public notice and comment under 36 CFR Part 216.

Comment: The same commenter suggested that in the list of examples of directives that do not formulate standards, criteria, or guidelines, the wording in the example of directives that make a purely technical change to be consistent with applicable law is ambiguous and should be clarified.

Response: The Agency believes that the phrase, “make a purely technical change to be consistent with applicable law” is clear and unambiguous and includes, for example, changing a citation to a statute that has been re-codified or superseded and correcting errors in an existing directive to be consistent with the governing statute.

Comment: One commenter stated that directives that reinforce the Agency’s preexisting interpretation of an existing rule or directive should include only those rules formulated according to the standards set forth in 36 CFR Part 216, as implemented by the proposed directive.

Response: Directives that reinforce the Agency’s preexisting interpretation of an existing rule or directive do not formulate standards, criteria, or guidelines applicable to Forest Service
programs and therefore do not require public notice and opportunity to comment under 36 CFR Part 216.

Section 31.2

Comment: One commenter requested that this section include a table of directives subject to public notice and comment.

Response: Advance notice of proposed and interim directives will be published quarterly in the Federal Register. In addition, notice of availability of proposed and interim directives for public comment will be published in the Federal Register and posted on the Forest Service Regulations and Policies webpage, at https://www.fs.fed.us/about-agency/regulations-policies. Interested parties may also request to receive notice of availability of proposed and interim directives for public comment through the Agency’s e-mail subscription service.

Section 31.4

Comment: Some commenters suggested changing the requirement for a “showing of good cause” to publish an interim directive to a “determination of good cause” to reflect the language in section 31.5. These commenters also suggested including examples of when delaying implementation of a directive until after completion of the public notice and comment process would create unfairness to the public.

Response: The phrase, “showing of good cause,” tracks 36 CFR 216.4, which states: “Upon a finding of good cause that an exigency exists, an interim directive may be effective in advance of providing notice and an opportunity for public comment.” Section 31.5 does not address the requirement for a showing of good cause to issue an interim directive, but rather who will determine whether there is good cause to issue an interim directive.

Comment: Another commenter suggested that “good cause” should be limited to emergency situations where a directive must be issued immediately to protect public health or the environment or prevent a violation of law. The commenter believed that 3 years was too long to allow for development of and public comment on a proposed directive to replace an interim directive and suggested that 6 months was a more appropriate timeframe for this process.

Response: The Agency does not believe that it is appropriate to limit good cause for issuance of an interim directive to emergency situations where a directive must be issued immediately to protect public health or the environment or prevent a violation of law because there could be other circumstances where there is an urgent need to issue an interim directive to mitigate or prevent adverse effects, including but not limited to situations where delaying implementation until after completion of the public notice and comment process would result in inability to implement a statute or regulation which requires directives to set out details for implementation. The Agency agrees that good cause exists where delaying implementation of a directive until after completion of the public notice and comment process would create an immediate risk to public health, safety, or the environment. Accordingly, the Agency has changed the third example of when good cause exists, “where delaying implementation until after completion of the public notice and comment process would create unfairness to the public,” which was somewhat vague, to “where delaying implementation until after completion of the public notice and comment process would create an immediate risk to public health, safety, or the environment.” After a proposed or interim directive is published for public comment under 36 CFR Part 216, timely comments will be considered in development of a final
directive. Final FSH 1109.12, Chapter 30, does not specify a timeframe for issuance of a final directive after a proposed directive is published for public comment. Final FSH 1109.12, Chapter 30, provides that a final directive will be issued no later than 36 months after an interim directive is published for public comment, unless an extension is granted by the Deputy Chief for the program area covered by the directive.

Comment: One commenter requested a process and specific timelines for coordination with State agencies on concurrence with the content of interim directives prior to their issuance.

Response: Section 14(a) of the FRRPRA and 36 CFR Part 216 do not require the concurrence of state agencies on the content of proposed or interim directives prior to their issuance. Accordingly, proposed and Final FSH 1109.12, Chapter 30, provide that the Agency may engage with elected officials of state, local, and tribal governments or their designees to exchange views, information, or advice on proposed or interim directives without being required to charter a FACA committee. Examples of elected officials of state and local governments in this context may include the Governor, County Commissioner, or Mayor. Any designations of authority by elected officials must be made in writing and must be provided to the Agency.

Section 32

Comment: One commenter suggested providing notice of availability of a directive for public comment other than through publication in the Federal Register.

Response: The Agency will post notice of availability of proposed and interim directives for public comment on the Agency’s Regulations and Policies webpage, and interested parties may also request to receive notice of availability of proposed and interim directives for public comment through the Agency’s e-mail subscription service. The Federal Register is also an effective tool for providing public notice because it is widely disseminated and is well known to the regulated community.

Comment: One commenter recommended that the Agency provide public notice and opportunity for comment through the Schedule of Proposed Action (SOPA) listings.

Response: The SOPA listings are exclusively for actions that are subject to environmental analysis and documentation. This system is currently not compatible with management of public notice and comment on directives.

Comment: Another commenter requested clarification on how to receive notice of directives that are determined not to be subject to public notice and comment, in order to provide input as to why public notice and comment should be provided for those directives.

Response: Section 14(a) of the FRRPRA and 36 CFR Part 216 require public notice and opportunity to comment on formulation of standards, criteria, and guidelines applicable to Forest Service programs. Section 14(a) of the FRRPRA and 36 CFR Part 216 do not require public notice and opportunity to comment on determinations that Forest Service directives do not formulate standards, criteria, or guidelines and therefore do not require public notice and opportunity to comment.

Section 32.1
Comment: One commenter asked who has the authority to provide a comment period of more than 30 days for a proposed or interim directive. Another commenter asked who has the authority to extend the comment period for a proposed or interim directive.

Response: The Deputy Chief for the program area covered by a proposed or interim directive has the authority to determine the length of the comment period or to extend the comment period for the directive.

Comment: Several commenters requested clarification on how the Agency would process feedback from public outreach methods, and in particular, whether the Agency would formally respond to that feedback. These commenters suggested providing a best practices document on public engagement to Agency personnel to ensure that future public outreach efforts will be as effective and meaningful as possible.

Response: In addition to the requirements to provide notice of a proposed or interim directive on the Forest Service’s Regulations and Policies webpage, publish a notice of availability for public comment in the Federal Register, and utilize the e-mail subscription service, the Agency has discretion to provide additional public engagement opportunities for a proposed or interim directive, such as public meetings and public informational webinars. The Agency will consider all timely and relevant public comments on a proposed or interim directive from all outreach efforts in developing the final directive. The authoring staff may revise a proposed or interim directive as needed. There is no requirement to adopt any recommendation received. Written response to comments will be provided, including when appropriate an explanation of the Agency’s reasoning. The Agency has discretion to determine the most effective approach to responding to comments.

Section 32.21

Comment: Another commenter suggested that all directives be published in the Federal Register to further simplify the process and maintain consistency with notification procedures.

Response: Section 14(a) of the FRRRPA and 36 CFR Part 216 require public notice and opportunity to comment on formulation of standards, criteria, and guidelines applicable to Forest Service programs. Advance notice of proposed and interim directives will be published quarterly in the Federal Register. In addition, notice of availability of proposed and interim directives for public comment will be published in the Federal Register. Directives that do not formulate standards, criteria, or guidelines applicable to Forest Service programs do not require public notice, through publication in the Federal Register or otherwise, or opportunity for comment.

Section 32.3

Comment: One commenter stated that it was unclear how the Agency would respond to comments on proposed and interim directives and suggested establishing multiple conflict resolution points in the public notice and comment process to avoid unnecessary legal challenges.

Response: The Agency will consider all timely and relevant public comments on a proposed or interim directive in developing the final directive. The authoring staff may revise a proposed or interim directive as needed. There is no requirement to adopt any recommendation received. Written response to comments will be provided, including when appropriate an explanation of
the Agency’s reasoning. The Agency has discretion to determine the most effective approach to responding to comments.

**Comment:** Several commenters suggested that consideration of public comments could be improved by adding the phrase, “to incorporate improvements and factual corrections” at the end of the sentence, “The authoring staff should revise the proposed or interim directive as needed.” The commenters also suggested revising the sentence, “Written response to comments must be provided, including when appropriate an explanation of the Agency’s reasoning,” to read: “Written Agency response to comments must be publicly available.”

**Response:** The Agency does not believe it is appropriate to add the phrase, “to incorporate improvements and factual corrections” at the end of the sentence, “The authoring staff should revise the proposed or interim directive as needed,” because the word “improvements” is subjective and because the phrase “improvements and factual corrections” is too limiting. The Agency may need to make other revisions, such as corrections to legal citations. Since the sentence, “Written response to comments must be provided,” is directed at agency employees, it is unnecessary to add the word “Agency” after the word “written” in the phrase, “written response to comments.” It is also unnecessary to state in this sentence that written response to comments must be publicly available, as section 32.5, paragraph 2, of final FSH 1109.12, Chapter 30, provides for posting a notice of a final directive on the Agency’s Regulations and Policies webpage that includes a response to timely and relevant comments on the proposed or interim directive.

**Section 33**

**Comment:** Several commenters noted a discrepancy between how the title of section 33 appeared in the table of contents versus in the directive text.

**Agency’s Response:** The title of section 33 in the proposed directive text is correct. The title of section 33 in the table of contents for the final directive has been revised to match the title of section 33 in the directive text.

**Section 33.1**

**Comment:** One commenter identified three typographical errors in the proposed directive text for this section.

**Response:** The Agency has corrected these typographical errors in the text of the final directive.

**Comment:** Another commenter suggested mentioning consultation with state and county governments, in addition to tribal governments, in paragraph 5 of this section.

**Response:** The Agency does not believe it would be appropriate to add a reference to state and local governments to paragraph 5 of section 33.1 of the final directive. Section 33.1 addresses the description of public notice methods in the Quarterly Directive Publication Notice, including any anticipated intergovernmental engagement such as tribal consultation, as appropriate. As stated in section 34.2 of the final directive, formal tribal consultation may be required for a proposed or interim directive. In contrast, per section 34.1 of the final directive, consultation with state and local governments is not required and is subject to the requirements of the Federal Advisory Committee Act.
Section 33.2

Comment: One commenter suggested changing the word “meetings” in the last sentence of this section to “engagement opportunities.”

Response: The Agency agrees that the term “engagement opportunities” is preferable, as it provides more flexibility than the term “meetings,” and has therefore made this change in the final directive.

Section 33.3

Comment: Several commenters requested clarification as to whether this section required development of a Public Engagement Plan. This section in the proposed directive stated: “A carefully developed Public Engagement Plan is a good resource for ensuring that public engagement is designed so that consensus advice is not sought and Federal Advisory Committee Act (FACA) requirements are not triggered.”

Response: While the proposed and final directives provide for required and optional public outreach methods, neither directive provides for preparation of a public engagement plan. Accordingly, section 33.3 in the final directive states: “Optional public outreach mechanisms should be designed so that consensus advice is not sought and Federal Advisory Committee Act (FACA) requirements are not triggered.”

Section 34.1

Comment: A commenter suggested adding County Commissioners as examples of elected officials with whom the Agency may engage to exchange views, information, or advice on proposed or interim directives without being required to charter a Federal Advisory Committee Act (FACA) committee.

Response: The Agency agrees that this would be a useful addition and has added “County Commissioners” to the examples of elected officials in this section of the final directive.

Comment: Another commenter suggested including procedures for the Agency to coordinate with states in the pre-planning and planning processes for interim and proposed directives to identify and address areas of mutual interest, statutory and management authority, state trust responsibilities, and state planning.

Response: Per section 34 of the final directive, it is the policy of the Forest Service to ensure appropriate intergovernmental communication consistent with FACA when developing or amending directives that are subject to public notice and comment. The Agency may engage with elected officials of state, local, and tribal governments or their designees to exchange views, information, or advice on proposed or interim directives without being required to charter a FACA committee. Examples of elected officials of state and local governments in this context may include the Governor of a state. Any designations of authority by elected officials must be made in writing and must be provided to the Agency.