



NATIONAL FOREST RECREATION ASSOCIATION
Responsible Recreational Use of America's Public Lands and Waters

March 16, 2020

Michael Migliori
Program Analyst
Office of Regulatory and Management Services
USDA Forest Service
201 14th Street SW
Washington, DC 20024

Re: *Comments in response to the USDA Forest Service Proposed Directives on Providing Notice and Comment on Proposed Forest Service Directives (85 Fed. Reg.2865)(January 16, 2020)*

Dear Mr. Migliori:

I am writing to you on behalf of the National Forest Recreation Association (NFRA), which represents and serves as an advocate for businesses offering quality outdoor recreation opportunities to the public on National Forests and other federal lands and waters across the United States. NFRA works with its members to forge a strong partnership with the USDA Forest Service and other land management agencies to ensure the public receives high quality recreational opportunities on public lands. NFRA very much appreciates the opportunity to submit comments in response to the Forest Service's proposed revisions to its directives regarding when the agency will provide notice of and seek public comment on proposed changes to those directives.

As the Forest Service notes on its website, the agency's directive system is the primary basis for the internal management and control of all programs administered by the agency and is the primary source of administrative direction to Forest Service employees. The directives also set out directions with which agency employees must comply when the terms "must," "shall" or other imperative language is used. For these reasons, the content of and changes to these directives are very important to NFRA's members who, in turn, must comply with direction provided to them by agency employees.

NFRA appreciates the government's general requirement that agency guidance documents are developed with appropriate public participation, are accessible and transparent to the public and are of high quality. To achieve this goal, the agency's proposed guidance recognizes that, except in very limited circumstances, directives that formulate standards, criteria or guidelines for the agency's programs or that directly impact the public must be first be set out for public comment before becoming binding on agency employees. However, there is no definitive test for whether guidance falls under these criteria. At times, the question of whether or not specific proposed guidance falls under these criteria and is therefore subject to notice and comment can be in dispute. *See, e.g., Back Country Horsemen of America v.*

Johanns, 424 F. Supp. 2d 89, 95-98 (D.D.D. 2006)(federal court disagreed with the Forest Service's determination that certain guidance did not need to be first issued for public comment). Due to this fact and the impact the agency's internal guidance can have on permittees, NFRA urges the agency to be very liberal in its determination of when guidance should be subject to notice and comment.

For example, the proposed guidance definitively states that any directive which implements a court order, regulation, executive order or memorandum of understanding that the Forest Service lacks discretion to implement is not subject to notice and guidance. (Sec. 31.12(1)(a)). NFRA agrees with that statement but only if and when the proposed guidance set out that in that court order or other authority is also set out verbatim in the proposed guidance. If the proposed guidance does not set it out verbatim, the directive likely will contain some element of interpretation of that authority. In that instance, the directive does in fact include discretionary additional guidance which should be subject to notice and comment.

The same point would be true with any new language that "reinforces" existing directive guidance. If the new language is needed, it presumably is being proposed to address an issue or direction that was not clear in the language of the existing directive. This new language would then also very likely be the type of discretionary additional and new direction that should be subject to notice and comment. Also, NFRA agrees with the proposed provision which states that changes that have a negligible effect on a program may not merit notice and comment. However, many effects that might be perceived as negligible to some could be very critical to others. Therefore, with regard to any proposed provisions that have an impact on businesses such as marinas, lodges, campgrounds, youth camps, pack stations, resorts and outfitter/guides, NFRA believes that the effect is not negligible. NFRA would oppose the issuance of any proposed guidance that impacts businesses without public comment. The proposed guidance also exempts any directives related to the agency's budget and finance matters. NFRA's members, however, are directly impacted by the agency's use of its financial resources. Thus, NFRA believes that directives that apply to the agency's budget and finances should at least be eligible for consideration for public notice and comment when appropriate.

For all of the foregoing reasons, NFRA urges the agency to err on the side of caution with regard to any determination that proposed changes to existing directives do not merit notice and comment.

The proposed guidance further states that the agency may elect to issue an interim directive that is fully and immediately binding on its employees (and thus, in effect, on NFRA's members) without any notice or comment "upon a showing of good cause." (Sec. 31.4.) The agency sets out several examples of what may constitute "good cause." NFRA urges the Forest Service to define good cause as being only emergency situations where a directive is required to be issued immediately to protect the public health, environment or a violation of law. And in the instance of avoiding a violation of law, the guidance should state that any directive must be limited to a verbatim statement of that applicable law. Otherwise, the agency very well may be creating an internal "law" that is binding on the public but was not subject to appropriate notice and comment. NFRA also strongly objects to the proposed language which would allow the agency to proceed under an interim directive for up to three (3) years before seeking any public

comment and notice. Three (3) years appears to be an excessive period of time under which an interim but fully binding rule that otherwise requires public comment is in place. NFRA believes a period of six (6) months is more appropriate.

Finally, proposed Section 32 describes the process for how the agency will provide notice and comment of directives to be published. NFRA requests that this language clarify that this process include notice of impending directives that the agency has determined will not be subject to any comments from the public. By doing so, the public will at least be provided the opportunity to inform the agency if they believe an impending directive does fall under the criteria for notice and comment as set out by law and the Office of Management and Budget's guidance.

NFRA appreciates the opportunity to submit the foregoing comments and the Forest Service's efforts to ensure proper notice is provided and comments received with regard to appropriate proposed changes to its internal policy guidance.

Very truly yours,

Kevin R. Garden

Kevin R. Garden
Washington Representative
National Forest Recreation Association