

Determination of Nominal Effects

Frequently Asked Questions

Background

In 2004, the Forest Service's special uses regulations at 36 CFR 251.50 were revised to clarify the categories of activities that require a special use authorization. The revised regulations provides the authorized officer the discretion to waive the requirement for a special use authorization other than for noncommercial group uses. Based on a review of the proposed use, the authorized officer can determine if the proposed use will have such nominal effects on National Forest System (NFS) lands, resources, or programs and waive the requirement for a special use authorization. This also means that it is not necessary to establish terms and conditions in a special use authorization to protect NFS lands and resources or to avoid conflict with NFS programs or operations (the complete language for 36 CFR 251.50(e)(1) is included at the end of this document for quick reference).

Under 36 CFR 251.50(e)(1), authorized officers have discretion to waive the special use authorization requirement for proposed uses on a case by case basis. Proposed uses in some situations may have little or no impact on NFS lands, resources, or programs. In considering whether a nominal effects determination is appropriate, seek to allow activities that truly will not impact or will have only nominal effects on NFS lands, resources or programs to move forward without undue process, recognizing the benefits to the Forest Service of connecting people to outdoor experiences. However, the waiver should not be used to avoid the permit process where effects are more than nominal. No two situations are exactly alike, and the authorized officer should exercise professional judgment, rely on experience with comparable uses, and consider all relevant facts in making a determination.

These FAQs are intended to help field staff better understand and utilize the authorities and tools we have in our current directives system.

Frequently Asked Questions

The following questions are all put forth in the context of 36 CFR 251.50(e)(1). The primary focus of these questions is on the use of nominal effects in the recreation context and in that context as it relates to other topics such as NEPA. However, there may be situations in the Lands context in which nominal effects should or should not be considered. Likewise, there may be situations in which further guidance is needed in the recreation context. In both of these situations consult with the appropriate regional program manager for further clarification.

Q1: What are “nominal effects”?

***AI:** Nominal effects are described in 36 CFR 251.50(e) as follows: For proposed uses other than a noncommercial group use, a special use authorization is not required if, based upon review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics: (1) The proposed use will have such nominal effects on National Forest System lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect National Forest System lands and resources*

or to avoid conflict with National Forest System programs or operations. (The other two characteristics are found in the CFR reference).

Q2: Who makes the determination that a proposed activity would have such nominal effects that an authorization is not required?

A2: The authorized officer, the employee with delegated authority, usually the District Ranger or the Forest Supervisor (see FSM 2704.2 for information on roles and responsibilities related to special use authorizations). The authorized officer can consult with appropriate specialists as needed given the nature and context of the proposed activity. Proponents do not make the determination and are not relieved of their obligation to submit a proposal to the authorized officer for their proposed use.

Q3: Can the authorized officer determine that a category of activities (e.g., all hiking on trails) has such nominal effects that a special use authorization is not required?

A3: No. Eligibility for a waiver of the special use authorization requirement must be made case by case, based on a review by the authorized officer of a specific proposal. Each situation is unique because of natural, cultural, social, and temporal components, and each situation will require individual consideration. The language and intent in 36 CFR 251.50(e)(1) for nominal effects should not be used to avoid conducting NEPA analysis, issuing special use authorizations, and collecting cost recovery and land use fees. A letter that documents that an authorized officer has determined that a proposed use does not require a special use authorization under 36 CFR 251.50(e)(1) is not a special use authorization. If the proposed use is not a nominal effect and requires a special use authorization, then follow the standard procedures; a special use authorization cannot be authorized by a letter (FSH 2709.11, sec. 14).

Q4: Can a commercial activity be waived from the requirement for a special use authorization?

A4: If the authorized officer determines based on the review of a proposal, that the proposed use will have such nominal effects on NFS lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect NFS lands and resources or to avoid conflict with NFS programs or operations, then a special use authorization is not required. That determination is not based on whether or not the use is commercial (see definition of commercial in FSH 2709.14 CH50). It is based on effects to NFS lands, resources and programs.

Q5: What kind of issues may have a bearing on whether a proposed use has nominal effects on NFS lands, resources, or programs?

A5: Examples include but are not limited to public health and safety; potential government liability; allocation of use and other aspects of special uses program administration; and potential impacts on natural resources, such as cultural or historical resources, threatened or endangered species, species of conservation concern, wilderness and other congressionally designated areas, wetlands, and watersheds. A determination of nominal effects is not a federal action for NEPA purposes and does not require environmental analysis and documentation.

Q6: Is Congressionally Designated Wilderness excluded from the nominal effects determination?

A6: No. While many permit applications may have nominal effects, the authorizing officer must comply with the Wilderness Act (U.S.C. 11310 1136) to evaluate the request to determine if it preserves wilderness character (CFR 36 293.2). If a proposed activity degrades qualities of

wilderness character that must be preserved, which include: 1) untrammled, 2) natural, 3) undeveloped, 4) opportunities for solitude or primitive and unconfined recreation, and 5) other features of value, then a nominal effects determination would not be appropriate.

Q7: Can commercial filming be considered to have nominal effects?

A7: See A4. However, commercial filming proposals in wilderness must meet other criteria and a special use authorization may be required.

Q8: Can non-recreation special uses have nominal effects?

A8: Yes. Uses with nominal effects are not limited to recreational activities. For example, some research projects on NFS lands might qualify for a waiver of the special use authorization requirement, such as collecting data on the species of butterflies that prefer certain species of wildflowers that merely involves walking to the research sites and making visual observations in a grid pattern over a half acre of NFS lands. However, collecting the same type of data in an area closed to the public because of the presence of endangered plant species would not have nominal effects and would not qualify for a waiver of the special use authorization requirement.

Q9: Would proposed use of existing Forest Service infrastructure such as campgrounds and trails be considered to have nominal effects?

A9: It depends on the nature and context of the proposed use. If the authorized officer determines, based on a review of the proposal, that the proposed use will have such nominal effects on NFS lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect NFS lands and resources or to avoid conflict with NFS programs or operations, then a special use authorization is not required. That determination is not based on whether the proposed activity involves use of existing Forest Service infrastructure; that determination is based on effects of the proposed activity on NFS lands, resources, and programs.

Q10: What about the potential of a proposed activity to exceed capacity of existing Forest Service infrastructure?

A10: If a proposed activity would exceed the capacity of existing Forest Service infrastructure, it would not have nominal effects under 36 CFR 251.50(e)(1).

Q11: I have a seasonally popular recreation opportunity in my district. Can I consider off-season use of that recreation opportunity to have nominal effects?

A11: Yes, you can consider off-season use to have nominal effects if the required conditions otherwise exist. However, nominal effects determinations must be made on a case by case basis. Each proposed use must be evaluated based on the nature and context of the proposed activity; for example, if a proposed use would likely lead to user conflicts or decrease the overall quality of the user experience, terms and conditions might be needed such that a nominal effects determination is not appropriate. In addition, there may be other factors besides off-season use, such as public health and safety, potential liability, and resource concerns that have a bearing on the nominal effects determination.

Q12: Can examples such as recreation residences, electric transmission lines, and campground concessions be considered to have nominal effects?

A12: See A4. In most cases, recreation residences, electric transmission lines, and campground concessions, which involve operation and maintenance of improvements on NFS lands, have such effects on NFS lands, resources, or programs that it is necessary to establish terms and

conditions in a special use authorization to protect NFS lands and resources or to avoid conflict with NFS programs or operations.

Q13: If the authorized officer determines that a proposed use would have nominal effects, what type of NEPA documentation is needed?

A13: If there is no federal decision needed to allow a use, then there is no NEPA requirement to be met. However, we encourage the authorized officer to document both the determination and the rationale for the determination that a proposed use qualifies for the exemption in 36 CFR 251.50(e)(1). In particular, the documentation should explain why the proposed use would have such nominal effects on NFS lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect NFS lands and resources or to avoid conflict with NFS programs or operations. In addition, the documentation should state that the determination may be rescinded in writing by the authorized officer at any time during the proposed activity and a special use authorization may be required if, due to changes to the proposed activity, associated NFS lands, or any other factors there is no longer a basis for the nominal effects determination. See A17.

Q14: If the authorized officer determines a proposed use would have nominal effects, what type of documentation is issued to the proponent?

A14: No special use authorization would be issued to the proponent, as the proposed use would be exempt from the special use authorization requirement. A letter or other form of notification should be sent to the proponent stating that a special use authorization is not required under 36 CFR 251.50(e)(1). They are encouraged to have the notification with them when they operate in the field to present to enforcement officers or permit administrators if asked. A sample letter for this purpose is attached at the end of this document. Since a special use authorization is not required, the letter should not contain terms and conditions.

Q15: Can an authorized officer place terms and conditions on a proposed use that qualifies as a nominal effects determination?

A15: No. If terms and conditions are needed, the proposed use does not qualify for the nominal effects determination and a special use authorization is required.

Q16: How long is a nominal effects determination effective?

A16: A nominal effects determination applies to the specific proposed activity associated with that determination and is effective for the duration of that activity not to exceed five years, provided there is still a basis for the nominal effects determination (nothing changes from the proposed activity). If due to changes to the proposed activity, associated NFS lands, or any other factors (such as the discovery of an endangered species in the area) there is no longer a basis for the nominal effects determination, the authorized officer should rescind the determination in writing and require a special use authorization. If the same activity is requested in the future, a new nominal effects determination must be made.

36 CFR 251.50(e) Language:

(e) For proposed uses other than a noncommercial group use, a special use authorization is not required if, based upon review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics:

- (1) The proposed use will have such nominal effects on National Forest System lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect National Forest System lands and resources or to avoid conflict with National Forest System programs or operations;
- (2) The proposed use is regulated by a State agency or another Federal agency in a manner that is adequate to protect National Forest System lands and resources and to avoid conflict with National Forest System programs or operations; or
- (3) The proposed use is not situated in a congressionally designated wilderness area, and is a routine operation or maintenance activity within the scope of a statutory right-of-way for a highway pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976) or for a ditch or canal pursuant to R.S. 2339 (43 U.S.C. 661, as amended), or the proposed use is a routine operation or maintenance activity within the express scope of a documented linear right-of-way.

Nominal effects determination letter template:

<General user notes – The authorized officer and special uses staff should review 36 CFR 251.50(e) to ensure that the proposed use does not require a special use authorization. A letter, using the optional template below, merely acknowledges that the proposed use was reviewed and a determination made that a special use authorization is not required. Letters cannot be used as a substitute for a special use authorization. If restrictions or requirements are needed beyond those applicable to the general public, the permit requirement should not be waived. >

Dear <proponent>

I have reviewed your proposal to < specify use, activity, location, group size, timing, etc> on the <specify unit> National Forest. After reviewing your proposal for compliance with regulations found at 36 CFR 251.50, I have determined that your proposed use, as you have described, will have nominal effects on the lands, resources, and programs of the National Forest, therefore a special use permit is not required.

If your proposed use changes from what you've described, please contact me to determine whether your use continues to qualify for a permit waiver. Likewise, if any factor associated NFS lands, resources, or programs (such as the discovery of an endangered species in the area) changes and there is no longer a basis for the nominal effects determination, I or someone from my office will contact you in writing to rescind the nominal effects determination. If this happens, there may be alternative mechanisms to permit your activity.

If you propose to conduct the same activity next year, please contact me again to ensure that your use continues to qualify for a permit waiver.

As a reminder, your use must comply with all federal, state, and local laws, regulations, and policies. <Optional – Add statements addressing known local conditions or restrictions. For example, XYZ area is subject to a closure order for the protection of nesting eagles between xxxx and xxxx.>

As a courtesy to others, I ask that you practice "Leave No Trace" ethics as described in the enclosed brochures. <delete if not applicable>

I recommend that you carry a copy of this letter with you to verify that I have determined that your use, as described above, does not require a special use authorization.

Enjoy your National Forest. Please contact my office if you need any further assistance.

Sincerely,

<authorized officer.>