

Considerations relevant to State plans to use piscicides within NFS lands

Contents

1. Is special use authorization required?	1
2. Does NEPA apply?	1
3. What level of NEPA is needed?	2
4. Is scoping required?	2

1. Is special use authorization required?

Special use authorization is required for pesticide use [36CFR 261.9(f)]. However, exceptions may apply where a special use authorization is not necessary. 36 CFR251.50(e)(1) and (e)(2) provide these exceptions where an authorization may be waived.

Prior to accepting a proposal, the Forest Service and State agency may coordinate, early, to develop a proposal. The State may approach the Forest Service to determine what actions would be **“adequate to protect National Forest System lands and resources”** [36CFR215.50(e)(2)]. This may preclude the need for the FS to **“establish terms and conditions in a special use authorization to protect National Forest System lands and resources”** [36CFR251.50(e)(1)]. The details of their proposal (self regulating) would determine whether additional terms and conditions would be needed.

36 CFR 261.9(f) prohibits the use of pesticides except as provided by a special use authorization.

“(f) Using any pesticide except for personal use as an insect repellent or as provided by special-use authorization for other minor uses.”

36CFR 251.50(a) requires special use authorization unless it is waived.

*“Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer, **unless that requirement is waived by paragraphs (c) through e(3).**”*

36 CFR251.50(e)(1) and (e)(2) outlines the exceptions for waivers:

“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.**”*

2. Does NEPA apply?

A proposal is subject to NEPA when *“The proposed action is subject to Forest Service control and responsibility (see 40 CFR 1508.18)”*. The Forest Service does not normally have control or responsibility over the management of wildlife. However, if the agency issues a special use authorization NEPA would apply. NEPA would also apply to any terms and conditions applied to the special use authorization. Examples may include (but not limited to) special closure order to an area during State operations, authorizing motorized use in

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nonmotorized areas, or timing restrictions. NEPA would only apply to the actions under the control and responsibility of the Forest Service.

3. What level of NEPA is needed?

Piscicide authorized actions could fall under the categorical exclusion (CE) at 36CFR 220.6(d)(8), for minor short-term uses on NFS lands, which does not require documentation. Although a supporting record is not required it is highly recommended that, as a minimum, the project or case file include the names of interested and affected people, groups, and agencies contacted; the **determination that no extraordinary circumstances exist**, and pertinent correspondence between the State and FS.

Keep in mind the mere presence of (or impact to) one or more of the seven resource conditions required for consideration under extraordinary circumstances does not preclude the use of the CE. It is the **degree of impact on the resource condition** that determines if there is an extraordinary circumstance. The consideration of extraordinary circumstances would apply only to those activities under the control and responsibility of the federal agency (e.g. agency prescribed terms and conditions or special authorizations to the State that is not allowable to the general public). However, cumulative impacts from the State activities would need to be considered in this evaluation.

36CFR 220.6(d)(8) – Categorical Exclusion

(d) Categories of actions for which a project or case file and decision memo are not required. A supporting record and a decision memo are not required, but at the discretion of the responsible official, may be prepared for the following categories:

(8) Approval, modification, or continuation of minor, short-term (1 year or less) special uses of NFS lands.

36 CFR 220.6(b) Extraordinary Circumstances

Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS are:

- (1) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;*
- (2) Flood plains, wetlands, or municipal watersheds;*
- (3) Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas;*
- (4) Inventoried roadless areas or potential wilderness areas;*
- (5) Research natural areas;*
- (6) American Indians and Alaska Native religious or cultural sites, and*
- (7) Archaeological sites, or historic properties or areas.*

The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion (CE). It is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determine whether extraordinary circumstances exist. (36 CFR 220.6(b))

4. Is scoping required?

Scoping is required for all actions subject to NEPA.

36 CFR 220.4(e)

(e) Scoping (40 CFR 1501.7). (1) Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS (§ 220.6). The level of scoping is at the discretion of the line officer and could only be internal project review.