

**Forest Service Handbook
National Headquarters - Washington Office
Washington, DC**

**Forest Service Handbook 1109.12 – Directive System Handbook
Chapter 30 - Providing Notice and Opportunity to Comment on Forest Service Directives**

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Superseded Directive:

Approved by: Claudette Fernandez, Deputy Chief, Business Operations

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Responsible Staff:

Explanation of changes: Following is an explanation of the changes throughout the directive by section.

Chapter 30: Removes and replaces Chapter 30 in its entirety.

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This chapter specifies when public notice and an opportunity to comment are required for Forest Service directives and the procedures for meeting those requirements.

31 – Forest Service Public Notice and Comment System

The Agency publishes public notice in the *Federal Register* of directives that will be published for comment in the next 3 months; publishes public notice of availability of directives for comment in the *Federal Register* and on the Forest Service’s Regulations and Policies webpage; uses an e-mail subscription service to notify the public of availability of directives for comment; considers and responds to timely and relevant public comments in developing final directives; and publishes public notice of final directives in the *Federal Register* and on the Agency’s Regulations and Policies webpage.

The Forest Service public notice and comment system is consistent with Executive Order (EO) 12866 and the Office of Management and Budget’s (OMB’s) direction, including the Final Bulletin for Agency Good Guidance Practices (GGP), on Agency guidance (72 Fed. Reg. 3439 (Jan. 25, 2007), available at <https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>). The purpose of EO 12866 and the GGP is to ensure that agency documents like Forest Service directives are developed with appropriate public participation, are accessible and transparent to the public, and are of high quality.

31.1 – Directives Subject to Public Notice and Comment Requirements

A Forest Service directive is subject to public notice and comment if it:

1. Formulates standards, criteria, or guidelines applicable to Forest Service programs (16 U.S.C. 1612(a); 36 CFR Part 216); or
2. Has been designated by OMB as a significant directive per Section I.4 of the GGP.

Directives may be published for public comment even when public notice and comment are not required by law or regulation. 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.

31.11 – Directives that Formulate Standards, Criteria, or Guidelines Applicable to Forest Service Programs

Public notice and opportunity to comment are required for directives that formulate standards, criteria, or guidelines applicable to Forest Service programs (16 U.S.C. 1612(a); 36 CFR Part 216). “Formulate” refers to development of new directives or modification or removal of existing directives.

1. Public notice and opportunity to comment are not required for directives that do not formulate standards, criteria, or guidelines (16 U.S.C. 1612(a); 36 CFR Part 216). Examples of directives that do not formulate standards, criteria, or guidelines and therefore do not require public notice and opportunity to comment include but are not limited to directives that:
 - a. Implement a court order, statute, regulation, executive order, or memorandum of understanding that the Forest Service lacks discretion to interpret;
 - b. Correct typographical, grammatical, or legal errors; update statutory or regulatory authorities; or reformat or reorganize existing content;
 - c. Make a purely technical change to be consistent with applicable law;
 - d. Reinforce the agency’s preexisting interpretation of an existing rule or directive; or
 - e. Have no or negligible effect on a Forest Service program.
2. Public notice and opportunity to comment are not required for directives that do not apply to Forest Service programs (16 U.S.C. 1612(a); 36 CFR Part 216). The following are not Forest Service programs, and therefore directives applicable to them do not require public notice and comment:
 - a. Law enforcement and investigations;
 - b. Personnel matters;
 - c. Procurement;
 - d. Administrative support activities such as budget and finance; and
 - e. Activities undertaken by the Forest Service on behalf of other federal agencies (36 CFR Part 216.1(b)).

31.12 – Significant Directives

Section III.2.a of the GGP requires that directives designated as significant by OMB's Office of Information and Regulatory Affairs (OIRA) be published for public comment. Directives designated as significant are also subject to review by OIRA. Significant directives include agency statements of general applicability and future effect, other than regulations, that set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue, and that have one or more of the effects listed in Section I(4)(i)-(iv) of the GGP and section 31.12, paragraphs 1a through 1d.

1. Criteria for Significance. Per Section 3(f) of EO 12866 and Section I.4.a of the GGP, a directive is considered to be significant if it may reasonably be anticipated to:
 - a. Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;
 - b. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
 - c. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
 - d. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866, as further amended.

Directives that do not meet any of the criteria in this paragraph are considered non-significant.

2. Obtaining Significance Determinations from OIRA.
 - a. Types of Directives Submitted for a Significance Determination. USDA's Office of Budget and Program Analysis (OBPA), on behalf of the Forest Service, will periodically provide to OIRA a list of proposed, interim, and final directives that impose, eliminate, or modify requirements on non-Forest Service parties or that create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, including a description of the directive and a recommendation as to which of those proposed, interim, and final directives should be designated as significant by OIRA. If OIRA designates a directive on the list as significant, the directive will be submitted to OIRA for EO 12866 interagency review.
 - b. Need for Subsequent Significance Determination for Final Directives. USDA will request a single significance determination at the proposed or interim stage that will apply to both the proposed or interim and final stages. If the directive is designated

as non-significant at the proposed or interim stage, no further significance determination is needed before publication of the final directive, unless there is public comment that would warrant a significance determination for the final directive. If the directive is designated as significant at the proposed stage, USDA will request a significance determination at the final stage or, if USDA believes the final directive is likely to be designated as significant, will submit the final directive to OIRA for review without a second significance determination.

31.2 – When Part of a Directive is Subject to Public Notice and Comment Requirements

An entire directive does not require public notice and opportunity to comment if only a part or parts of it formulate standards, criteria, or guidelines applicable to Forest Service programs. Only the part or parts of that directive that formulate standards, criteria, or guidelines applicable to Forest Service programs require public notice and opportunity to comment.

31.3 – Directive Supplements

Forest Service units have the authority to issue supplements to Service-wide directives to address region- or forest-specific circumstances, consistent with corresponding Service-wide directives (36 CFR 200.4). Directive supplements that have been designated by OIRA as significant or that formulate standards, criteria, or guidelines applicable to Forest Service programs require public notice and opportunity to comment.

31.4 – Interim Directives

Upon a showing of good cause, the Agency may issue a directive that is subject to public notice and comment as an interim directive, which takes effect immediately upon publication for public comment. An interim directive is still subject to review by OIRA for a determination of significance prior to publication for public comment. The interim directive will serve as the public notice for the final directive. After the comment period for the interim directive closes, timely and relevant comments on the interim directive will be considered in developing the final directive. The final directive will be issued no later than 36 months after the interim directive is published for public comment, unless an extension is granted by the Deputy Chief for the program area covered by the directive.

Good cause for purposes of issuance of an interim directive includes but is not limited to situations where delaying implementation of the directive until after completion of the public notice and comment process would:

1. Violate applicable law, such as when delay in implementation would result in noncompliance with a statute or court order;
2. Result in inability to implement a statute or regulation which requires the Agency to issue directives to set out details for implementation; or

3. Create an immediate risk to public health, safety, or the environment.

31.5 – Determining Whether a Directive Must be Made Available for Public Comment

The Deputy Chief for the program area covered by a directive or directive supplement determines whether that directive or directive supplement must be made available for public comment pursuant to 36 CFR Part 216 (sec. 31.11 of this chapter) and if good cause exists to support publication of an interim directive (sec. 31.4).

32 – Procedures for Providing Notice and Opportunity for the Public to Comment on Proposed and Interim Directives

The Agency’s procedure for providing public notice and opportunity to comment is to provide public notice of directives that will be published for comment in the next 3 months; provide public notice and opportunity to comment on proposed and interim directives; consider and respond to timely and relevant public comments in developing final directives; and provide public notice of final directives. Table 1 identifies the stages of the public notice and comment process discussed in this section. The Washington Office manages public notice and comment procedures, when required, for directives and directive supplements.

Table 1: Summary of Public Notice and Comment Procedures for Directives
<u>Step 1. Publish Advance Notice.</u> The intent to propose a directive, or to issue an interim directive, with a brief description, will be set out in the Forest Service Directive Publication Notice, published quarterly in the <i>Federal Register</i> and posted on the Forest Service’s Directives and Policies webpage (sec. 32.1).
<u>Step 2. Notify the Public When a Proposed or Interim Directive is Available for Comment.</u> A proposed or interim directive will be posted on the Forest Service’s Regulations and Policies webpage, and a Notice of Availability will be published in the <i>Federal Register</i> (sec. 32.2).
<u>Step 3. Consideration of Timely and Relevant Comments.</u> At the close of the comment period, the Agency will consider and respond to timely and relevant comments on the proposed or interim directive and revise it as appropriate (sec. 32.3).
<u>Step 4. Finalize the Directive.</u> The final directive will be published in the Directive System and on the Forest Service’s Regulations and Policies webpage and will be listed, with a link to the final directive as issued on the Forest Service’s website, in the quarterly Directive Publication Notice, which will be published in the <i>Federal Register</i> . The Agency’s response to comments received on the proposed or interim directive will also be posted on the Agency’s Regulations and Policies webpage (sec 32.4).

32.1 – Directive Publication Notice

To provide advance notice that directives will be published for public comment, the Servicewide Directive Manager will include a list of proposed and interim directives to be published in the next three months in a Directive Publication Notice published quarterly in the *Federal Register* and posted on the Forest Service’s Regulations and Policies webpage.

The Forest Service Directive Publication Notice includes:

1. A list of proposed and interim directives that the Agency plans to publish for public comment during the next 3 months, along with a brief description of each.
2. A description of public outreach methods planned for each proposed or interim directive so that the public may know what to expect regarding the public notice and comment process and may recommend changes that could improve the effectiveness of planned communication strategies (sec. 33.1).
3. A list of every proposed and interim directive that has been published for public comment and that has not yet been issued as a final directive.
4. A list of proposed and interim directives that were finalized in the prior quarter, with a link to the final directives as issued on the Forest Service’s website.
5. Any additional information that may be helpful to the public in understanding the status of the Directive System.
6. The name, e-mail address, and telephone number of a Forest Service employee to contact for more information.

Publication of a proposed directive for public comment will be at least 15 days after advance notice of the directive was published in the Directive Publication Notice.

An interim directive may be published for public comment prior to inclusion in a Directive Publication Notice, but if so, must be included in the first Directive Publication Notice after the interim directive is published for public comment.

32.2 – Notifying the Public of the Availability of a Proposed or Interim Directive for Public Comment

Once a proposed or interim directive is cleared for publication for public comment, the Agency shall post the directive on the Forest Service’s Regulations and Policies webpage and shall publish a notice of availability (NOA) of the directive in the *Federal Register*. The NOA will include a link to the directive on the Forest Service’s Regulations and Policies webpage.

32.21 – Comment Period

The comment period starts on the date the NOA is published in the *Federal Register*. The Deputy Chief for the program area covered by a proposed or interim directive has discretion to determine the comment period that is appropriate for that directive, subject to the following requirements:

1. The comment period for all directives subject to public notice and comment is at least 30 days. A longer comment period may be provided, if appropriate.
2. The comment period for interim directives that were published prior to inclusion in a quarterly Directive Publication Notice must extend at least 15 days after the publication of the quarterly Directive Publication Notice published after an interim directive.

32.22 – Required Information to be Provided in an NOA and on the Forest Service's Regulations and Policies Webpage

1. NOAs Only. An NOA must include a link to the proposed or interim directive on the Forest Service's Regulations and Policies webpage. For significant directives, the NOA must state that the directive has been designated as significant by OIRA.
2. Forest Service's Regulations and Policies Webpage Only. The following information, in addition to the proposed and interim directive, must be posted on the Forest Service's Regulations and Policies webpage:
 - a. Information on how to track the public notice and comment process for the directive, including how to register for e-mail notification of publication of the final directive.
 - b. A description of public notice methods.
 - c. Regulatory certifications, if the directive imposes, eliminates, or modifies requirements on non-Forest Service parties.

The responsible staff may post any additional information on the webpage they believe may be helpful to the public.

3. NOAs and the Forest Service's Regulations and Policies Webpage. The following information, in addition to the proposed and interim directive, must be included in an NOA and posted on the Forest Service's Regulations and Policies webpage:
 - a. The length of the comment period (see sec. 32.21).
 - b. Directions for submitting comments, with a link to an electronic comment form on the Comment and Analysis Response Application (CARA) platform, including

digital submission via facsimile, e-mail, or a telecommunications device for the deaf.

- c. A summary of the proposed or interim directive.
- d. If only a part or parts of a directive are proposed for revision, a copy of the chapter being revised, with the part or parts proposed for revision highlighted.
- e. Identification of any issues on which the Agency particularly seeks public comment.
- f. The name, e-mail address, and telephone number of a Forest Service employee to contact for more information.
- g. For interim directives, the basis for the determination that good cause exists for the interim directive to go into effect upon publication for public comment, rather than upon completion of the public notice and comment process (36 CFR 216.3, 216.4; sec. 31.4).

32.23 – Other Public Information Materials

All other mechanisms that the Agency may choose to use in addition to the NOA and posting on the Forest Service's Regulations and Policies webpage to notify the public of the availability of a proposed or interim directive for public comment should include a link to the directive on the Agency's Regulations and Policies webpage, along with directions for submitting comments electronically or via a telecommunications device for the deaf.

32.3 – Consideration of Public Comments and Finalizing a Directive

After a public comment period closes, the authoring staff must consider all timely and relevant comments on the proposed or interim directive in developing a final directive. The authoring staff should revise the proposed or interim directive as appropriate. There is no requirement to adopt any recommendation received. Written response to comments must be provided, including when appropriate, an explanation of the Agency's reasoning. The Agency may collectively respond to the same or similar comments. The Agency has discretion to determine the most effective approach to responding to comments.

32.4 – Compliance with the Congressional Review Act

Prior to issuance, final directives that have been designated as significant must be submitted to OIRA for a determination of whether they should be designated as a major rule under the Congressional Review Act. Non-significant directives are presumptively non-major and do not have to be provided to OIRA for designation under the Congressional Review Act.

32.5 – Notifying the Public of Issuance of a Final Directive

Notice of all final directives must be posted on the Forest Service’s Regulations and Policies webpage, included in the quarterly Directive Publication Notice, and sent to those who registered for e-mail notification of publication of the final directives. A notice of a final directive posted on the Forest Service’s Regulations and Policies webpage should include:

1. Identification of changes that were made to the proposed or interim directive and the reasons for those changes.
2. A response to timely and relevant comments on the proposed or interim directive, as deemed appropriate by the Agency (sec. 32.3).
3. A link to the final directive.
4. Regulatory certifications, if the directive imposes, eliminates, or modifies requirements on non-Forest Service parties.

A notice of a final directive sent to those who registered for e-mail notification of publication of a final directive should include a link to the notice of the final directive posted on the Forest Service’s Regulations and Policies webpage.

33 – Public Notice Methods

The Regulations and Policies webpage and Directive Publication Notice should provide a concise description of how the Agency will engage the public and, as appropriate, other governmental entities during the public notice and comment process for a proposed or interim directive to provide a framework for consistent, effective, appropriate, and transparent engagement (sec. 32.1(2)).

Public outreach methods should reflect the anticipated degree of interest in the proposed or interim directive. For many proposed or interim directives, the required public notice and 30-day comment period are appropriate, but for directives that are complex or novel or are of specific interest to the public, more robust public engagement may be appropriate.

Including a description of public outreach methods in the quarterly Directive Publication Notice provides an opportunity for the Agency to obtain feedback on outreach methods; to understand which proposed and interim directives are of particular interest to the public, states, local governments, and tribes; and to facilitate effective public and intergovernmental communication.

33.1 – Description of Public Notice Methods

Communication with the public and, as appropriate, other governmental entities regarding a proposed or interim directive will vary based on the directive's complexity, novelty, and the anticipated degree of public interest in the directive. The description of public notice methods in the quarterly Directive Publication Notice must:

1. Identify optional mechanisms, if any, the Forest Service intends to use to share information regarding proposed or interim directives. The optional mechanisms would augment the requirements to provide notice on the Forest Service's Regulations and Policies webpage, publish an NOA in the *Federal Register*, and utilize the e-mail subscription service.
2. Describe any additional public engagement opportunities, such as public meetings, public teleconferences, and informational webinars that may be provided, including directions for participation.
3. Indicate how the public may request services, such as translation or interpretation services, in advance of a public event.
4. Describe any anticipated intergovernmental engagement, including tribal consultation, as appropriate (see sec. 34 for additional guidance on intergovernmental engagement).
5. Describe how the public can track the public notice and comment process.

33.2 – Changes to Planned Public Outreach Methods

The description of public outreach methods does not impose requirements on the Agency, and the Agency may make changes to planned public outreach methods at any time. For example, if there is strong public response on a particular issue, the Agency may elect to add public informational webinars that were not initially anticipated and included in a Directive Publication Notice. Alternatively, resource constraints or unanticipated conditions may preclude planned public engagement opportunities.

33.3 – Federal Advisory Committee Act Compliance

Generally, the goal of public notice and comment on proposed and interim directives is not to obtain consensus, i.e., collective, advice or recommendations that would require compliance with the Federal Advisory Committee Act (FACA). Optional public outreach mechanisms should be designed to avoid inadvertently triggering FACA requirements by seeking consensus advice or recommendations.

Consultation with the Directives and Regulations Branch and the Office of the General Counsel is recommended when additional mechanisms for public engagement besides public meetings

and public informational webinars will be used (sec. 33.1, para. 2), to ensure those mechanisms are consistent with FACA.

34 – Interagency and Intergovernmental Communication

It is the policy of the Forest Service to ensure appropriate interagency and intergovernmental communication when developing or amending directives that are subject to public notice and comment.

34.1 – Engagement with States and Local Governments

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 Commissioners, or the Mayor. Any designations of authority by elected officials must be made in writing and must be provided to the Agency.

34.2 – Forest Service Tribal Consultation

See FSH 1509.13 for guidance on working with the Forest Service Office of Tribal Relations (OTR) to determine when formal tribal consultation is required for proposed and interim directives. When required, formal tribal consultation should be initiated early in the process of developing proposed and interim directives and must last for at least 120 days.

OTR is responsible for ensuring dissemination of proposed and interim directives to tribes. OTR will facilitate communications among tribes, the Directives and Regulations Branch, and the responsible program staff (FSM 1563).

34.3 – Interagency Communication

Coordinate with other federal agencies about a proposed or interim directive if there are overlapping interests or management responsibilities or if that agency would have an interest in the proposed or interim directive. It is important to coordinate with other agencies prior to seeking a significance determination from OIRA. (sec. 31.11) A directive may be designated as significant if it creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency (sec. 30.11). In this case, interagency review will be facilitated by OIRA.