

## Legislative Provisions to Streamline Federal Motor Carrier Safety Administration Regulations

Two provisions designed to streamline FMCSA regulations for 9 to 15 passenger vans used by outfitters have passed the House of Representatives.

The first is report language in the Appropriations bill (H.R. 7617), which includes funding for the Department of Transportation. Report language is not legally binding, so there will have to be follow up if and when this language is included in the final Appropriations bill.

*Outfitters and Guides*—The Committee recognizes the important role that youth camps and outfitting guides play in the economy of certain states, including Idaho, Wyoming, and Montana. The Committee Acknowledges that outfitters, guides and youth camps engaged in interstate commerce must comply with requirements under FMCSA regulations and that complying with such regulations can be costly. **The Committee encourages FMCSA to study the safety implications of exempting drivers of 9 to 15 passenger motor vehicles operated by an outdoor adventure and recreational outfitter from work and location requirements under section 395.1(e) of title 49, Code of Federal Regulations, and to report to the House and Senate Committees on Appropriations with their findings.**

395.1 (e) exempts short haul operations from the **Electronic Logging Device** requirement if they operate within 150 air miles of their base but still requires logs. The record keeping requirement is described below.

(e) *Short-haul operations*—(1) *150 air-mile radius driver*. A driver is exempt from the requirements of [§§395.8 and 395.11](#) if:

(i) The driver operates within a 150 air-mile radius (172.6 statute miles) of the normal work reporting location;

(ii) The driver, except a driver-salesperson, returns to the work reporting location and is released from work within 14 consecutive hours;

(iii)(A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off-duty separating each 14 hours on-duty;

(B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off-duty separating each 14 hours on-duty; and

(iv) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on-duty each day;

(C) The time the driver is released from duty each day; and

(D) The total time for the preceding 7 days in accordance with §395.8(j)(2) for drivers used for the first time or intermittently.

**Even better language was included in a House in H.R. 2 infrastructure bill, which passed the House but is not expected to pass in the Senate until next session. We need to work to keep this language in the bill.**

Provision provides a short haul exemption to include 9 to 15 passenger vans towing trailers from FMCSA regulation. State regulation will prevail.

SEC. 4205. PROVIDERS OF RECREATIONAL ACTIVITIES.

Section 13506(b) of title 49, United States Code, is amended

(1) in paragraph (2) by striking “or” at the end;

(2) in paragraph (3) by striking the period at the end and inserting “; or”; and

(3) by adding at the end the following:

“(4) transportation by a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached for the transport of recreational equipment, that is operated by a person that provides recreational activities if—

“(A) the transportation is provided within a 150 air-mile radius of the location where passengers are boarded; and

“(B) the person operating the motor vehicle, if transporting passengers over a route between a place in a State and a place in another State, is otherwise lawfully providing transportation of passengers over the entire route in accordance with applicable State law.”.

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## **Forest Service NEPA Streamlining**

On November 19, 2020, the Forest Service published the final rule streamlining some requirements for compliance with the National Environmental Policy Act. The rule expands the use of categorical exclusions which enables the issuance of new special use permits without completion of and Environmental Assessment (EA) or and Environmental Impact Statement (EIS).

As you may recall the cost recovery rule requires the permit holder to pay for the costs of the processes required to renew permits or issue new permits if the time required to process those authorizations exceeds 50 hours. This rule will help eliminate some of those costs to the permit holder although that is not the purpose of the rule.

**Presentation of Forest Service NEPA Streamlining, FMCSA Regulations and Emerging Fees on Paddlecraft Users for AO Virtual Conference, December 2, 2020. By David Brown, Bennett Group**

To give you some quick background NEPA compliance is required for every major federal action. Issuing permits for any more than a 1-year term at the Forest Service is deemed to be subject to NEPA compliance, which must be documented through:

- **A categorical exclusion.** A CE is a category of actions that the agency has determined does not individually or cumulatively have a significant effect on the quality of the human environment, or
- **An Environmental assessment.** The purpose of an EA is to determine the significance of the environmental effects and to look at alternative means to achieve the agency's objectives. The EA is intended to be a concise document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) aids an agency's compliance with NEPA when no environmental impact statement is necessary; and (3) facilitates preparation of an Environmental Impact Statement when one is necessary.
- **Or an Environmental Impact Statement.** A Federal agency must prepare an EIS if it is proposing a major federal action significantly affecting the quality of the human environment.<sup>26</sup>

There are other processes involved and one was added by the rule in an effort to avoid duplicative NEPA documentation.

**The Forest Service is the only federal agency that does scoping with every level of NEPA analysis.**

Most federal agencies only do formal scoping for an EIS. One of the proposals in the draft regulations was to replace formal scoping with informal collection of public input as may be needed for cat exs and EAs. The rule punted on that issue and deferred it to the Council on Environmental Quality.

**Overall, these changes will be beneficial by authorizing the use of categorical exclusions** to outfitters seeking

- permit renewal where there are no changes in their operation, such as the scope or magnitude of authorized activities;
- when the business is sold;
- when a permit is converted from a transitional priority use authorization to a priority use authorization (generally to the buyer of a business);
- New authorizations or amendments to existing authorizations on existing forest roads or trails where such activities are allowed. Some example provided in the regulations for this provision include:
  - Issuance of outfitting and guiding permits for mountain biking on NFS roads that are not closed to mountain biking;
  - Issuance of a permit for a competitive motorcycle event;
  - Issuance of a permit for backcountry skiing;
  - Issuance of a permit for one-time use of facilities for recreational events;
  - Issuance of a campground concessions permit for a campground that was previously operated by the Forest Service.
- Presumably, this category of permits would cover new permits for other types of outfitting on existing roads and trails where those activities are not prohibited.

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**There is a catch. Where extraordinary circumstances are present, the agency may still use a CE but will have find that the proposed authorized activities do not have an impact on extraordinary circumstances.**

Extraordinary circumstances may include impacts on:

- (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; Wild and Scenic Rivers are likely to be included in this category;
- (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))

The Forest Service will produce a Memo to File to authorize the use of a CE and cover extraordinary circumstances.

**One other major streamlining change presented by the rule is the establishment of a Determination of NEPA Adequacy which is designed to eliminate duplicative NEPA analyses by evaluating the adequacy of previous NEPA documentation prior to engaging in another EA or EIS.**

1) An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety for a new proposed action if the Responsible Official determines that the existing NEPA analysis adequately assesses the environmental effects of the proposed action and reasonable alternatives. The responsible official must determine and document that each of the following elements is met:

(i) The new proposed action is substantially the same as a previously analyzed proposed action or alternative analyzed in detail in the existing NEPA analysis.

(ii) The range of alternatives analyzed in the existing NEPA document(s) is appropriate with respect to the new proposed action.

(iii) Any new information or circumstances relevant to environmental concerns would not substantially change the analysis in an existing NEPA document(s).

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(iv) The environmental effects that would result from implementation of the new proposed action are similar to those analyzed in the existing NEPA (2) A DNA for a new proposed action shall be included in the project record for the new proposed action. Proposed actions undergoing a DNA review shall:

**(i) Be included on the SOPA;**

**(ii) Be subject to scoping;**

**(iii) Be subject to pre-decisional administrative review, if applicable; and**

**(iv) Include issuance of a new decision document (decision memo, decision notice, or record of decision) when approved.**

One question is whether or not the DNA is subject to cost recovery.

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## **Increased Fees and Regulation on Paddlecraft (Non Motorized Vessels)**

Virginia and Tennessee are working on regulations and fees on paddlers of non motorized vessels (NMV). Other states can be expected to follow suit if they do not have revenue streams from non-motorized vessels.

### **Virginia**

VA passed legislation that authorizes the VDWR to require paddlers using agency access point to obtain a permit prior to using the boat ramps to put-in or take-out. The permit would be obtained online and cost \$4 per day. Only the operator of the paddlecraft is required to have a permit. Both customers of outfitters and private boaters would be required to obtain the permit prior to launching. The VA Paddlesports Association sent a letter to Director protesting the permit requirement and proposing instead a parking pass requirement and fee for outfitter vehicles instead of a fee on each operator of the NMV.

This issue has not been finalized and is currently under consideration for revision.

Below is the fee schedule for commercial outfitters suggested by VA Paddlesports Association

	<u>Day</u>	<u>Week</u>	<u>Annual</u>
• 8 passengers or less			
• 9 to 15 passengers			
• More than 15 passengers			

### **Tennessee**

Legislation passed the General Assembly in TN over 2 years ago that gave the Tennessee Wildlife Resources Agency the authority to regulate all aspects of paddlecraft rental businesses. Outfitters established the TN Paddlesports Association after the law passed and have been successful in modifying

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the original proposals and eliminating the fee requirement. TPA is proposing to study the fee requirement. TWRA is currently requiring a permit and safety orientation and record keeping of how many canoes, kayaks, SUPs, and tubes are launched each day by type and public access points.

These regulatory proposals have been pushed by the Tennessee Wildlife Federation and fishermen.

A key point is that in both instances outfitters did not have boots on the ground in the state Capitols to monitor and influence the state legislature. Lobbyist are expensive, but in this day and age, you are going to pay one way or the other and the fees proposed in TN and VA were far greater than fees to fund a lobbyist.