

NATIONAL GRASSLANDS MANAGEMENT

A PRIMER

Appendix M

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To: Regional Foresters, Region 1 through 9

REPLY DUE DECEMBER 31, 1995¹

The 1995 Rescission Bill became law (Public Law 104-19) on July 27, 1995. Section 504 of Public Law 104-19 addresses allotment analysis, grazing permit issuance, and compliance with the National Environmental Policy Act (NEPA). Preliminary advice for implementing Section 504 and a copy of the text of Section 504 was provided in my August 8, 1995 letter (see enclosed General Provisions). The enclosed "Questions and Answers" provide additional guidance. We anticipate completing amendments to the directive system in the near future.

Section 504 requires that each National Forest System unit develop and adhere to a schedule for completing NEPA analysis on all allotments where NEPA analysis is needed. These schedules will be issued by the responsible Forest Supervisor and are due in the Washington Office by December 31, 1995.

NEPA must be completed on all allotments listed on the schedules within 15 years. The actual length of the schedule could be shorter, depending on the number and complexity of analysis that need to be completed. Section 504 specifically prohibits the agency from completing the analyses and decisions on more than 20 percent of the allotments listed on the schedule on or before September 30, 1996. There are no such limitations in Section 504 regarding the completion of analyses and decisions after September 30, 1996.

The schedule will list allotments, in priority order, by 3 year periods. To the extent practicable, in establishing the schedules the units should take into account existing and anticipated budgets and other factors that may have a bearing on the units' ability to adhere to the schedule.

As stated in my August 8, 1995 letter, the following applies to any term grazing permit which has expired, or has been waived, and a new term permit has not been issued solely because the analysis required by NEPA and other applicable laws has not been completed:

You are to issue a new term grazing permit under the same terms and conditions as the original permit, including the length of term. Upon completion of the NEPA analysis and decision related to the allotment(s) to which the permit applies, the terms and conditions of the permit can be modified or a new permit issued, if necessary to conform to the analysis and decision. The line officer still has the authority to make a decision not to issue a new permit for reasons other than not having the analysis required by NEPA and other applicable laws completed.

¹ Transcribed from original for legibility.

The process established in the January 1995 strategy for completing NEPA analyses and decisions on permit issuance is being supplemented by the Rescission Act requirement for a schedule for analysis by allotment. In those instances where the analysis has been completed in accordance with the 1995 strategy, further analysis is not needed and a permit may be issued based on that analysis, bearing in mind the 20 percent cap. Further analysis would not be needed for these allotments until monitoring, new information, or changed conditions indicate the need, or the allotment is to undergo analysis pursuant to the schedule required by Section 504. Similarly, information which has been gathered and analyzed using the 1995 strategy should be applied to the analyses of allotments scheduled under Section 504.

/s/ Jack Ward Thomas

JACK WARD THOMAS
Chief

Enclosure

GENERAL PROVISIONS

SEC. 504 (a) SCHEDULE FOR NEPA COMPLIANCE. – Each National Forest System unit shall establish and adhere to a schedule for the completion of National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) analysis and decisions on all allotments within the National Forest System unit for which NEPA analysis is needed. The schedule shall provide that not more than 20 percent of the allotments shall undergo NEPA analysis and decisions through fiscal year 1996.

(b) REISSUANCE PENDING NEPA COMPLIANCE. – Notwithstanding any other law, term grazing permits which expire or are waived before NEPA analysis and decision pursuant to the schedule developed by individual Forest Service System units, shall be issued on the same terms and conditions and for the full term of the expired or waived permit. Upon completion of the scheduled NEPA analysis and decision for the allotment, the terms and conditions of existing grazing permits may be modified or re-issued, if necessary to conform to such NEPA analysis.

(c) EXPIRED PERMITS. – This section shall only apply if a new term grazing permit has not been issued to replace an expired or waived term grazing permit solely because the analysis required by NEPA and other applicable laws has not been completed and also shall include permits that expired or were waived in 1994 and 1995 before the date of enactment of this Act.

Questions and Answers

Implementation of Public Law 104-19, Section 504

October 4, 1995

1. What is a “National Forest System unit?”
 - A. A “National Forest System unit” as that term is used in Section 504 (a) is an administrative unit of the National Forest System (NFS) which is governed by a land and resource management plan (LRMP). 36 CFR 219.4 (b) (3)
2. When will the allotment analysis schedules be issued?
 - A. The allotment analysis schedules will be issued by December 31, 1995.
3. How many schedules will be required?
 - A. One schedule is required for each NFS unit where allotments exist which require National Environmental Policy Act (NEPA) analysis. These schedules will be stand alone documents.
4. Must each schedule be identical or similar in their handling of allotments or the time frame in which the NEPA analysis must be completed?
 - A. By December 31, 1995, schedules for all allotments needing NEPA must be issued. NEPA must be completed on all allotments listed on the schedules within 15 years. This is a maximum time period. The actual length of the schedule could be shorter, depending on the number and complexity of analyses that need to be completed. This does not necessarily mean that the schedules will disappear in 15 years. Allotments will be added to the schedule in the future if conditions change to the extent that a new analysis is needed. The schedules will provide that not more than 20 percent of allotments on them undergo NEPA analysis and decisions through September 30, 1996. The schedules will list allotments, in priority order, by 3 year periods, that is 1996-98, 1999-2001, and so on.
5. Why 3 year periods instead of yearly?
 - A. The schedule needs to provide for some annual variation, which is not predictable at this time, for differences in the complexity of the inventory, analysis, and decision-making process for each allotment.
6. How does the Forest Service interpret which allotments need NEPA?
 - A. NEPA is needed if: there is no existing completed NEPA analysis; the permit terms and conditions are being implemented yet monitoring indicates that Forest Plan or an existing NEPA decision requirements are not being met; monitoring indicates

that vegetation trend is not moving toward or meeting the described desired condition in the Forest Plan or existing NEPA decision; analyses required under the Endangered Species Act, National Historic Preservation Act, Clean Water Act, or other relevant environmental Laws are needed: or a proposal is made to change the authorized grazing activity from that covered by an existing NEPA analysis.

7. How is the schedule affected by permit expirations and waivers?

A. The schedule should include all allotments needing NEPA, thus a permit expiration or waiver should not affect the schedule unless an applicant for a new permit proposes change from an expiring or waived permit that are outside the existing NEPA analysis. Then the allotment would be added to the schedule. Changes proposed by an applicant that are outside the scope of existing analysis could not be implemented until a new analysis is completed.

8. Will allotments undergoing NEPA analysis as of the date of issuance of the schedule (no later than December 31, 1995) be included on the schedule?

A. Yes, as discussed in #6 above, an allotment is in need of NEPA analysis until such time as the associated analysis and decision has been completed. As discussed in #18 below, the NEPA analysis for a given allotment is completed when there is final agency action. Thus, if the NEPA process for a given allotment(s) has been initiated but there has been no final agency action as of the date on which the schedule is issued, but no later than December 31, 1995, the allotment(s) must go on the schedule regardless of how far the agency has gone in the NEPA process.

9. Should allotments be included on the schedule if the NEPA analysis was completed after the date of enactment of the Rescission Act (July 27, 1995) but before the date of issuance of the schedule (no later than December 31, 1995)?

A. Strictly speaking, allotments should only be listed on the schedule if they need NEPA analysis. If the NEPA analysis for a given allotment (s) was completed prior to the date of issuance of the schedule, further NEPA analysis on that allotment(s) is not needed and it should not be included on the schedule. However, allotments for which the completion dates of the NEPA analysis occurred between the date of enactment of the Rescission Act and the date of establishment of the schedule must be identified for purposes of calculating the 20 percent cap on completion of NEPA analysis through FY 1996 that is specified in the Rescission Act.

If a unit has one or more allotments that fall into the latter category, it would be appropriate to develop a schedule that lists the allotments for which NEPA analysis is needed as of the date of issuance of the schedule and include a footnote, asterisk or some other notation identifying those allotments where the NEPA analysis was completed between July 27 and December 31, 1995. The notation would specify that these allotments, although no longer needing NEPA analysis, will be used to calculate the 20 percent cap on NEPA analyses through fiscal year 1996.

10. Who approves the schedules?

A. The Forest Supervisor will approve the schedule.

11. May a schedule be amended?

A. Yes. However, once the schedule is established, any amendments to it should be made judiciously in light of the Section 504(a) requirement that the Forest Service “adhere” to its schedule.

12. Must the schedule be published in the Federal Register for notice and comment?

A. No.

13. Is this schedule available to the public?

A. Yes

14. Will the schedules be subject to administrative appeal?

A. No. The establishment of a schedule and the priorities for completing NEPA analysis under 504 (a) are not appealable under current Forest Service regulations, 36 CFR 215, 217, or 251.

15. Could the Forest Service be held liable under the Administrative Procedures Act (APA) for violating Section 504 (a) based solely upon the establishment of schedules?

A. No, unless the schedule exceeded the 20 percent limit on completing NEPA analysis and decisions through fiscal year 1996. The schedules required under Section 504 (a) are agency actions “committed to agency discretion by law” and thus not reviewable under the APA.

16. Must we complete NEPA analysis for 20 percent of the allotments for each National Forest System unit by the end of fiscal year 1996?

A. No. The 20 percent figure is an upper limit through September 30, 1996. As of October 1, 1996, there is no limitation on the number or analyses or decisions that can be completed in one year, except as provided in the units’ schedules.

17. When do the provisions of Section 504 expire?

A. Section 504 does not contain an expiration date and will apply until it is repealed or amended, except as noted in question 16.

18. When is the NEPA analysis and decision completed for purposes of Section 504?

A. There are repeated references in Section 504 to the “completion” of NEPA analysis and decisions. The NEPA analysis and decision is completed for the purposes of Section 504 when the agency has finished all administrative action related to the decision on whether or not to authorize grazing on a given allotment. Thus, a completed NEPA analysis and decision is equivalent to final agency action and would include not only the issuance of the decision document but also the exhaustion of any administrative appeals related to that decision document.

19. If a term grazing permit expires or is waived prior to the completion of the scheduled NEPA analysis, what terms and conditions will be included in the new term grazing permit?

A. Section 504 (b) specifically states that the agency is to issue a new permit “on the same terms and conditions and for the full term of the expired or waived permit.” The new permits would include any modifications currently included in parts 1, 2, or 3 of the permit including the allotment management plan and annual operating plan. Suspensions and or cancellations would be part of the new permit.

20. May the terms and conditions in a new term grazing permit issued pursuant to Section 504 (b) include standards and guidelines from the applicable forest plan if those standards and guidelines were not included in the expired or waived permit? If the forest plan is amended to include new standards and guidelines after the issuance of a new term permit subject. Section 504 (b), could the terms and conditions of such a permit be changed to include the new standards and guidelines? What about other changes brought about by compliance with other laws such as ESA, CWA, and NHPA?

A. All existing permits contain a clause stating, “This permit can also be cancelled, in whole or in part, or otherwise modified, at any time during the term to conform with needed changes brought about by law, regulation, Executive order, allotment management plans, land management planning, numbers permitted or seasons of use necessary because of resource conditions, or the lands described otherwise being available for grazing.” Consequently, the terms and conditions of expiring permits and new permits issued on those same terms and conditions are, on their face, subject to modification to correspond with, among other things, changes brought about by amendments to the Forest Plan, a Biological Opinion, State water quality requirements, or implementation of National Historic Preservation Act requirements.

21. May a term grazing permit, issued pursuant to Section 504, be cancelled, suspended or modified in response to resource conditions or violations of permit terms and conditions prior to the completion of the scheduled NEPA analysis?

A. Yes. The Forest Service is authorized to take action against any grazing permit issued pursuant to Section 504, to cancel, suspend, or modify in accordance with the provisions of 36 CFR 222.4 where resource conditions warrant or for violations of the terms and conditions.

22. Following the completion of the scheduled NEPA analysis, may the Forest Service cancel the new term grazing permit and refuse to issue another one based on the results of the NEPA analysis?

A. Yes. The key feature of Section 504 (b) is that the grazing activity may be made to conform with the signed decision associated with the completed NEPA analysis. Consequently, if that analysis and decision indicate that grazing should be temporarily or permanently discontinued, the agency must be able to implement the decision by terminating the permit.

23. Is the January 1995 strategy for evaluating allotments still valid?

A. Yes, the strategy is still valid to the extent that it can be reconciled with the provisions of Section 504 of the Rescission Act. In both cases, the environmental effects of the proposed actions are related to the allotment and are resource based. In the first case where NEPA is focused on permit issuance, new permits should be issued in conformance with the NEPA analyses and decisions. Further analyses would not be needed for those allotments until monitoring, new information, or changed conditions indicate the need for new analyses or the allotment is to undergo analysis pursuant to the schedule required by Section 504. In the second case, the analyses for allotments required under Section 504 should focus on environmental effects of the appropriate proposed action(s).

24. May units continue to “group” allotments for the purpose of analyzing the grazing activity pursuant to NEPA and other applicable laws?

A. Yes. With the exception of the 20 percent cap through fiscal year 1996, there is nothing in Section 504 which would preclude units from following this practice which was recognized in the January 1995 strategy.

25. What should the Forest Service do if a permittee submits an application for a grazing permit which has expired, and requests a new permit in accordance with Section 504?

A. As instructed in a August 8, 1995 letter to the Regional Foresters, issue a new permit for the same term, and with the same terms and conditions as the expired permit, if the sole reason that a new permit has not been issued is because the analysis required by NEPA and other applicable laws has not been completed.

26. What should be the duration of a new permit issued under Section 504 (b) resulting from a waiver?

A. The term of the new permit should be the same as the term of the waived permit.