

Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendment to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 1.61–8, the first sentence of paragraph (b) is revised to read as follows:

§ 1.61–8 Rents and royalties.

* * * * *

(b) * * * Except as provided in section 467 and the regulations thereunder, and except as otherwise provided by the Commissioner in published guidance (see § 601.601(d)(2) of this chapter), gross income includes advance rentals, which must be included in income for the year of receipt regardless of the period covered or the method of accounting employed by the taxpayer. * * *

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David A. Mader,

Assistant Deputy Commissioner of Internal Revenue.

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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 215

RIN 0596–AB89

Notice, Comment, and Appeal Procedures for Projects and Activities on National Forest System Lands

AGENCY: Forest Service, USDA.

ACTION: Proposed rule; request for comment.

SUMMARY: The Forest Service is proposing to amend the rule adopted in 1994 for the notice, comment, and appeal procedures for projects and activities implementing land and resource management plans on National Forest System lands. The proposed rule changes current procedures to clarify certain provisions and reduce

complexity in the current rule, improve efficiency of processing appeals, encourage early and effective public participation in the environmental analysis of projects and activities, and ensure consistency with the provisions of the statutory authority. Topics addressed include emergency situations; 30-day notice and comment procedures; site-specific comments; who may appeal; and the formal disposition process. Public comment is invited and will be considered in development of the final rule.

DATES: Comments must be received in writing by February 18, 2003.

ADDRESSES: Send written comments to USDA FS, Appeal Rule Content Analysis Team, P.O. Box 9079, Missoula, MT 59807; by electronic mail to 215appeals@fs.fed.us; or by facsimile to (406) 329–3556. To aid in our analysis of comments, it would be helpful if comments are organized section by section. Please note that all comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The agency cannot confirm receipt of comments. Individuals wishing to inspect the comments should call (406) 329–3038 to facilitate an appointment. Additional information is provided at <http://www.fs.fed.us/emc/applit/index.htm>.

FOR FURTHER INFORMATION CONTACT: Ginger Hamilton, Program Manager, Content Analysis Team (406) 329–3038.

SUPPLEMENTARY INFORMATION:

Background

The Forest Service has a long-term commitment to promoting effective public involvement in both planning and project level decisionmaking. For example, in 1977, the proposed National Forest Management Act (NFMA) regulations directed that forest plan approvals, although subject to mandatory public involvement, would not be subject to administrative appeal. 44 FR 25554, 25589 (May 4, 1979). The final regulations adopted in 1979 dropped the no appeal provision and such appeals were allowed. In 1989 the Forest Service again undertook a major revision of its appeal regulations splitting its appeal regulations into two major rules, one for the general public (36 CFR part 217) and one for holders of special use permits (36 CFR 251.80). By 1992, the Forest Service had determined that the process had become too complex, confrontational and costly.

In 1992, the Forest Service undertook a year-long review and evaluation of its administrative appeal procedures. The 1992 review uncovered many problems with the procedures and led to the

publication of a proposed rule to amend 36 CFR part 217 to continue allowing forest plan-level appeals but substituting an expanded pre-decisional public involvement opportunity to replace post-decisional administrative appeals of environmental assessments (57 FR 10444) and eliminating appeals of categorical exclusions for projects. The Forest Service received over 30,000 comments on the proposed rule. Before a final rule was published, however, Congress, operating through an annual appropriation rider, enacted section 322 of Interior and Related Agencies Appropriation Act of Fiscal Year 1993, Pub. L. 102–381, 106 Stat. 1419, (hereinafter “Appeals Reform Act”) (ARA) instructing the Secretary of Agriculture to establish a notice, comment and appeal process modifying the existing appeal regulations.

The ARA contains relatively little specific guidance beyond the statutorily established timelines. The Forest Service was, therefore, tasked with establishing the process that would lay out the particulars of the appeals procedures. The origins of the ARA derive primarily from an amendment co-sponsored by Senators Craig and DeConcini. The Craig-DeConcini amendment was subsequently amended by the conference committee with a consensus from both parties of Congress. The Senate floor colloquy during consideration of the conference committee report contains revealing statements which support the conclusion that Congress intended to allow the agency to determine the appropriate scope and other details regarding the appeal process to be developed by the Secretary. Senator Craig described “a reasonable and balanced approach to resolve the debate over the future of the Forest Service’s appeal process.” 138 Cong. Rec. S15848 (Sept. 30, 1992). While Congress was clearly taking matters into its own hands regarding whether there should be an appeal system and the specific timeframes for how long such an appeal could take, Congress did not provide a detailed legislative framework. In fact, the legislative history shows that Congress even intended for the agency to address a statutory drafting error regarding the duration of administrative stays through the agency regulations.

The Forest Service has a continuing commitment to periodically review its regulations, identify specific problems in administering them, and determine whether they meet Congressional intent, as well as agency and public needs. Experience with the procedures at 36

CFR part 215 has shown that certain provisions in the current rule consistently raise questions or reduce efficient processing of appeals. In April 2001, the agency chartered a team to assess the part 215 appeal rule, identify ways to reduce the complexity of the current rule, and improve efficiency for the public and the Forest Service. The team conducted interviews with and solicited comments from a cross-section of agency personnel at the various field levels and the national headquarters staff.

Implementation issues associated with the current rule that were most often cited generally fell into two areas: inefficiency of the procedures and the process for public involvement. Specific issues identified included: The 30-day notice and comment process; emergency situations; informal disposition; dismissals; interested parties; the definition of projects implementing a land and resource management plan; who may file an appeal; appeal issues; and electronic transmission of comments and/or appeals. In addition, many comments stated that the provisions in the current rule exceed the requirements of the Act. After careful consideration, the agency has determined that the major areas needing attention are: Emergency situations; 30-day notice and comment process; site-specific comments; who may file an appeal; and the formal disposition process. As a result, the Forest Service is proposing to amend 36 CFR part 215. The proposed changes would clarify and reduce the complexity of the rule; elicit more effective public participation by seeking public comment early in the process; provide for electronic submission of comments; result in more consistent application of the rule; simplify the language; and reorganize the rule into a more logical sequence.

Two particular regulatory issues warrant special attention: The scope of decisions subject to appeal ("proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans") and stays of "emergency" actions. Congress did not provide statutory definitions for either of these terms.

The existing appeal regulations provide for appeals of actions evaluated in an environmental assessment or environmental impact statement, as well as one specific class of categorically excluded activities that is no longer in use. The ARA was enacted in direct response to the Forest Service's 1992 proposed regulation that would have substituted appeals with a pre-decisional review. Congress preferred appeals over pre-decisional public

involvement for these assessments. Congress did not express a specific intent regarding where the "line should be drawn" or to "set in concrete" which activities would be subject to notice, comment and appeal. Nor was there any indication that Congress intended to extend the notice, comment and appeal requirements to all classes of categorically excluded activities. This was a determination left to the discretion and judgment of the Secretary. Congress knew that not every decision of the Forest Service was subject to appeal before the 1992 Act.

The agency believes that Congress used the phrase "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans" to delineate between administrative appeals of forest plans and project level decisions, rather than define a comprehensive or precise set of activities. Congress could, of course, have provided a specific definition. But Congress did not do so and absent such a definition, the courts have recognized that agencies are free, indeed expected, to fill in the gaps and that such regulatory interpretations are due deference. Through the 1993 rulemaking process the Secretary concluded that the Forest Service's categorically excluded activities were generally not of the sort that Congress would have intended to apply additional notice, comment and appeal requirements given the generally minor potential for environmental effects.

One exception was made to require notice, comment and appeal for timber sales exceeding certain volume limits, but that category is no longer in use. This exception, however, does illustrate a consistent interpretation by the Department that Congress intended to grant the Secretary the authority to establish a flexible process through rulemaking. The appeal regulation's reliance upon its existing administrative framework (the agency's NEPA procedures) is also consistent with other Forest Service regulations that rely on the NEPA procedures for guidance regarding public participation (see *e.g.* 36 CFR 219.6(b)). This practice is in keeping with the Council on Environmental Quality's instructions for agencies to "integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice * * *". 40 CFR 1500.2(c).

By their very nature, activities that have been categorically excluded generally have no significant environmental effect, or stated otherwise, were determined not to cross

the NEPA "significance threshold" based on the agency's experience, judgment, and analysis from implementing similar activities over many years. Therefore they typically do not include preparation of extensive records; in fact, the Forest Service NEPA procedures do not require decision documents or project files to be maintained for many categorical exclusions. Congress' intent was to streamline an appeal process in need of revision, not entangle the agency in a costly and time-consuming exercise for minor decisions by Forest Service officials. That being the case, the Forest Service has determined that including affected and interested individuals in project planning early in the process is more effective than subjecting these projects to formal and extensive notice, comment and appeal procedures.

The existing regulation's treatment of categorically excluded activities is the subject of unresolved litigation. While that litigation is currently focused on procedural matters, the agency believes that both the current and proposed regulations are within the scope of the Secretary's delegated authority to establish a notice, comment and appeal process as set forth in the ARA. This assumption is supported by the fact that during the ten years of implementation of the 1993 regulations, Congress has not sought to amend the ARA to adjust the agency's implementation, and has in fact relied upon the regulatory structure and exempted individual and classes of activities from the regulations. For example, in July 2002, Congress passed legislation recognizing the urgency of the severe fire threat posed to private homes from fire and diseased trees in the Black Hills National Forest and the procedural problems that could delay prompt action. The legislation exempted timber cutting as part of a fuels treatment project from public notice and comment as well as judicial review and appeals.

Regardless of the scope of the administrative appeals procedures, Forest Service procedures require that all projects subject to the National Environmental Policy Act (NEPA), including projects covered under categorical exclusions, include interested and affected individuals in project planning to the extent appropriate considering the nature and complexity of the proposed action. For example, for hazardous fuels reduction projects near communities, the Forest Service would collaborate with local constituents in a manner consistent with the process identified in A Collaborative Approach for Reducing Wildland Fire Risks to Communities

and the Environment 10-Year Comprehensive Strategy Implementation Plan.

The ARA expressly authorizes the Chief to exempt certain activities from the mandatory stay provision in an "emergency" but does not provide a statutory definition or specify particular criteria for making such determinations. The agency's 1993 regulations attempted to provide such guidance, but experience has shown the need for refinement. In particular, the Forest Service wishes to clarify that economic factors can be relied upon in making the determination of whether to exempt a project from stay while an appeal is pending. During implementation of the current rule, the agency has found that the rule is unnecessarily restrictive and results in undue waste of natural and economic resources. Fire impacted forest ecosystems and damaged watersheds impose a variety of economic costs to communities and implementation delays can result in loss of economic value that may alter the agency's options for addressing resource problems. The proposed regulation would adjust the definition of "emergency" to address this issue.

The significance of specific changes to the current rule is indicated in the following section-by-section description. Minor changes are summarized, while more detail is included for new sections and those sections that involve substantive change.

Proposed Section 215.1 Purpose and scope. This proposed section incorporates the current § 215.1 with changes that are generally minor and clarifying in nature. Proposed paragraph (b) is rewritten to eliminate repetitive language and to clearly state that the appeals process is available only for those who commented during the time period for the opportunity to comment and that appeal issues are limited to those raised during that comment period (§ 215.5). Other changes to note are that here and throughout the proposed rule the phrase "opportunity to comment" is often used to better reflect Congressional intent to require a specific time period to seek public comment.

Proposed Section 215.2 Definitions. This proposed section incorporates the current § 215.2 with changes. The proposed rule adds six new terms: Appeal disposition, emergency situation, name, National Forest System lands, projects and activities implementing a land and resource management plan, and substantive comments; removes three terms because they would no longer be applicable to

the 215 regulations as amended: Decision document, decision memo, and interested party; removes the definition for "proposed timber harvest categorically excluded from documentation under Forest Service Handbook 1909.12, section 31.2, paragraph 4" as this was removed from the Handbook; and revises and updates several terms and definitions as explained in the following paragraphs. Terms and definitions not set out here are unchanged from the current rule.

Appeal. The proposed definition replaces the verb "objects" with "seeking review of" to distinguish appeals from the recently established "objection" process in the 2000 planning regulation at 36 CFR part 219.

Appeal Deciding Officer. The proposed definition corrects a typographical error and changes "Forest Service line officer" to "Secretary of Agriculture or Department or agency designee," making it clear that the Secretary can serve as the Deciding Officer in the event that there is an appeal of a Chief's decision.

Appeal period. The proposed definition clarifies that the appeal periods begins following publication of the legal notice of a decision.

Appeal record. The proposed definition is rewritten to eliminate unnecessary wording; delete the term "written comment submitted by interested parties" to conform to the proposed removal of the term "interested party"; and add "the Appeal Reviewing Officer's recommendation," which was inadvertently omitted in the current rule.

Appeal Reviewing Officer. The proposed definition clarifies that a Department of Agriculture official can also serve as an Appeal Reviewing Officer.

Categorical Exclusion. This proposed term was changed to conform to the regulations governing categorical exclusions. The current term is categorically excluded.

Comment period. This proposed definition is rewritten and changed to state that the notice of the opportunity to comment must be published in a legal notice as opposed to the current language, which merely says a notice must be published. Additionally, the information in § 215.5 on how to compute the comment period is included.

Decision document. For clarity, it is proposed to remove this term and use Decision Notice and/or Record of Decision as appropriate.

Decision documentation. It is proposed to shorten and clarify this definition and eliminate the

unnecessary examples of what might constitute decision documentation.

Decision memo. It is proposed to remove this definition because it is no longer applicable to this regulation.

Environmental Assessment (EA)—Language was added to this proposed definition to conform to that found in 40 CFR 1508.9 regarding an EA.

Emergency situation. It is proposed to move the definition to § 215.2, while incorporating and revising the description at current § 215.10. While the Act does not specifically define emergency situations, it gives the Chief discretion to determine when an emergency situation exists. This proposed definition would be broadened to make clear that emergency situations can include situations not explicitly listed in the current description at section 215.10.

Additionally, experience has shown that some emergency situations on National Forest System lands may pose a risk to adjacent lands and therefore, warrant being included in the definition of emergency situations. Some situations may result in substantial loss of economic value if implementation is delayed. Further, the examples are removed, as it is impossible to predict all possible scenarios where an emergency situation exists.

Forest Service line officer. The proposed definition removes the current examples of line positions, as they are not necessary for understanding and applying the definition.

Interested party. It is proposed to remove this term and thus the definition, which is not used in the proposed rule. Related information is set out in the description of proposed § 215.12.

Name. It is proposed to add this definition. Because the proposed rule provides for accepting electronic comments and appeals, it is critical that the Forest Service have the ability to identify individuals and organizations in order to establish their standing (ability to submit appeals).

National Forest System lands. This definition, based on § 200.1(c)(2), is added to clarify what lands comprise the National Forest System. This definition makes clear that research and experimental areas (such as experimental forests) are included in National Forest System lands.

Projects and activities implementing a land and resource management plan. It is proposed to add this definition. The Act uses this phrase to define what proposed actions are subject to this part; however, the current regulation does not provide a definition. Application of the current rule has shown that the lack of

a definition causes confusion about exactly which projects and activities are subject to notice, comment, and appeal. Further, the proposed definition makes clear that research activities on all National Forest System lands are subject to this part.

Proposed action—The proposed definition was changed to remove the words “recommend” and “implement” to avoid confusion. Actions that are “recommended” are not subject to this rule and actions that have been approved and already subject to this rule are not subjected again at implementation.

Proposed timber harvest categorically excluded from documentation under Forest Service Handbook 1909.12, section 31.2, paragraph 4. It is proposed to remove this term from the definitions and throughout the proposed rule because this categorical exclusion is no longer in use.

Responsible Official. The proposed definition would replace “line officer” and “authority and responsibility to make decisions” with “Forest Service employee who has the delegated authority to make and implement the decision” to clarify that some decisions subject to this rule are made and implemented by a Regional Director, through delegated authority, even though this position is not considered a “Forest Service line officer.”

Substantive comments. It is proposed to add this definition in order to define a new term that is added to the proposed rule. The explanation for adding this term is included in the proposed §§ 215.5 and 215.6 below.

Proposed Section 215.3 Proposed actions subject to legal notice and opportunity to comment. This proposed section revises and incorporates current regulatory text from § 215.3, and revises the heading to include the term “opportunity to comment.”

Since timber harvest is no longer an activity that may be categorically excluded from documentation in an environmental assessment (EA) or environmental impact statement (EIS), current paragraph (b) is removed; current paragraph (c) on nonsignificant amendments to land and resource management plans is redesignated to paragraph (b).

Proposed paragraph (c) would apply procedures for notice and opportunity to comment to revision of an EA based on new information or changed circumstances. Paragraph (c) is added because confusion has resulted from not having addressed this point in the current rule.

Current paragraph (d) covering National Forests without land and

resource management plans is removed as all National Forests now have approved land and resource management plans.

Current paragraph (e) is redesignated (d) and is rewritten to say “research activities” instead of “forestry research activities” to reflect that research activities conducted on National Forest System lands for which environmental analysis is performed, include forestry as well as other types of research.

Proposed Section 215.4 Actions not subject to legal notice and opportunity to comment. This proposed section revises and incorporates the regulatory text from the current § 215.4 and revises the heading to include the term “opportunity to comment.”

Proposed paragraph (b) is rewritten excluding from notice and opportunity to comment all proposed actions that are categorically excluded. As explained when 36 CFR part 215 was promulgated (58 FR 58905), it is appropriate to exclude proposed actions that are categorically excluded from notice and opportunity to comment. For all projects subject to NEPA, Forest Service procedures require that interested and affected individuals be included in project planning through public involvement commensurate with the nature and complexity of the proposed action. By their very nature, proposed actions that may be categorically excluded from documentation in an EA or EIS generally have little to no environmental effect.

The current rule does not address the application of this section to the following situation: a determination by the Responsible Official that new information or changed circumstances does not result in revision of the EA. Proposed paragraph (d) is added to clarify that such situations are not subject to notice and opportunity to comment.

Proposed Section 215.5 Legal notice of proposed action and opportunity to comment. The proposed heading is rewritten for clarity and to include the term “opportunity to comment.” This proposed section retains but also revises and reorganizes most of the requirements in current § 215.5 and also incorporates pertinent paragraphs from current § 215.6. The proposed paragraph headings are rewritten for clarity and to reflect the reorganization of this section. In this section and throughout the proposed rule, the terms “notice” and “public notice” are replaced with the term “legal notice” to reflect standard practice and terminology. “Legal notice” is intended to mean publication in the legal notice section of the paper of record.

Proposed paragraph (a), “Timing for publication of legal notice,” would incorporate and revise current paragraph (b)(2)(i) to give the Responsible Official discretion to determine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment. There are instances when a proposed action is well developed, with sufficient information to allow for substantive public comment during the scoping phase of project planning. Other times, it might be more helpful to the Responsible Official for the comment period to occur prior to alternative development. In a third instance, a comment period after alternative development might be of most benefit. These are examples of how the rule’s flexibility allows for the most effective use of the comment period significantly earlier in the project planning than the current rule permits. Timing for the comment period would be determined on a project-by-project basis, depending on the nature and complexity of the project. The flexibility with such discretion would allow the Responsible Official to provide an opportunity for early comment and meaningful public participation during project planning, at the stage when comments will be most helpful in developing public understanding and an effective project. The Forest Service expects to develop policy guidance with regard to the appropriate timing of the 30-day comment period following promulgation of a final rule. This change is consistent with the statutory language of the Act. In contrast, the current rule requires that the EA be mailed to any individual who is known to have participated, a procedure which goes beyond the requirements in the Act and unnecessarily delays the process by requiring, in all cases, the mandated 30-day comment period only after the EA is completed.

Proposed paragraphs (b)(1) through (b)(5) incorporate the regulatory text concerning notice and comments from the current §§ 215.5, 215.6(a) and 215.10(d)(2).

Proposed paragraph (b)(4)(i)–(viii), “Content of legal notice,” adds all forms of the Responsible Official’s address; the acceptable format for electronic comments; a signature requirement for each individual or organization listed; a statement that the ability to appeal is tied to timely submission of comments; and information about emergency situations.

The proposed rule provides for electronic submission of comments which is not addressed in the current rule. Proposed paragraph (b)(4)(v),

requires that the legal notice specify a standard format for electronic comments, because experience has shown that not all electronic submissions are compatible with the Forest Service computer systems. It should be noted that those availing themselves of electronic transmission of comments are responsible for ensuring that their submissions are timely. The Forest Service is unable to accept responsibility for failure of electronic devices.

The notice requirements for emergency situations are currently described in current § 215.10(d) "Implementation of decisions," but it is more appropriate to include them in proposed paragraph (b)(4)(ix).

Proposed paragraph (b)(5) incorporates current § 215.6(a) concerning the time period for comments and is rewritten for clarity. The current requirement that the public notice for comment include the date the comment period ends has resulted in problems and confusion for the agency and the public. Currently, the agency employee preparing the legal notice must estimate the date of publication and the date the comment period ends, for inclusion in the notice. However, because publication delays are not uncommon, there have been numerous instances of confusion as to the correct deadline for accepting comments. The remedy to this problem is found in proposed paragraphs (b)(5) to (b)(5)(i)(B), which describe how the commenter can determine the last day for accepting comments by noting the newspaper date of the legal notice and adding thirty days. Comments must be sent by the end of the 30th day.

The current regulation does not address extending the comment period and this has resulted in confusion. Proposed paragraph (b)(5)(ii), which conforms to the language in the Act, explicitly states that the period for the opportunity to comment cannot be extended.

Proposed paragraph (c), "Comments," revises and incorporates the requirements regarding the content of comments currently in § 215.6(b), and adds new paragraphs (1) and (3), requiring signatures on the comment letters, that comments must be specific and provides consistent requirements for oral comments. The requirements in paragraph (c) through (c)(3) are rewritten to address the following difficulties encountered during implementation of the current rule: identification of those who can appeal when comment letters list several organizations but include only one signature with a statement that the

individual represents all the organizations; uncertainty as to which proposed action the comments address; receipt of comments that are not relevant to the specific project or activity or are so general in nature that they are not useful to the Responsible Official in making a more informed decision; and inconsistency in submission of oral comments.

Proposed Section 215.6 Consideration of comments. This section, as proposed, is considerably shortened from the current rule because the current paragraphs (a) and (b) on procedures for commenting are moved to proposed § 215.5. In order to encourage the public to submit meaningful and specific comments, the remaining paragraphs are revised by requiring the consideration of all substantive written and oral comments.

Proposed Section 215.7 Legal notice of decision. This proposed section makes minor revisions, incorporates the requirements in the current Notice of decision, § 215.9, and adds two new paragraphs as described below.

Proposed paragraph (a)(2)(ii) would require that the legal notice describe how the time period for filing an appeal is calculated and would clarify that it is the appellants' responsibility to determine the time allotted, based on the publication date of the legal notice and not relying on dates or time frames provided by any other source. To avoid any confusion should publication be delayed, this proposed paragraph also makes clear that an actual date for the end of the comment period shall not be included in the legal notice.

Proposed paragraph (a)(2)(vi) would provide for notification of the public as to when implementation may occur in emergency situations as set out in proposed § 215.9(b). While implementation of decisions regarding emergency situations is discussed in current § 215.10(d), there is no requirement to notify the public of timeframes.

Proposed Section 215.8 Decision implementation. This proposed section incorporates, revises, and redesignates at paragraphs (a) through (c)(2), the requirements currently in § 215.10 paragraphs (a) through (c). Proposed paragraph (c) differentiates between when decisions documented in a Decision Notice (DN) or in a Record of Decision (ROD) can be implemented, which was inadvertently omitted from the current § 215.10. This differentiation is necessary to ensure compliance with the Council on Environmental Quality (CEQ) regulations governing final environmental impact statement (FEIS) and ROD timeframes.

Proposed Section 215.9 Emergency situations. This proposed section is added to set out procedures for emergency situations in a separate section for clarity and so that they can be located quickly and easily. The definition for emergency situations, at current (§ 215.10(d)(1)), is moved to § 215.2, Definitions.

Proposed paragraph (a) clarifies that authority for determination of an emergency situation is not reserved to the Chief and may be delegated, though not below the Regional Forester or Station Director level. The current regulation appears to reserve this determination solely for the Chief, although the Act does not mandate such reservation.

Proposed paragraph (b) incorporates current § 215.10(d) regarding implementation of emergency situations and clarifies when implementation of the project or activity may begin. In addition, it differentiates between decisions determined to be an emergency documented either in a Decision Notice (DN) or in a Record of Decision (ROD). This differentiation is necessary to clarify compliance with the Council on Environmental Quality (CEQ) regulations governing final environmental impact statement (FEIS) and ROD timeframes.

Proposed paragraph (c) reiterates that the legal notice shall include information about the determination of an emergency situation. Examples of emergency situations are removed because they do not cover all emergency situations that may occur, which caused confusion.

Proposed Section 215.10 Decisions subject to appeal. This proposed section incorporates § 215.7(a) of the current rule and adds two new paragraphs to proposed paragraph (a). To clarify existing confusion over how to apply this section when considering new information or changed circumstances, paragraph (a)(2) is added; and a new paragraph (a)(3) is added to clarify and address those instances where the Forest Service makes decisions in conjunction with other federal agencies but where only a portion of the decision applies to National Forest System lands.

Current paragraph § 215.7(b) is removed because Forest Service policy no longer allows timber harvest projects and activities to be documented in a decision memo.

Proposed paragraph (b) is added, but it is only a technical change. Currently these decisions are discussed in § 215.8(c) Decisions not subject to appeal, which could be misleading to someone who has the option to use the appeal process at either part 215 or part

251. It is more appropriate under this section.

Proposed Section 215.11 Decisions and actions not subject to appeal. This proposed section revises, reorganizes and incorporates the requirements from current § 215.8. Proposed paragraph (b) is added to address situations involving new information or changed circumstances that do not result in a new decision and make clear that this situation is not subject to appeal. Proposed paragraph (c)(ii) is added (corresponding to that provided for environmental assessments in proposed paragraph (c)(i)) for situations where no comments or only supportive comments are received during the comment period for a draft environmental impact statement (DEIS), and the Responsible Official's decision does not modify the preferred alternative identified in the DEIS. This was an inadvertent omission in the current rule.

Proposed paragraph (c) combines two current paragraphs ((a)(2) and (b)), and removes sentences and examples found in the current rule that are necessary for understanding and paragraph (c) in the current § 215.8 is moved to proposed § 215.10, "Decisions subject to appeal."

Proposed paragraph (d) differentiates between environmental assessments (EAs) and environmental impact statements (EISs) not subject to appeal and proposed paragraph (d)(ii) sets out that for a decision to not be subject to appeal under this paragraph, both criteria must be met.

Proposed paragraphs (f), "Nonsignificant amendments to land and resource management plans," and (g), "Concurrences and recommendations from other federal agencies" are added for clarification and to eliminate confusion about what is subject to appeal. Concurrences and recommendations from other federal agencies are not Forest Service decisions, nor do they meet the definition of a Forest Service "project or activity implementing a land and resource management plan" and thus would not be subject to appeal.

Proposed Section 215.12 Who may appeal. This proposed section incorporates current § 215.11, paragraphs (a), (c), and (d) and is rewritten for clarity.

Proposed paragraph (a) combines current paragraphs § 215.11(a)(1) and that portion of (2) regarding submission of comments pursuant to provisions of § 215.6 (now proposed § 215.5). The remaining portion of paragraph (a)(2) is removed to more closely conform to the Act in regard to "who may appeal". The Forest Service believes that a mere "expression of interest", such as that of

an individual having no participation in the project planning process, but who requested a copy of the decision, does not meet Congressional intent for who may appeal. This conclusion is based on a reading of those portions of the Act and the Congressional colloquy regarding the appeal process, which make clear that an individual's participation in the statutorily mandated public comment period is required to establish standing to appeal.

Current § 215.11(b) "Interested parties," is removed. The current provision exceeds the provisions of the Act, which only addresses appellants or those individuals who have participated in the planning process and who have provided comments within the proscribed timeframes.

Proposed paragraph (b) addresses procedures for appeals listing multiple individuals or organizations. The current regulations are unclear on how to process appeals with multiple names to determine who has standing to appeal, resulting in inconsistent application across the Forest Service.

Proposed Section 215.13 Where to file appeals. This section incorporates the requirements in current § 215.12, adds two levels of Responsible Officials inadvertently omitted from the current regulation: Chief of the Forest Service and Research Work Unit Leader, and clarifies that a Station Director is also considered a Responsible Official.

Proposed Section 215.14 Appeal time periods and process. The requirements in current § 215.13 are incorporated in proposed section § 215.14; paragraphs are rewritten for clarity, reorganized, and redesignated.

Proposed paragraph (b) clarifies that all time periods that end on a Saturday, Sunday, or federal holiday shall be extended to the end of the next federal working day.

Proposed paragraph (c) clarifies how timeliness shall be determined for various methods of delivery, including e-mail; states that an automated response should be received from the agency when an appeal is electronically mailed, as a verification of receipt; and that should an electronic response not be received, it is the appellant's responsibility to provide evidence that the appeal was sent in a timely manner.

Current § 215.13(e), "Interested party comments," is removed, as discussed in proposed § 215.12 and the remainder of proposed § 215.14 is redesignated. Proposed paragraph (e) rewrites current paragraph § 215.13(f)(1) replacing "transmit appeal record" with "transmit decision documentation." The appeal record is assembled by the Deciding Officer, not the Responsible Official.

Further, the current paragraph on review recommendation (§ 215.13(f)(2)) is removed because the Act does not include any time period for the review recommendation. The regulatory text describing what an appeal decision must contain at § 215.13(f)(3) is moved to proposed § 215.18.

Proposed Section 215.15 Appeal content. This section of the proposed rule retains the requirements of current § 215.14.

Proposed paragraph (a) is rewritten with minor changes for terminology consistency and to clarify that the focus of the appeal is providing project- or activity-specific evidence and rationale as it relates to the decision. The term "remanded" in current paragraph (a) is removed because it is not used elsewhere in either the current rule or the proposed rule.

Proposed paragraph (b) rewrites, reorganizes, and redesignates current § 215.14(b). Proposed paragraph (b)(5) clarifies that appeal issues are limited to substantive comments submitted during the comment period. This change is consistent with the Act.

Proposed paragraph (c) is added, setting out those instances when an appeal would not be accepted. It makes clear to those planning to appeal that it is to their benefit to include all applicable information.

Proposed Section 215.16 Dismissal of appeal without review. The requirements in current § 215.15 now appear in proposed § 215.16.

Proposed paragraph (a) is rewritten for clarity and consistency with proposed § 215.14, to show how timeframes for different delivery methods are applied. Current § 215.15(a)(7) concerning filing for judicial review is removed in accordance with Public Law 103-354, the USDA Reorganization Act of 1993. Current § 215.15(a)(5) is rewritten as proposed paragraph (a)(6) and is consistent with proposed § 215.15(b)(5) concerning the limitation of appeal issues. Proposed paragraph (a)(9) is added to provide for dismissal when an appellant withdraws an appeal and to be consistent with the current rule which provides for dismissal when a responsible official withdraws a decision.

Proposed Section 215.17 Informal disposition. The requirements in current § 215.16 are incorporated in proposed § 215.17, with minor changes.

Proposed paragraph (b) is rewritten to clarify that it is the "initial" meeting that must occur within 15 days. This change alleviates the confusion about whether informal resolution must be concluded within 15 days.

Proposed paragraph (c) removes the reference to interested parties, consistent with the proposed change removing this term elsewhere in the rule.

Proposed paragraph (d) is rewritten, articulating the various scenarios that may result from informal disposition.

Proposed Section 215.18 Formal review and disposition procedures. The requirements of current § 215.17 are incorporated in proposed § 215.18 and the proposed heading is changed to "Formal review and disposition procedures" for clarity.

Proposed paragraph (b)(1) adds the procedures to use when an appeal decision includes instructions. The omission of these procedures in the current rule has resulted in confusion about the procedures to follow in such cases. Proposed paragraph (b)(2) articulates that issuing an appeal decision is not required; this change is consistent with the Act.

Proposed paragraph (c) makes clear that an appeal decision cannot be issued after the 45th day.

Proposed paragraph (d) is moved from current § 215.18, "Appeal Deciding Officer authority", as it is more appropriate in this section.

Proposed Section 215.19 Appeal Deciding Officer's authority. This proposed section incorporates the language from current § 215.18, except for paragraph (c), reorganizing it to more clearly follow the process as it relates to the Appeal Deciding Officer's (ADO) authority.

Proposed paragraph (b) is rewritten to clarify that the ADO may consolidate appeals and issue one or more appeal decisions, whereas the current § 215.18 language implies that the only options are one decision for all appellants or separate decisions for each appellant.

Proposed paragraph (c) is added, describing the ADO's authority when appeals listing multiple names are received. The current regulations do not address these types of appeals, resulting in inconsistent application of the regulation. As discussed above, paragraph (c) regarding appeal decisions from the current § 215.18 is moved to proposed § 215.18(d), "Formal review and disposition" and a new paragraph (d) is added, clarifying that the ADO's decision can be different from the Appeal Reviewing Officer's recommendation. This provision was not addressed specifically in the Act but was implied with the use of the term "recommendation."

Proposed Section 215.20 Appeal Reviewing Officer's responsibilities. This proposed section incorporates and revises the language from current

§ 215.19. The proposed heading is revised to be consistent with the Act and the paragraph headings are also revised. Proposed paragraph (a) is revised to conform directly with the language in the Act regarding who may be designated as the Appeal Reviewing Officer. Proposed paragraph (b) clarifies the scope of review, using language from the Act. Proposed paragraph (c) clarifies that the Appeal Reviewing Officer has an option to issue one recommendation or as many as appropriate in cases involving multiple appeals of decisions.

Proposed Section 215.21 Secretary's authority. This proposed section is added to set out the relationship between the Secretary of Agriculture and the Forest Service concerning decisionmaking and the rules of this part.

Proposed Section 215.22 Judicial proceedings. The concepts from current § 215.20 are incorporated in this proposed section, but it is rewritten to remove the option for waiver since Public Law 103-354, the USDA Reorganization Act of 1993 (7 U.S.C. 6901) supercedes this option.

Proposed Section 215.23 Applicability and effective date. This proposed section specifies in paragraph (a) when the new procedures in the final rule would apply. Proposed paragraph (b) would provide that decisions for which legal notice is given prior to the effective date of the final rule would remain subject to the rules previously in effect in part 215.

Proposed Section 215.24 Information Collection Requirements. This section explains that the rule contains information collection requirements as defined in 5 CFR part 1320 by specifying the information that appellants must supply in an appeal. The OMB Control Number for this information will be included in the final rule.

Regulatory Certifications

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant rule. This rule will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of

entitlements, grants user fees, or loan programs or the rights and obligations of recipients of such programs.

Moreover, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this proposed rule.

Environmental Impacts

This proposed rule would revise the administrative procedures and requirements to guide notice, comment, and appeal of projects and activities implementing a land and resource management plan. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43168; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction." This proposed rule clearly falls within this category of actions and no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement.

Energy Effects

This proposed rule has been reviewed under Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this proposed rule does not constitute a significant energy action as defined in the Executive order. Procedural in nature, this proposed rule would revise the administrative procedures and requirements to guide notice, comment, and appeal of projects and activities implementing a land and resource management plan.

Controlling Paperwork Burdens on the Public

This proposed rule at 36 CFR 215.15 sets out requirements for the information that appellants must provide in an appeal. As such, this proposed rule contains information collection requirements as defined in 5 CFR part 1320 and, therefore, is subject to the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. part 3501 *et seq.*) and implementing regulations at 5 CFR part 1320.

Federalism

The agency has considered this proposed rule under the requirements of

Executive Order 13132, Federalism, and Executive Order 12875, Government Partnerships. The agency has made a preliminary assessment that the proposed rule conforms with the federalism principles set out in these Executive orders; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Based on comments received on this proposed rule, the agency will consider if any additional consultation will be needed with State and local governments prior to adopting a final rule.

Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications as defined in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and, therefore, advance consultation with tribes is not required.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that the rule does not pose the risk of a taking of Constitutionally protected private property. This proposed rule would only revise the administrative procedures and requirements that guide notice, comment, and appeal of projects and activities implementing a land and resource management plan.

Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. The agency has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this proposed rule. Nevertheless, in the event that such a conflict were to be identified, the proposed rule, if implemented, would preempt the State or local laws or regulations found to be in conflict. However, in that case, (1) No retroactive effect would be given to this proposed rule; and (2) the Department would not require the parties to use administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the agency has assessed the effects of this proposed

rule on State, local, and tribal governments and the private sector.

This rule does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

List of Subjects in 36 CFR Part 215

Administrative practice and procedure, National forests.

Therefore, for the reasons set forth in the preamble, it is proposed to amend Part 215 of Title 36 of the Code of Federal Regulations as follows:

PART 215—NOTICE, COMMENT, AND APPEAL PROCEDURES FOR NATIONAL FOREST SYSTEM PROJECTS AND ACTIVITIES

Sec.

- 215.1 Purpose and scope.
- 215.2 Definitions.
- 215.3 Proposed actions subject to legal notice and opportunity to comment.
- 215.4 Actions not subject to legal notice and opportunity to comment.
- 215.5 Legal notice of proposed action and opportunity to comment.
- 215.6 Consideration of comments.
- 215.7 Legal notice of decision.
- 215.8 Decision implementation.
- 215.9 Emergency situations.
- 215.10 Decisions subject to appeal.
- 215.11 Decisions and actions not subject to appeal.
- 215.12 Who may appeal.
- 215.13 Where to file appeals.
- 215.14 Appeal time periods and process.
- 215.15 Appeal content.
- 215.16 Dismissal of appeal without review.
- 215.17 Informal disposition.
- 215.18 Formal review and disposition procedures.
- 215.19 Appeal Deciding Officer's authority.
- 215.20 Appeal Reviewing Officer's responsibilities.
- 215.21 Secretary's authority.
- 215.22 Judicial proceedings.
- 215.23 Applicability and effective date.
- 215.24 Information collection requirements

Authority: 16 U.S.C. 472, 551; sec. 322, Pub. L. 102–381, 106 Stat. 1419 (16 U.S.C. 1612 note).

§ 215.1 Purpose and scope.

(a) *Purpose.* The rules of this part have two purposes. First, this part establishes a process by which the public receives notice and an opportunity to comment on proposed actions for projects and activities implementing a land and resource management plan prior to a decision by the Responsible Official. Second, this part establishes an appeal process and identifies the decisions that may be appealed, who may appeal those decisions, the responsibilities of the participants in an appeal, and the

procedures that apply for the prompt disposition of the appeal.

(b) *Scope.* The notice of proposed actions and opportunity to comment provides an opportunity for the public to provide meaningful input prior to the decision on projects and activities implementing land and resource management plans. The rules of this part complement, but do not replace, numerous other opportunities to participate in and influence the agency's project and activity planning, such as those provided by the National Environmental Policy Act of 1969 (NEPA), the National Forest Management Act, and the implementing regulations and procedures in 40 CFR parts 1500–1508 and 36 CFR parts 216 and 219, Forest Service Manual (FSM) Chapters 1920 and 1950, and Forest Service Handbooks (FSH) 1909.12 and 1909.15. The appeal process is available to those who submit comments during the comment period, and issues are limited to those specifically raised by the appellant in their comments. Appeal disposition constitutes the final administrative determination of the United States Department of Agriculture.

§ 215.2 Definitions.

Appeal—The written document filed with an Appeal Deciding Officer by someone seeking review of a decision.

Appeal Deciding Officer—The Secretary of Agriculture or the Department or agency designee having the delegated authority and responsibility to render a decision on an appeal filed under this part.

Appeal disposition—Either a written appeal decision or written notification that an appeal decision will not be issued.

Appeal period—The 45-calendar-day period following publication of the legal notice of a decision during which an appeal may be filed with the Appeal Deciding Officer.

Appeal record—The information upon which review of an appeal is conducted, consisting of the decision documentation, the legal notice of decision, the appeal, the Responsible Official's documentation of the informal disposition meeting, and the Appeal Reviewing Officer's recommendation.

Appeal Reviewing Officer—An agency or Department of Agriculture official who reviews an appeal and makes a written recommendation to the Appeal Deciding Officer on the disposition of the appeal.

Appellant—An individual or organization filing an appeal under this part.

Categorically excluded—Proposed actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental impact statement (EIS) nor an environmental assessment (EA) is required (40 CFR 1508.4; Forest Service Handbook (FSH) 1909.15, Chapter 30).

Comment period—The 30-calendar-day period following publication of the legal notice of a proposed action, during which the public has the opportunity to provide comments to a Responsible Official on a proposed action subject to this part. The time period is computed using calendar days, including Saturdays, Sundays, and federal holidays. However, when the time period expires on a Saturday, Sunday, or federal holiday, comments shall be accepted until the end of the next federal working day.

Decision documentation—The Decision Notice or Record of Decision and all relevant environmental and other analysis documentation and records on which the Responsible Official bases a decision under appeal.

Decision Notice (DN)—A concise written record of a Responsible Official's decision based on an environmental assessment and a finding of no significant impact (40 CFR 1508.9; FSH 1909.15, Chapter 40).

Emergency situation—A situation on National Forest System lands in which a proposed action would provide relief from hazards threatening human health and safety or natural resources on those or adjacent lands; or that would result in substantial loss of economic value to the Government if implementation of the proposed action were delayed.

Environmental Assessment (EA)—A concise public document that provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact, aids an agency's compliance with NEPA when no environmental impact statement is necessary, and facilitates preparation of a statement when one is necessary. (40 CFR 1508.9; FSH 1909.15, Chapter 40).

Environmental Impact Statement (EIS)—A detailed written statement as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (40 CFR 1508.11; FSH 1909.15, Chapter 20).

Finding of No Significant Impact (FONSI)—A document prepared by a federal agency presenting the reasons why an action, not otherwise excluded, will not have a significant effect on the human environment and for which an environmental impact statement, therefore, will not be prepared. It

includes the environmental assessment or a summary of it and shall note any other environmental documents related to it (40 CFR 1508.13; FSH 1909.15, Chapter 40).

Forest Service line officer—A Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions subject to this part.

Name—The first and last name of an individual or the name of an organization. An e-mail address or electronic username is insufficient for identification of an individual or organization.

National Forest System lands—Proclaimed or designated National Forests; National Grasslands; Purchase Units; Land Utilization Projects; Research and Experimental Areas; and other areas (36 CFR 200.1(c)(2)).

Projects and activities implementing a land and resource management plan—Site-specific projects and activities, including those for research, on National Forest System lands that are approved in a Decision Notice or Record of Decision by a Forest Service official.

Proposed action—A proposal made by the Forest Service to authorize an action on National Forest System lands to meet a specific purpose and need which is subject to the notice and comment provisions of this part.

Record of Decision—A document signed by a Responsible Official recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2; FSH 1909.15, Chapter 20).

Responsible Official—The Forest Service employee who has the delegated authority to make and implement a decision subject to this part.

Substantive comments—Comments that are within the scope of the proposed action, are specific to the proposed action, and have a direct relationship to the proposed action.

§ 215.3 Proposed actions subject to legal notice and opportunity to comment.

The legal notice and opportunity to comment procedures (§ 215.5) only apply to:

(a) Proposed projects and activities implementing land and resource management plans (§ 215.2) for which an environmental assessment (EA) is prepared.

(b) Proposed nonsignificant amendments to land and resource management plans (36 CFR part 219) that are included as part of a decision on a project or activity for which an EA is prepared.

(c) Proposed revision of the EA based on consideration of new information or

changed circumstances (FSH 1909.15, section 18).

(d) Proposed research activities to be conducted on National Forest System lands for which an EA is prepared.

§ 215.4 Actions not subject to legal notice and opportunity to comment.

The procedures for legal notice and opportunity to comment (§ 215.5) do not apply to:

(a) Proposed projects and activities described in a draft environmental impact statement (EIS), for which notice and comment procedures are governed by 40 CFR 1500–1508.

(b) Projects and activities which are categorically excluded from documentation in an EIS or environmental assessment (EA) pursuant to FSH 1909.15, sections 31.1 and 31.2.

(c) Projects and activities not subject to the provisions of the National Environmental Policy Act and the implementing regulations at 40 CFR parts 1500–1508 and the National Forest Management Act and the implementing regulations at 36 CFR part 219.

(d) New information or changed circumstances, based upon which, the Responsible Official determines that revision of the EA is not required (FSH 1909.15, section 18).

(e) Rules promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or policies and procedures issued in the Forest Service Manual and Handbooks (36 CFR parts 200 and 216).

(f) Proposed nonsignificant amendment to a land and resource management plan that is made separately from a project or activity specified in § 215.3(b).

§ 215.5 Legal notice of proposed action and opportunity to comment.

(a) *Timing for publication of notice.* Comments on the proposed action shall be accepted for 30 days following the date of publication of the notice; the Responsible Official has the discretion to determine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment (§ 215.5(b)).

(b) *Giving Notice*—(1) *Principal newspaper.* Through notice published annually in the **Federal Register**, each Regional Forester shall advise the public of the principal newspapers utilized for publishing legal notices required by this part.

(2) The Responsible Official shall promptly mail the proposed action (§ 215.2) to any individual or organization who has requested it and to individuals who have participated in project planning.

(3) The Responsible Official shall publish a legal notice of the opportunity to comment on a proposed action in the principal newspaper identified in § 215.5(b)(1), or in the case of the Chief of the Forest Service, in the **Federal Register**.

(4) *Content of legal notice.* All legal notices shall include the following:

(i) The title and brief description of the proposed action;

(ii) A general description of the proposed action's location with sufficient information to allow the interested public to identify the location;

(iii) Instructions on how to obtain additional information on the proposed action;

(iv) The name, title, telephone number, and addresses (street, postal, facsimile, and e-mail) of the Responsible Official to whom comments are to be submitted;

(v) The acceptable format(s) for electronic comments;

(vi) A statement indicating that each individual, or a representative from each organization, must sign comment letters.

(vii) Rather than giving a specific date, a statement indicating that the opportunity to comment ends 30 days following the date of publication of the legal notice;

(viii) A statement indicating that only those who submit timely comments will be accepted as appellants; and

(ix) When applicable, a statement that the Responsible Official is requesting an emergency situation determination or it has been determined that an emergency situation exists for the project or activity as provided for in § 215.9.

(5) *Computation of time period.* The 30-day comment period begins on the first day after publication of the legal notice. The time period is computed using calendar days, including Saturdays, Sundays, and federal holidays. However, when the time period expires on a Saturday, Sunday, or federal holiday, comments shall be accepted until the end of the next federal working day.

(i) The Responsible Official shall accept comments on the proposed action that are:

(A) Postmarked, e-mailed, faxed, or otherwise submitted (for example, express delivery service) by the end of the 30th calendar day following publication of the legal notice (§ 215.5(b)(3)); or

(B) Hand-delivered and received by the end of the 30th calendar day following publication of the legal notice (§ 215.5(b)(3)).

(ii) The time period for the opportunity to comment shall not be extended.

(c) *Comments.* Written and oral comments shall be accepted and shall become a matter of public record.

(1) Anyone commenting must provide the following information:

(i) Name and address;

(ii) Title of the proposed action; and

(iii) Specific substantive comments (§ 215.2) on the proposed action along with supporting reasons that the Responsible Official should consider in reaching a decision.

(2) *Written Comments Signature.* Written comments, submitted via delivery service (for example, U.S. Postal Service, express mail service, courier, etc.) or submitted in person, must be signed. When a written comment, submitted via delivery service or in person, is filed on behalf of multiple individuals, each name listed must include a signature.

Verification of the author(s) may be necessary for electronically submitted comments. For organizations, a signature of an individual officially representing each organization must be included. Comments received from an official representative(s) of an organization are considered as those of the organization only, and do not meet comment requirements of this section for individual members of that organization.

(3) *Oral Comments—Oral comments* must be provided at the agency office during normal business hours via telephone or in person, or if non-business hours, must be at an official agency function which is designed to elicit public comment.

§ 215.6 Consideration of comments.

(a) All written comments received by the Responsible Official shall be placed in the project file.

(b) The Responsible Official shall clearly identify the date all oral comments are received in response to the legal notice (§ 215.5), document them, and place in the project file.

(c) The Responsible Official shall consider all substantive written and oral comments submitted in compliance with § 215.5(b)(5)(i) and (c).

§ 215.7 Legal notice of decision.

(a) The Responsible Official shall publish a legal notice of any decision subject to appeal (§ 215.10) in the principal newspaper (§ 215.5(b)(1)). The legal notice shall:

(1) Include the title of the project or activity and a concise description of the action(s) to be taken, the name and title of the Responsible Official, and

instructions for obtaining a copy of the Decision Notice (DN) and Finding of No Significant Impact (FONSI) or Record of Decision (ROD).

(2) State that the decision is subject to appeal pursuant to 36 CFR part 215 and include the following:

(i) Name and address of the Appeal Deciding Officer with whom an appeal is to be filed. The notice shall specify a street, postal, fax, and e-mail address, and acceptable format(s) for electronically submitted appeals.

(ii) A statement that the publication date of the legal notice is the exclusive means for calculating the time to file an appeal (§ 215.14) and that appellants should not rely upon dates or timeframe information provided by any other source. An actual date shall not be included in the legal notice.

(iii) A statement that an appeal, including attachments, must be postmarked, faxed, e-mailed, hand-delivered, or otherwise submitted to the appropriate Appeal Deciding Officer (§ 215.13) within 45 days following the date of publication of the legal notice.

(iv) A statement indicating that individuals or organizations who submitted comments during the comment period (§ 215.5) may appeal. Appeal issues are limited to those raised by the appellant in his/her comments (§ 215.5).

(v) A statement specifying, when applicable, that the Chief of the Forest Service, or a designee, has determined that an emergency situation exists (§ 215.9), and which portion of the project is covered by that determination as provided for in § 215.9.

(vi) A statement indicating how many days following publication that implementation may begin (§ 215.8), including those portions covered by an emergency situation determination, if applicable (§ 215.9).

(3) When no comments or only supportive comments are received, include a statement indicating that the decision is not subject to appeal pursuant to § 215.11.

(b) The Responsible Official shall promptly mail the ROD or the DN and FONSI to those who requested the decision document and those who submitted comments during the comment period provided under § 215.5.

§ 215.8 Decision implementation.

(a) If no appeal is filed within the time period provided, implementation of the decision may begin on, but not before, the fifth (5th) business day following the close of the appeal-filing period (§ 215.14).

(b) Except for emergency situations as noted in § 215.9(b), when an appeal is filed, implementation may occur on, but not before, the 15th business day following the date of appeal disposition (§ 215.2). In the event of multiple appeals of the same decision, the implementation date is controlled by the date of the last appeal disposition.

(c) When a project or activity decision is not subject to appeal (§ 215.11), implementation may occur as follows:

(1) Immediately when documented in a Decision Notice; or

(2) Immediately when documented in a Record of Decision after complying with the timeframes described in 40 CFR 1506.10(b)(2).

§ 215.9 Emergency situations.

(a) *Determination.* The Chief of the Forest Service or a designee may make the determination that an emergency situation (§ 215.2) exists. The authority for determination of an emergency situation may not be delegated below the Regional Forester or Station Director. The determination that an emergency situation exists shall be based on an examination of the relevant information. During the review, additional information may be requested and/or the Responsible Official may be consulted.

(b) *Implementation.* When it is determined that an emergency situation exists with respect to all or part of the decision, implementation may proceed as follows:

(1) Immediately when documented in a Decision Notice, for that portion of the decision determined to be an emergency.

(2) Immediately when documented in a Record of Decision, after complying with the timeframes described in 40 CFR 1506.10(b)(2), for that portion of the decision determined to be an emergency.

(c) *Notification.* The Responsible Official shall notify the public that the Forest Service is handling part of, or the entire project, as an emergency in the legal notice of decision (§ 215.7).

§ 215.10 Decisions subject to appeal.

(a) The following decisions are subject to appeal under this part:

(1) Decisions for projects and activities implementing land and resource management plans (§ 215.2) documented in a Record of Decision (ROD) or Decision Notice (DN), including those which, as a part of the decision, contain a nonsignificant amendment to a land and resource management plan (36 CFR 219.10).

(2) A new DN or ROD made after supplementation or revision of an

environmental assessment or environmental impact statement pursuant to FSH 1909.15, section 18. However, only that portion of the decision that is changed is subject to appeal.

(3) Decisions made in conjunction with other federal agencies and meeting the requirements of preceding paragraph (a)(1) of this section. However, only that portion of the decision made by the Forest Service affecting National Forest System lands (§ 215.2) is subject to appeal under this part.

(b) Decisions solely affecting the business relationship between the Forest Service and holders of written instruments regarding occupancy and use of National Forest System lands and meeting the requirements of preceding paragraph (a) of this section are subject to appeal by permit holders under either this part or 36 CFR part 251, subpart C, but not under both parts.

§ 215.11 Decisions and actions not subject to appeal.

The following decisions are not subject to appeal under this part:

(a) Decisions for projects or activities included in a Record of Decision for significant amendment, revision, or adoption of a land and resource management plan (36 CFR part 217 and part 219).

(b) Documentation that a new decision is not needed following supplementation or revision of an environmental assessment (EA) pursuant to FSH 1909.15, section 18.

(c) Preliminary findings made during planning and/or analysis processes on a project or activity and the subsequent implementing actions that result from the initial project decision subject to appeal.

(d) Projects or activities for which notice of the proposed action and opportunity to comment is published (§ 215.5) and

(i) No comments or only supportive comments are received during the comment period (§ 215.5); or

(ii) No comments or only supportive comments are received during the comment period for a draft environmental impact statement (EIS) (40 CFR 1502.19), and the Responsible Official's decision does not modify the preferred alternative identified in the draft EIS.

(e) Decisions for actions that have been categorically excluded from documentation in an EA or EIS in FSH 1909.15, sections 31.1 and 31.2.

(f) An amendment to a land and resource management plan that is made independent of a project or activity (36 CFR 219.32).

(g) Concurrences and recommendations to other federal agencies.

§ 215.12 Who may appeal.

(a) Individuals and organizations who submit written or oral comments during the comment period for an environmental assessment (§ 215.5), or in response to a draft environmental impact statement, except as provided in paragraph (c) of this section, may file an appeal. Comments received from an official representative(s) of an organization are considered as those of the organization only, and individual members of that organization do not meet appeal requirements on the basis of membership in an organization which submitted comments.

(b) When the appeal lists multiple individuals or organizations, each shall meet the requirements of paragraph (a) of this section.

Individuals or organizations that do not meet the requirements of paragraph (a) of this section shall not be accepted as appellants.

(c) Federal agencies may not appeal.

(d) Federal employees filing appeals in a non-official capacity under this part shall comply with Federal conflict of interest statutes at 18 U.S.C. 202–209 and with employee ethics requirements at 5 CFR part 2635. Specifically, employees shall not be on official duty nor use government property or equipment in the preparation or transmittal of an appeal. Further, employees shall not incorporate official information not yet released to the public, including federal agency documents that are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552 (b).

§ 215.13 Where to file appeals.

Appeals must be filed with the Appeal Deciding Officer as follows:

If the Responsible Official who made the decision is:	Then the Appeal Deciding Officer is:
Chief	Secretary of Agriculture.
Regional Forester or Station Director.	Chief of the Forest Service.
Forest Supervisor	Regional Forester.
District Ranger	Regional Forester.
Research Work Unit Project Leader.	Station Director.

§ 215.14 Appeal time periods and process.

(a) *Time to file an appeal.* Written appeals, including any attachments, must be submitted to the Appeal Deciding Officer within 45 days

following the publication date of the legal notice (§ 215.7).

(b) *Computation of time periods.* (1) All time periods are computed using calendar days, including Saturdays, Sundays, and federal holidays. However, when the time period expires on a Saturday, Sunday, or federal holiday, the time is extended to the end of the next federal working day.

(2) The day after the publication of the legal notice (§ 215.7) is the first day of the appeal-filing period.

(3) The publication date of the legal notice of the decision is the exclusive means for calculating the time to file an appeal. Appellants should not rely on dates or timeframe information provided by any other source.

(c) *Evidence of timely filing.* When there is a question about timely filing of an appeal, timeliness shall be determined by:

(1) The postmark on an appeal and/or attachment mailed or otherwise submitted (for example, express mail service), or evidence of the date sent on an e-mailed or faxed appeal and/or attachments. When an appeal is electronically mailed, the appellant should expect to receive an automated electronic response from the agency as confirmation of receipt; or

(2) The time and date imprint at the correct receiving office on a hand-delivered appeal and/or attachments.

(d) *Extensions.* Time extensions, except as noted in paragraph (b) of this section, are not permitted.

(e) *Other timeframes.* Unless an appeal is resolved through the informal disposition process (§ 215.17), the following timeframes and processes shall apply:

(1) *Transmittal of decision documentation.* Within 15 days of the close of the appeal-filing period, the Responsible Official shall transmit the decision documentation to the Appeal Reviewing Officer.

(2) *Appeal decision.* Within 45 days following the end of the appeal-filing period, the Appeal Deciding Officer shall issue a written decision to the appellant(s) concerning the disposition of the appeal. When an appeal decision is not issued within 45 days, the Responsible Official's decision is deemed the final agency action and the appellant shall be so notified (§ 215.18).

§ 215.15 Appeal content.

(a) It is the appellant's responsibility to provide sufficient project- or activity-specific evidence and rationale, focusing on the decision, to show why the Responsible Official's decision should be reversed.

(b) The appeal must be submitted to the Appeal Deciding Officer in writing. At a minimum, an appeal must include the following:

(1) Appellant's name (as defined in § 215.2), signature (for those appeals submitted via delivery service, for example, United States Postal Service, express mail service, courier, etc.) and address, with a telephone number, if available;

(2) The name of the project or activity for which the decision was made, the name and title of the Responsible Official, and the date of the decision;

(3) The regulation under which the appeal is being filed, when there is an option to appeal under this part or 36 CFR part 251 subpart C (§ 215.10(b));

(4) Any specific change(s) in the decision that the appellant seeks or portion(s) of the decision with which the appellant disagrees; and

(5) Why the appellant believes the Responsible Official's decision failed to consider their substantive comments and/or how the appellant believes the decision specifically violates law, regulation, or policy. Appeal issues are limited to those raised by the appellant in her/his comments (§ 215.5).

(c) The Appeal Deciding Officer shall not accept an appeal when:

(1) The identity of an appellant cannot be determined; or

(2) A reasonable means of contact is not provided; or

(3) The appellant's signature is not provided, except for those appeals submitted electronically, which may be subject to verification of the author; or

(4) Multiple names are listed without a signature accompanying each name except for those appeals submitted electronically, which may be subject to verification of the author; or

(5) The signature of the individual representing an organization is not provided, except for those appeals submitted electronically, which may be subject to verification of the author; or

(6) The decision cannot be identified.

§ 215.16 Dismissal of appeal without review.

(a) The Appeal Deciding Officer shall dismiss an appeal without review when:

(1) The postmark on an appeal and/or attachment mailed or otherwise submitted (for example, express mail service) or the evidence of the date sent on an e-mailed or faxed appeal and/or attachments is not within the 45-day appeal-filing period (§ 215.14); or

(2) The time and date imprint at the correct receiving office on a hand-delivered appeal and/or attachments is not within the 45-day appeal-filing period (§ 215.14); or

(3) The requested relief or change cannot be granted under law, policy, or regulation; or

(4) The appellant has appealed the same decision under 36 CFR part 251 (§ 215.10(b)); or

(5) The decision is excluded from appeal (§ 215.11); or

(6) The appellant did not submit comments during the comment period (§ 215.5); or

(7) The Responsible Official withdraws the decision; or

(8) The appellant's appeal does not provide sufficient information in response to § 215.15(b)(4) and (5) for the Appeal Deciding Officer to render a decision; or

(9) The appellant withdraws the appeal.

(b) The Appeal Deciding Officer shall give written notice to the appellant and the Responsible Official when an appeal is dismissed and shall give the reasons for dismissal.

§ 215.17 Informal disposition.

(a) *Offer to meet.* When an appeal is received, the Responsible Official must contact the appellant and offer to meet and discuss resolution of the issues raised in the appeal. This contact shall be as soon as practicable after the appeal is received.

(b) *Time and location of meeting.* When an appellant agrees to meet, the initial meeting(s) shall take place within 15 days after the closing date for filing an appeal (§ 215.14). The location of the meeting shall be in the vicinity of the lands affected by the decision. When the District Ranger is the Responsible Official, meetings will generally be located on or near that Ranger District. When the Forest Supervisor or Regional Forester is the Responsible Official, meetings will generally take place at a location within or near the National Forest.

(c) *Meeting structure.* Generally, the appellant and any other participants should be physically present at informal disposition meetings. If the appellant cannot attend a meeting in person because of schedule conflicts or travel distances, alternative types of meetings (such as telephone conferences or video conferences) may be arranged. All meetings are open to the public.

(d) *Outcome.* The Responsible Official shall notify the Appeal Deciding Officer of the meeting participants and the outcome of the informal disposition meeting in writing. If the appellant(s) decline to meet, the Responsible Official shall advise the Appeal Deciding Officer.

(1) When an appellant and the Responsible Official reach agreement on

disposition of all or a portion of an appeal, the appellant shall withdraw all or the agreed upon portion of the appeal by letter to the Appeal Deciding Officer within 15 days of the agreement. When the appellant does not withdraw the appeal in writing, formal review and disposition of the appeal shall continue.

(2) When, as a result of the agreement reached at the informal disposition meeting, new information is received or changes to the original decision or environmental analysis are proposed, the Responsible Official must follow the procedures in FSH 1909.15, section 18, and §§ 215.3 and 215.4.

(3) When an appeal is not entirely resolved through informal disposition, formal review and disposition of the appeal shall continue (§ 215.18).

§ 215.18 Formal review and disposition procedures.

(a) *Scope of review.* The Appeal Deciding Officer shall complete a review based on the appeal record (§ 215.2) and the Appeal Reviewing Officer's recommendation (§ 215.19(b)).

(b) *Disposition.* The Appeal Deciding Officer shall issue either:

(1) Within 45 days following the end of the appeal filing period, a written appeal decision affirming or reversing the Responsible Official's decision, in whole or in part, and may include instructions for further action. When an appeal decision involves instructions concerning new information or changed circumstances, the Responsible Official must follow the procedures in FSH 1909.15, section 18; and §§ 215.3, 215.4, 215.10, and 215.11. A copy of the appeal decision shall be sent to the appellant, the Appeal Reviewing Officer, and the Responsible Official;

(2) No sooner than 46 days nor later than 50 days following the end of the appeal filing period, written notification to the appellant that an appeal decision will not be issued and that the Responsible Official's decision constitutes the final administrative decision of the Department of Agriculture (§ 215.14(e)(2)). A copy shall be sent to the Responsible Official.

(c) The Appeal Deciding Officer shall not issue an appeal decision when 45 days have elapsed following the end of the appeal filing period.

(d) The Appeal Deciding Officer's appeal decision constitutes the final administrative determination of the Department of Agriculture.

§ 215.19 Appeal Deciding Officer's authority.

(a) *Procedural decisions.* The Appeal Deciding Officer makes all procedural determinations. Such determinations

are not subject to further administrative review.

(b) *Consolidation of appeal decisions.* In cases involving multiple appeals of a decision, the Appeal Deciding Officer may consolidate appeals and may issue one or more appeal decisions.

(c) *Multiple names.* (1) When an appeal lists multiple names, the Appeal Deciding Officer shall identify all qualified appellants (§ 215.12).

(2) The Appeal Deciding Officer has the discretion to appoint a representative from those listed on an appeal to act on behalf of all parties to that appeal.

(d) The Appeal Deciding Officer may issue an appeal decision different from the Appeal Reviewing Officer's recommendation.

§ 215.20 Appeal Reviewing Officer's responsibilities.

(a) *Designation.* The Appeal Reviewing Officer may be:

(1) designated by the Chief or designee, and shall be a line officer at least at the level of the agency official who made the initial decision on the project or activity that is under appeal, who has not participated in the initial decision and will not be responsible for implementation of the initial decision after the appeal is decided.

(2) or designated by the Secretary in the case of Chief's decisions.

(b) *Review and recommendation.* The Appeal Reviewing Officer shall review an appeal and make a written recommendation to the Appeal Deciding Officer on the disposition of the appeal. That recommendation shall be released only upon issuance of an appeal decision.

(c) *Multiple appeals.* In cases involving multiple appeals of a decision, the Appeal Reviewing Officer may consolidate appeals and issue one or more recommendations.

§ 215.21 Secretary's authority.

(a) Nothing in this part limits the Secretary of Agriculture's authority for making decisions subject to this part.

(b) When the Secretary of Agriculture or Under Secretary, Natural Resources and Environment, issues a decision for projects and activities implementing land and resource management plans, such decisions shall not be subject to the notice, comment, and appeal procedures of this part. A decision by the Secretary of Agriculture constitutes the final administrative decision of the Department of Agriculture.

§ 215.22 Judicial proceedings.

It is the position of the Department of Agriculture that any filing for federal

judicial review of a decision subject to appeal is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the appeal procedures in this part (7 U.S.C. 6901).

§ 215.23 Applicability and effective date.

(a) These procedures apply to all projects and activities for which notice is published after 30 days from date of publication of final rule in the **Federal Register**.

(b) Decisions for which legal notice is given (§ 215.5) on or prior to 30 days from date of publication of final rule in the **Federal Register** remain subject to the appeal procedures of 36 CFR part 215 in effect when the final rule is published

§ 215.24 Information collection requirements.

The rules of this subpart governing appeal of decisions regarding projects and activities implementing a land and resource management plan specify the information that appellants must provide in an appeal (§ 215.15). As such, these rules contain information collection requirements as defined in 5 CFR part 1320. These information requirements are assigned OMB Control Number 0596-_____.

Dated: December 11, 2002.

Dale N. Bosworth,

Chief, Forest Service.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KY 139-200307(b); FRL-7423-5]

Approval and Promulgation of Implementation Plans for Kentucky: Source-Specific Revision for Lawson Mardon Packaging

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a source-specific revision to the State Implementation Plan (SIP) of the Commonwealth of Kentucky. This revision allows Lawson Mardon Packaging, USA, Corporation to have an alternative compliance averaging period of 30 days instead of the 24-hour averaging period specified by Kentucky air quality regulations 59:210 and 59:212. In the Final Rules section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the