Frequency	Field strength* (volts per meter)	
	Peak	Average
18 GHz–40GHz	600	200

*The field strengths are expressed in terms of peak root-mean-square (rms) values.

or,

(2) The applicant may demonstrate by a system test and analysis that the electrical and electronic systems that perform critical functions can withstand a minimum threat of 100 volts per meter, electrical field strength, from 10 kHz to 18 GHz. When using this test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

A preliminary hazard analysis must be performed by the applicant for approval by the FAA to identify either electrical or electronic systems that perform critical functions. The term ''critical'' means those functions, whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or any combination of these. Service experience alone is not acceptable since normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

Applicability

As discussed above, these special conditions are applicable to the Cessna 441. Should West Star Aviation apply at a later date for a supplemental type certificate to modify any other model on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Cessna 441 airplane modified by West Star Aviation to add two Honeywell/Ametek AM–250 digital air data computers.

1. Protection of Electrical and Electronic Systems from High Intensity Radiated Fields (HIRF). Each system that performs critical functions must be designed and installed to ensure that the operations, and operational capabilities of these systems to perform critical functions, are not adversely affected when the airplane is exposed to high intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions: Functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on May 18, 2005.

John R. Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–10907 Filed 6–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 228

RIN 0596–AC17

Clarification as to When a Notice of Intent To Operate and/or Plan of Operation Is Needed for Locatable Mineral Operations on National Forest System Lands

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations governing the use of National Forest System lands in connection with operations authorized by the United States mining laws. The final rule clarifies the regulations at 36 CFR 228.4(a) concerning the requirements for mining operators to submit a ''notice of intent'' to operate and requirements to submit and obtain an approved ''plan of operations.'' Clarification of the requirements in § 228.4(a) are necessary to minimize adverse environmental impacts to National Forest System lands and resources.

DATES: The final rule is effective July 6, 2005.

ADDRESSES: The documents used in developing this final rule are available for inspection and copying at the office of the Director, Minerals and Geology Management, Forest Service, USDA, 1601 N. Kent Street, 5th Floor, Arlington, VA 22209, during regular business hours (8:30 a.m. to 4:30 p.m.), Monday through Friday, except holidays. Those wishing to copy or inspect these documents are asked to call ahead (703) 605–4818 to facilitate access to the building.

FOR FURTHER INFORMATION CONTACT: Mike Doran, Minerals and Geology Management Staff, (703) 605–4818.

SUPPLEMENTARY INFORMATION:

Background and Need for Final Rule

For purposes of this final rule, all references to 36 CFR part 228, Subpart A, without qualifying terms ''interim rule'' or ''final rule,'' refer to language

in that subpart in effect prior to issuance of the interim rule (69 FR 41428, Jul. 9, 2004).

Since 1974, the Forest Service has applied the regulations now set forth at 36 CFR part 228, subpart A, to minimize adverse environmental impacts from mineral operations authorized by the United States mining laws by requiring mineral operators to file proposed plans of operations for mineral operations which the District Ranger determines will likely cause significant surface disturbance of National Forest System (NFS) lands. These regulated operations may include, but are not limited to, the construction of storage facilities, mills, and mill buildings; placement of trailers or other personal equipment; residential occupancy and use; storage of vehicles and equipment; excavation of holes, trenches, and pits by mechanized or non-mechanized procedures; diversion of water; use of sluice boxes and portable devices for separating gold from sediments; off highway vehicle use; road and bridge construction; handling and disposal of mine and other wastes; and signing and fencing to restrict public use of NFS lands affected by mining operations. The Forest Service and the courts had consistently required locatable mineral operators to obtain approval of a plan of operations whenever such operations would likely cause a significant surface disturbance, whether or not those operations involve mechanized earth moving equipment or the cutting of trees.

However, two years ago, a District Court departed from this consistent interpretation and ruled that 36 CFR 228.4(a)(2)(iii) allowed a mining operation to occur on NFS lands without prior notification to the Forest Service or prior Forest Service approval of a plan of operations when the operation did not involve mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, irrespective of the surface disturbing impacts that the operation would likely cause. This unprecedented ruling severely restricted the ability of the Forest Service to regulate miners engaged in surface disturbing operations not involving mechanized earth moving equipment or the cutting of trees, but have serious environmental impacts, including impacts to water quality, visual quality, natural features, fisheries, and species listed under the Endangered Species Act, as well as conflicts with other NFS users.

To prevent confusion as to the proper interpretation of 36 CFR 228.4(a), the Forest Service published an interim rule in the **Federal Register** on July 9, 2004 (69 FR 41428), which took effect on August 9, 2004. The interim rule sought to clarify that the requirement to file a notice of intent to operate with the District Ranger is mandatory in any situation in which a mining operation might cause disturbance of surface resources, regardless of whether that operation would involve the use of mechanized earth moving equipment, such as a bulldozer or backhoe, or the cutting of trees. The interim rule also sought to eliminate possible confusion by more specifically addressing the issue of what level of operation requires prior submission of a notice of intent to operate and what level of operation requires prior submission and approval of a plan of operations. The interim rule directs a mining operator to submit a notice of intent to operate when the proposed operation might cause a disturbance of surface resources. After a notice of intent to operate is submitted, the District Ranger would determine whether the proposed operations would likely cause a significant disturbance of surface resources. If the District Ranger determines that the proposed operations would likely cause a significant disturbance of surface resources, the District Ranger would notify the operator that prior submission and approval of a plan of operations is required before the operations commence.

The opportunity for public comment was not legally required to promulgate the interim rule. Nonetheless, the Forest Service provided a 60-day comment period and stated that comments received on the interim rule would be considered in adopting a final rule. The Department has considered those comments and has modified several provisions of the interim rule in this final rule.

Analysis of Public Comment

Overview

The Forest Service received 2,373 responses to the interim rule (69 FR 41428), including fifteen responses which said they were responding to the interim rule, but in actuality were nonresponsive and dealt with different issues, such as timber harvesting and investment opportunities. The total number also includes three challenges to the interim rule: (1) A notice of appeal of the interim rule, (2) a petition seeking the repeal of the interim rule pursuant to rule making requirements that give an interested person the right to petition repeal of the rule at 5 U.S.C. 553(e), and (3) a lawsuit seeking to enjoin the interim rule. The three challenges to the interim rule were disposed of separately and consequently were not independently considered in the development of the final rule. However, every issue raised in the three challenges to the interim rule also was raised in one or more of the comments submitted on the interim rule. Also included in the total number were several responses received after the comment period ended.

There were 2,230 comments in favor of the interim rule. Most were an identical one-page email supporting the provisions in the interim rule, namely the long-standing requirement that miners either notify the Forest Service or obtain Forest Service approval before conducting proposed mining operations. Several industry organizations submitted detailed comments which expressed general support for the interim rule, but suggested specific revisions of the rule's text to make its requirements clearer. Other letters of support came from State regulatory agencies, environmental groups, and the United States Environmental Protection Agency.

Most of the 125 comments in opposition to the interim rule were submitted by individuals, many of whom identified themselves as miners or prospectors engaging in small scale mining operations.

All comments submitted on the interim rule and the administrative record are available for review in the Office of the Director, Minerals and Geology Management Staff, 1610 N. Kent St., 5th Floor, Arlington, Virginia, 22209, during regular business hours (8 a.m. to 5 p.m.), Monday through Friday, except Federal holidays. Those wishing to view the comments and the administrative record should call in advance to arrange access to the building (*see* **FOR FURTHER INFORMATION CONTACT**).

Response to Comments

1. Comments on the Validity of the Interim Rule's Promulgation

Comment: Many respondents stated that the Forest Service cannot adopt a rule altering the interpretation of § 228.4(a), a portion of the rule promulgated in 1974, and adopted in *United States* v. *Lex*, 300 F. Supp. 2d 951 (E.D. Cal. 2003).

Response: Nothing in *Lex* could, or purports to, restrict the Forest Service's clear authority to promulgate rules regulating the effects of locatable mineral resources on NFS lands. Indeed, the court in *Lex*, after noting that it was ''not unsympathetic to the problem posed by the [former 36 CFR 228.4(a)] in this case,'' specifically stated that ''[t]he solution to this problem* * * is

to amend the regulations * * *'' *United States* v. *Lex*, 300 F. Supp. 2d 951, 962 n.10 (E.D. Cal. 2003). Thus, the contention that *Lex* somehow precludes the Forest Service from adopting the precise solution which the decision identified is untenable.

Comment: Four respondents said that the interim rule is a substantive rule which substantially, and improperly, changes exemptions to plan of operations and notice of intent to operate requirements previously applied to small scale mining operations. These comments appear to involve the application of the Administrative Procedure Act (APA) to the promulgation of the interim rule.

Response: These comments are predicated upon the interpretation of § 228.4(a) adopted in *United States* v. *Lex*, 300 F. Supp. 2d 951 (E.D. Cal. 2003). As the preamble to the interim rule notes, the departure from the long-standing interpretation of § 228.4(a) is not the interim rule, but *Lex* itself. The technical amendments to § 228.4(a) set forth in the interim rule simply reinforce the long-standing interpretation of that provision held by the Forest Service and previous reviewing courts that a locatable mineral operator may be required to submit a notice of intent to operate or to submit and obtain approval of a proposed plan of operations whether or not the proposed operations would involve the cutting of trees or the use of mechanized earth moving equipment, as do the amendments set forth in the final rule. Similarly, the technical amendments to § 228.4(a) in the interim rule simply reinforce the long-standing interpretation of that provision held by the Forest Service and previous reviewing courts that a locatable mineral operator is required to obtain approval of a proposed plan of operations whenever the operator or the applicable District Ranger determines that the proposed operations will likely result in significant disturbance of NFS lands and resources, irrespective of whether the operator first was required to submit a notice of intent to operate, as do the amendments set forth in the final rule.

Moreover, even if the changes to § 228.4(a) adopted in the interim rule were not technical amendments to that provision, the interim rule was proper under the APA given that the Department found for good cause that prior notice and public comment on the rule was ''impracticable, unnecessary, or contrary to the public interest'' (5 U.S.C. 553(b)(3)(B)).

Comment: A number of respondents stated that the Forest Service violated the public participation requirements of the Forest and Rangeland Renewable Resources Planning Act (RPA) (16 U.S.C. 1612(a)) by not giving the public notice and an opportunity to comment before adopting the interim rule.

Response: The public participation provisions of 16 U.S.C. 1612(a) do not mandate prior notice and an opportunity to comment before the Forest Service adopts a rule in every case. Rather, it requires the Forest Service to give ''adequate'' notice and an opportunity to comment. The Forest Service provided the public adequate notice and opportunity to comment in connection with the technical amendment of § 228.4(a) in the interim rule by providing for a public comment period on the interim rule and considering those comments in adopting the final rule.

Comment: Several respondents commented that the public participation requirements of RPA makes the exceptions of APA's rule making requirements at 5 U.S.C. 553(b)(3) and 553(d) inapplicable to the interim rule.

Response: The exceptions to the APA's requirements for prior notice and opportunity for public comment on the adoption of rules and for a delay in the effective date of certain rules are not overridden by the public participation requirements of RPA. That provision clearly did not specifically repeal or be construed as an implicit repeal of the rule making requirements at 5 U.S.C. 553(b)(3)(A)–(B) or 553(d)(1)–(3).

'' 'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.' '' *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (citation omitted). Indeed, an implied partial repeal will not be recognized unless there is an irreconcilable conflict between the two statutes at issue or the later statute covers the whole subject of the earlier one and is clearly intended as a substitute. '' 'But, in either case, the intention of the legislature to repeal must be clear and manifest * * *' '' (alteration in original) (citation omitted). Moreover, '' '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary.' '' at 155 (alteration in original) (citation omitted).

In adopting the public participation requirements of RPA, Congress' intention to repeal APA's exceptions at 5 U.S.C. 553(b)(3)(A)–(B) and 553(d)(1)–(3), insofar as Forest Service rules are concerned, certainly is not manifest. Furthermore, it is not necessary to read 16 U.S.C. 1612(a) as repealing the exceptions set forth at 5 U.S.C. 553(b)(3)(A)–(B) to the APA's requirement for prior notice and opportunity for public comment on the adoption of rules in E.O. to make 16 U.S.C. 1612(a) work, even assuming that 16 U.S.C. 1612(a) is applicable to the adoption of the interim rule. Adequate notice and opportunity to comment for purposes of 16 U.S.C. 1612(a) can be provided by accepting public comments on an interim rule which are considered in the adoption of the final rule, as is being done in the context of the revision of § 228.4(a). Nor is it necessary to read 16 U.S.C. 1612(a) as repealing the exceptions set forth at 5 U.S.C. 553(d)(1)–(3) to the APA's requirements for a delay in the effective date of certain rules in E.O. to make 16 U.S.C. 1612(a) work, even assuming that 16 U.S.C. 1612(a) is applicable to the adoption of the interim rule. Agencies can delay the effective dates of rules, as was done in the context of the interim rule.

Comment: Several respondents said that the interim rule's violation of the public participation requirements of RPA (16 U.S.C. 1612(a)) also constitutes a violation of the Congressional Review Requirements at 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: Given that the Forest Service did not violate the public participation requirements of RPA in promulgating the interim rule for the reasons previously discussed, there is no cumulative violation of the Congressional review requirements as suggested by the respondents.

Comment: Five respondents commented that the Forest Service violated the Regulatory Flexibility Act by failing to prepare and make available for public comment both an initial and a final regulatory flexibility analysis on the rule and failed to list the interim rule on its regulatory flexibility agenda. Additionally, those respondents stated that these violations of the Regulatory Flexibility Act also constitutes a violation of the Congressional review requirements at 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: The obligation to prepare and make available for public comment an initial regulatory flexibility analysis is triggered ''[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule * * *'' (5 U.S.C. 603(a)). As previously discussed, the interim rule made technical, rather than substantive, changes to § 228.4(a). Under the APA, a rulemaking which does not constitute a substantive rule is exempted from the notice and comment requirements of the Act by 5 U.S.C.

553(b)(3)(A) (*Animal Legal Defense Fund* v. *Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991)). Further, even if the changes which the interim rule made to § 228.4(a) were properly viewed as substantive changes to that provision, the APA still would not have required general notice of proposed rulemaking for the promulgation of the interim rule because the Department, for good cause, found that notice and public procedure on the interim rule was impracticable and contrary to the public interest pursuant to another of the Act's exception at 5 U.S.C. 553(b)(3)(B). Moreover, no other law required a general notice of proposed rulemaking for the interim rule. Consequently, the Forest Service was not under an obligation to prepare and make available for public comment an initial regulatory flexibility analysis for the interim rule because general notice of proposed rulemaking was not required for the promulgation of that rule.

The obligation to prepare a final regulatory flexibility analysis is triggered ''[w]hen an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking * * *.'' 5 U.S.C. 604(a). The interim rule is not a final rule. As the interim rule explained, ''[c]omments received on this interim rule will be considered in adoption of a final rule, notice of which will be published in the **Federal Register**. The final rule will include a response to comments received and identify any revisions made to the rule as a result of the comments'' (69 FR 41428, July 9, 2004).

Any failure to list the interim rule on the Forest Service's regulatory flexibility agenda prior to the rule's adoption does not constitute a violation of the Regulatory Flexibility Act which specifically provides that ''[n]othing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda * * *.'' 5 U.S.C. 602(d).

Given that the Forest Service did not violate the Regulatory Flexibility Act in promulgating the interim rule, there is no cumulative violation of the Congressional review requirements as suggested by the respondents.

Comment: Several respondents stated that the interim rule is a major rule for purposes of the Regulatory Flexibility Act, 5 U.S.C. 801–808.

Response: On March 15, 2004, the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) found that the interim rule proposed for § 228.4(a) was not a major rule for purposes of 5 U.S.C. 801–808.

Comment: Three respondents said that the Forest Service violated the Congressional review requirements of the Regulatory Flexibility Act by failing to submit required reports on the rule to each House of Congress and the Comptroller General.

Response: The Forest Service did comply with this requirement. On July 19, 2004, the Forest Service submitted a Congressional Rulemaking Report to the House of Representatives (Congressman Hastert), the Senate (Vice President Cheney), and the General Accounting Office (Comptroller General Walker), containing the provision of the interim rule and therefore meeting the Congressional rulemaking reporting requirements in the Act.

Comment: Two respondents commented that the Forest Service violated the Unfunded Mandates Reform Act by failing to prepare a required written statement, failing to seek input from elected officers of State, local and tribal governments, and failing to consider regulatory alternatives to the rule. Those respondents further stated that these violations of the Act also constitute violations of the Congressional review requirements.

Response: The obligation to prepare the written statement required by the Unfunded Mandates Reform Act (act) (2 U.S.C. 1532) is triggered by the intention to publish certain ''general notice[s] of proposed rulemaking'' or ''any final rule for which a general notice of proposed rulemaking was published.'' As previously discussed, the interim rule is neither a general notice of proposed rulemaking or a final rule. Therefore, the Forest Service was not under an obligation to prepare a statement pursuant to the act in promulgating the interim rule.

The obligation to seek input from elected officers of State, local, and tribal governments as required by the act at § 1532 is triggered by ''the development of regulatory proposals containing significant Federal intergovernmental mandates.'' 2 U.S.C. 1534(a). For purposes of this act at § 15342, the term ''Federal intergovernmental mandate'' means:

(A) any provision in legislation, statute, or regulation that—

(i) would impose [certain] enforceable dut[ies] upon State, local, or tribal governments * * *; or

(ii) would reduce or eliminate the amount of [certain] authorization[s] of appropriations * * *; [or]

(B)[certain] provision[s] in legislation, statute, or regulation that relate[] to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority * * *. 2 U.S.C. 658(5), 1502(1).

Nothing in the interim rule imposes enforceable duties upon State, local, or tribal governments, reduces or eliminates appropriations, or relates to an existing program under which money is provided annually to State, local, or tribal governments. Consequently, the Forest Service was not under an obligation to seek input from elected officers of State, local, and tribal governments pursuant to this act in promulgating the interim rule.

Compliance with the requirements of § 1535 of this act concerning consideration of regulatory alternatives to a rule is mandated ''before promulgating any rule for which a written statement is required under section 1532 of this title * * *'' (2 U.S.C. 1535(a)). For the reasons previously stated, the Forest Service was not under an obligation to prepare a statement pursuant to § 1532 of the act in promulgating the interim rule.

Given that the Forest Service did not violate the Unfunded Mandates Reform Act in promulgating the interim rule, there is no cumulative violation of the Congressional review requirements.

Comment: Two respondents said that the Forest Service violated the Paperwork Reduction Act by failing to have a control number for the collection of information in paragraph 228.4(a) of the interim rule.

Response: The OMB control number for § 228.4 is 0596–0022 and was current upon adoption of the interim rule and is approved through July 31, 2005. While the interim rule amended the language of § 228.4(a), the amended language was a clarification which did not alter the meaning of that provision and did not change the scope of information or number of burden hours associated with this collection number. Therefore, the Forest Service did not need to obtain another control number or modify control number 0596–0022 prior to the adoption of the interim rule. Nothing in the Paperwork Reduction Act renders the interim rule or the final rule unenforceable.

Comment: Two respondents commented that the Forest Service violated the Endangered Species Act (ESA) by failing to engage in formal consultation with the Department of the Interior before publishing the rule. Those respondents further said that the violation of the ESA also constitutes a violation of Congressional review requirements.

Response: The assertion that formal consultation was required for the

promulgation of the interim rule is predicated upon a conclusion that the purpose of the interim rule was to prevent undue degradation coupled with an assumption that the undue degradation of concern involved threatened and endangered species. However, the purpose of the interim rule is not the prevention of undue degradation as is made evident by the rule's preamble. Indeed, the term ''undue degradation'' is not employed in either the text of the interim rule or its preamble.

Moreover, the interim rule itself has no impact on any threatened or endangered specie or the habitat of a threatened or endangered specie. Rather, in the context of 36 CFR part 228, subpart A, the action which the Forest Service takes which might have such an effect is approving a proposed plan of operations. The ESA consequently imposes no obligation upon the Forest Service to engage in formal consultation before the agency receives a proposed plan of operations from a miner.

Given that the Forest Service did not violate the ESA in promulgating the interim rule, there is no cumulative violation of Congressional review requirements.

Comment: Several respondents said that the Forest Service violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement (EIS).

Response: The respondents' assertion that an EIS was required for the promulgation of the interim rule is solely predicated upon the conclusion that the rule's promulgation was a major Federal action which, under NEPA, requires the preparation of an EIS. However, NEPA requires the preparation of an EIS only for those major Federal actions significantly affecting the quality of the human environment (42 U.S.C. 4332(2)(C)) and does not require an EIS for a major action which does not have a significant impact on the environment. *Sierra Club* v. *Hassell*, 636 F.2d 1095, 1097 (5th Cir. 1981); *Cf. Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

The respondents do not identify or describe the significant environmental impacts which they believe resulted from promulgation of the interim rule. In fact, the interim rule has no impact on the human environment. For these reasons, NEPA did not require the preparation of an EIS prior to the promulgation of the interim rule.

Comment: Several respondents said that the Forest Service violated NEPA by failing to prepare both an environmental assessment (EA) and an EIS.

Response: The respondents did not explain the reasons for their conclusion that the interim rule should have been deemed a proposal for major Federal action significantly affecting the quality of the human environment such that an EIS should have been prepared in connection with the promulgation of the rule. Nor did the respondents explain why they concluded that an EA should have been prepared in connection with the promulgation of the interim rule. However, the comments do seem to imply that the interim rule should not have been categorically excluded from documentation in an EIS or an EA because extraordinary circumstances listed in Forest Service Handbook (FSH) 1905.15, section 30.3, paragraphs 1 & 2 are present. The comments also appear to suggest that an EA must always be prepared prior to the preparation of an EIS.

The assumption that an EA always must be prepared prior to an EIS clearly is incorrect, because an EA is not necessary if the agency has decided to prepare an EIS (40 CFR 1501.3(a)).

The Department has not independently identified a reason to conclude that the interim rule was inappropriately categorically excluded from documentation in an EIS or an EA. The interim rule squarely fits within the Forest Service's categorical exclusion for ''[r]ules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' (FSH 1909.15, sec. 31.1b, para 2).

Even if an action falls within a category of proposed actions normally excluded from further analysis and documentation in an EIS or an EA, the presence of certain resource conditions, such as wilderness or flood plains, specified in the Forest Service's NEPA procedures may, in some cases, constitute extraordinary circumstances warranting such analysis and documentation. Nonetheless, the mere existence of such resource conditions is not determinative in deciding whether it is proper to categorically exclude an action from documentation in an EIS or an EA. The Forest Service's NEPA procedures specifically provide that ''[t]he mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion. It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.''

Although the interim rule will govern locatable mineral operations which might affect the resource conditions listed in FSH 1909.15, section 31.1b, paragraph 2, the distinction quoted in the previous paragraph is crucial because the interim rule itself has no impact on the human environment, including the specified resource conditions. For these reasons, NEPA did not require the preparation of both an EA and an EIS prior to the promulgation of the interim rule.

Comment: A number of respondents stated that the Forest Service violated NEPA by failing to consider all reasonable alternatives to the rule.

Response: NEPA only requires consideration of alternatives to ''proposals for * * * major Federal actions significantly affecting the quality of the human environment'' (42 U.S.C. 4332(2)(C)(iii)). As previously discussed, the promulgation of the interim rule does not constitute a major Federal action significantly affecting the quality of the human environment.

Additionally, the interim rule does not involve unresolved conflicts concerning the alternative uses of available resources. Both the original and revised (interim rule) § 228.4(a) provide for the development of locatable mineral resources upon the completion of certain procedural requirements. Consequently, the promulgation of the interim rule was not a ''proposal which involves unresolved conflicts concerning alternative uses of available resources'' requiring the consideration of alternatives.

For these reasons, NEPA did not require the Forest Service to consider all reasonable alternatives to the interim rule.

Comment: A number of respondents commented that the Forest Service violated NEPA by failing to consider and disclose the direct, indirect, and cumulative effects of the interim rule and its reasonable alternatives. These respondents also faulted the Forest Service for failing to consider the cumulative adverse socio-economic impacts of the interim rule in connection with other Federal regulatory actions.

Response: The respondents did not identify or describe the direct, indirect, or cumulative impacts which they believe resulted from promulgation of the interim rule which the Forest failed to consider or assess. The respondents also neglected to identify the other Federal regulatory actions finalized and proposed in recent years, which work to increase the cumulative cost of the interim rule, while also diminishing marginal environmental benefit.

As previously discussed, the Department has not independently identified an impact on the environment

which would result from the promulgation of the interim rule, nor was the consideration of reasonable alternatives required given that the interim rule was properly categorically excluded from documentation in an EIS or an EA (40 CFR 1508.4).

The Department also disagrees with the respondents' statements that there have been other Federal regulatory actions proposed or finalized in recent years which would have, or have, had any impact on locatable mineral operations proposed or occurring on NFS lands. The rules governing these operations at 36 CFR part 228, subpart A, have not been substantively changed since their promulgation in 1974. Nor has a rule contemplating such a change been proposed.

For these reasons, NEPA did not require the consideration and disclosure of the direct, indirect, and cumulative effects of the interim rule and its reasonable alternatives.

Comment: Several respondents stated the Forest Service violated NEPA by failing to use reliable methodology.

Response: The respondents did not explain why they believe that the Forest Service used unreliable methodology in promulgating the interim rule. In fact, the totality of the respondents' description of this issue consists of the statement that ''[t]he Interim Rule fails to use reliable methodology in violation of NEPA and its implementing regulations.''

The Department's review of the interim rule identified no instance where unreliable methodology was used in the rule's promulgation.

Comment: Several respondents said that the Forest Service violated NEPA by failing to conduct scoping on the rule.

Response: The Council on Environmental Quality regulations implementing NEPA only require scoping where an agency is preparing an EIS (40 CFR 1501.4(d)). As previously discussed, NEPA did not require the preparation of an EIS prior to the promulgation of the interim rule. Accordingly, NEPA did not require scoping prior to the promulgation of the interim rule.

Comment: Two respondents said that the Forest Service violated 40 CFR part 25 by failing to meet the requirements for public participation set forth in that part. Those respondents also stated that the Forest Service's violation of the public participation requirement at 40 CFR part 25 also constitutes a violation of Congressional review requirements.

Response: The regulations at 40 CFR part 25 govern ''public participation in operations under the Clean Water Act (Pub. L. 95–217), the Resource Conservation and Recovery Act (Pub. L. 94–580), and the Safe Drinking Water Act (Pub. L. 93–523).'' The Forest Service's regulation of the impacts of locatable mineral operations on NFS resources is not an activity undertaken pursuant to any of these acts. Rather, the interim rule was adopted pursuant to authority conferred upon the Forest Service by portions of the Organic Administration Act (16 U.S.C. 478, 551). Consequently, 40 CFR part 25 is inapplicable to the adoption of the interim rule.

Given that the Forest Service did not violate 40 CFR part 25 in promulgating the interim rule, there is no cumulative violation of Congressional reporting requirements.

Comment: Two respondents stated that the interim rule is inconsistent with Executive Order (E.O.) 13132 because it would permit the Forest Service to regulate locatable mineral operations which take place in waters which the respondents believe is committed to States, not the Federal government. More specifically, those respondents said that the Forest Service, in promulgating the interim rule, violated the E.O. by failing to make a required disclosure as to the effect of the rule upon principles of Federalism. Those respondents also commented that the Forest Service violated the E.O. by failing to consult with affected State and local officials and that a violation of the E.O. also constitutes a violation of the Congressional reporting requirements.

Response: For purposes of 36 CFR part 228, subpart A, there can be no doubt that the Forest Service's authority to regulate the disturbance of NFS surface resources resulting from locatable mineral operations generally encompasses the effects of those operations on water, streambeds, or other submerged lands. Section 228.8 characterizes fisheries habitat as a ''National Forest surface resource'' and requires rehabilitation of fisheries habitat. Fisheries habitat, of course, can consist of nothing other than water, streambeds, or other submerged lands. Only where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union are those resources solely subject to State regulation. Thus, the Forest Service has clear authority to regulate the effects which locatable mineral operations have on water, streambeds, or other submerged lands, whether or not those operations are taking place in waters themselves, except where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union.

The disclosures and consultations required by E.O. 13132 only apply to those policies which have Federalism implications which by definition are those ''regulations * * * that 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'' (Sec. 1(a)). Nothing in the interim rule restricts State or local government's current regulatory powers over locatable mineral operations which take place in waters. Thus, as explained in the interim rule's preamble, that rule ''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'' (69 FR 41428–41430). Consequently, the Forest Service was not required to make the disclosures or undertake the consultation referenced in these comments.

Given that the Forest Service did not violate E.O. 13132 in promulgating the interim rule, there is no cumulative violation of Congressional reporting requirements.

Comment: Two respondents commented that the Forest Service violated E.O. 12630 by failing to disclose the potential impact of the rule on property rights. Those respondents further commented that this violation of the E.O. also constitutes a violation of 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

Response: In their discussions of E.O. 12630, the respondents do not specifically identify or describe the impact of the interim rule which they believe would constitute a regulatory taking of mining claimants' property rights. Rather, the respondents simply state that ''[a]s was established above, the Interim Rule would affect a regulatory taking of all [mining claims].'' However, the respondents' only other reference to a regulatory taking appears in their discussion of the impact of requiring a bond from miners for small scale mining operations.

The interim rule does not address, or purport to address, bonding of locatable mineral operations. Moreover, it is well established that a rule such as the interim rule, which in certain circumstances requires a miner to obtain approval before conducting locatable mineral operations, does not deprive the miner of any property right conferred by a mining claim. *Freese* v. *United States*, 6 Cl. Ct. 1, 14–16 (1984), aff'd mem., 770

F.2d 177 (Fed. Cir. 1985); *Trustees for Alaska* v. *Environmental Protection Agency*, 749 F.2d 549, 559–60 (9th Cir. 1984); cf. *Clouser* v. *Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994), *cert. denied sub nom. Clouser* v. *Glickman*, 515 U.S. 1141 (1995). Therefore, the Department properly found that an analysis of the interim rule conducted pursuant to E.O. 12630 properly ''determined that the interim rule does not pose the risk of a taking of private property'' (69 FR 41430, Jul. 9, 2004).

For these reasons, the Forest Service did not violate E.O. 12630 in promulgating the interim rule. Given that, there is no cumulative violation of Congressional reporting requirements.

Comment: Two respondents said that the Forest Service, in promulgating the interim rule, violated E.O. 12866 by failing to make a required disclosure as to the effect of the rule on the Federal budget. Those respondents further stated that this violation of the E.O. also constitutes a violation of Congressional reporting requirements.

Response: The respondents did not cite the applicable provision of E.O. 12866 which they believe requires ''disclosures concerning whether the interim rule represents a government action that would significantly effect the Federal budget'' and the E.O. does not use the term ''Federal budget'' or any obvious synonym. The only provision in the E.O. to which the respondents might be referring appears to be Sec. 6(a)(3)(C)(ii) which requires ''an assessment * * * of costs anticipated from the regulatory action (such as, but not limited to, the direst cost * * * to the government in administering the regulation * * *).'' However, such an assessment only is required ''for those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action * * *.'' Sec. 6(a)(3)(C).

On March 15, 2004, the Administrator of the Office of Information and Regulatory Affairs of the OMB found that the interim rule proposed for 36 CFR 228.4(a) was non-significant for purposes of E.O. 12866. Thus, the assessment mandated by Sec. 6(a)(3)(C)(ii) of the E.O. was not required for the interim rule.

Given that the Forest Service did not violate E.O. 12866 in promulgating the interim rule, there is no cumulative violation of Congressional reporting requirements.

Comment: Two respondents commented that the Forest Service failed to solicit comment on the interim rule from western governors which violates the spirit of the 1998 Department of the Interior and Related Agencies Appropriations Act, Pub. L. 105–83, § 339, 111 Stat. 1543, 1602 (1997).

Response: The cited provision of the 1998 Department of the Interior and Related Agencies Appropriations Act required the Bureau of Land Management (BLM), Department of the Interior, to consult with the governors from each Western State containing public lands open to location under the United States mining laws before adopting a rule to amend or replace 43 CFR part 3800, subpart 3809. These regulations are the Department of the Interior's counterpart to 36 CFR part 228, subpart A. The Department's promulgation of the interim rule did not violate this provision because the provision, by its own terms, is not applicable to 36 CFR part 228, subpart A.

Prior to the enactment of the 1998 Department of the Interior and Related Agencies Appropriations Act, the Department of the Interior had announced its intent to prepare an EIS for the proposed revision of 43 CFR part 3800, subpart 3809 (62 FR 16177). That notice described the scope of the contemplated revisions to 43 CFR part 3800, subpart 3809, as ''comprehensive.'' In contrast, the scope of the interim rule at § 228.4(a) is limited and only concerns the form of authorization required for conducting locatable mineral operations on National Forest System lands.

Given the vastly different scopes of the Department of the Interior's 1997 proposal to a ''comprehensive'' revision of their regulations and the clarification of § 228.4(a) provided for in the Department's interim rule, there is no reason to presume that Congress would have intended that consultation, such as it required for the comprehensive revision of 43 CFR part 3800, subpart 3809, be performed for the promulgation of the interim rule. Therefore, the promulgation of the interim rule is not in any manner inconsistent with the ''spirit'' of Sec. 339 of the 1998 Department of the Interior and Related Agencies Appropriations Act.

Comment: Two respondents stated that the Small Business Administration (SBA) would find that the interim rule will have a major impact on small entities given the SBA's finding that a purportedly similar rule, 43 CFR part 3800, subpart 3809, would have a major impact on small entities.

Response: As discussed in the response to the previous comment, the scope of the interim rule, which only concerns the form of authorization required for conducting locatable mineral operations on NFS lands, is dramatically less sweeping than the scope the proposed changes to 43 CFR part 3800, subpart 3809. While 43 CFR part 3800, subpart 3809, addresses a similar issue for lands administered by the BLM, it additionally sets forth a host of other requirements. Therefore, any finding which the SBA made on the effect of 43 CFR part 3800, subpart 3809, on small entities consequently has exceedingly limited predictive value in terms of the SBA's possible assessment of the impact of the Forest Service's interim rule.

Comment: Many respondents noted that the Forest Service improperly invoked an emergency as the grounds for implementing the interim rule before receiving and responding to public comment.

Response: The Forest Service did not rely upon the existence of an emergency in adopting the interim rule. Neither the text of the interim rule nor its preamble employ the term ''emergency'' or any of its synonyms. The Forest Service consequently did not need to meet the test advocated by the respondents to assess the existence of an emergency prior to adopting and implementing the interim rule. Moreover, even if such terminology had been used, the legal standards governing the adoption of rules are set forth in the Administrative Procedure Act, 5 U.S.C. 553. The preamble to the interim rule explains the Department of Agriculture's compliance with that Act's standards in promulgating the interim rule.

2. Comments on the Effect of the Interim Rule

General Issues

Comment: Numerous respondents stated that the changes to 36 CFR 228.4(a) adopted by the interim rule have confused miners and are capable of being misapplied.

Response: Given these comments and other specific comments made on individual paragraphs of the interim rule, the Department agrees that changes are required to make the text of the interim rule clearer to foster the consistency of its application by Forest Service employees. These changes generally are described in the following subsection entitled ''Comments on Specific Sections of the Interim Rule,'' of this section of the Response to Comments. In addition, the final rule also reorganizes the text of the interim rule so that its sequence is more logical and reflects an increasing level of Forest Service consideration of the environmental impacts of locatable mining operations on NFS resources. As reorganized by the final rule, § 228.4(a)

will describe in sequence when an operator is required to submit a notice of intent to operate before commencing operations, what operations are exempt from the requirement for prior submission of a notice of intent to operate, when an operator is required to submit and obtain approval of a proposed plan of operations before commencing operations, what operations are exempt from the requirement for prior submission and approval of a proposed plan of operations, and a District Ranger's authority to require submission and approval of a proposed plan of operations before an operator commences proposed operations or continues ongoing operations. This reorganization parallels the typical progression of mining operations from the least functions, work, or activities for prospecting or casual use, which would not normally require prior submission and approval of a plan or operations, through exploration, which often would require prior submission of a notice of intent to operate, and might require prior submission and approval of a plan of operations, to development and production, which normally would require prior submission and approval of a plan of operations. These changes should enhance the final rule's clarity and comprehensibility.

Comment: Numerous respondents said that the interim rule unfairly restricts entities or persons, whom the respondents characterized as mining clubs, recreational miners, hobby miners, and recreational suction dredgers. Some of the respondents also commented that the interim rule could collapse the recreational mining industry. Other respondents said that United States mining laws authorize recreational and hobby mining.

Response: The Organic Administration Act (16 U.S.C. 482) makes the United States mining laws (30 U.S.C. 22 *et seq.*) applicable to NFS lands reserved from the public domain pursuant to the Creative Act of 1891 (§ 24, 26 Stat. 1095, 1103 (1891), repealed by Federal Land Policy and Management Act of 1976, § 704(a), 90 Stat, 2743, 2792 (1976)). Under the United States mining laws, United States citizens may enter those NFS lands to prospect or explore for and remove valuable deposits of certain minerals referred to as locatable minerals.

Neither the United States mining laws or 36 CFR part 228, subpart A, recognize any distinction between ''recreational'' versus ''commercial'' miners, or provide any exceptions for operations conducted by ''recreational'' miners. The same rules apply to all miners. Thus, to the extent that individuals or members of mining clubs are prospecting for or mining valuable deposits of locatable minerals, and making use of or occupying NFS surface resources for functions, work or activities which are reasonably incidental to such prospecting and mining, it does not matter whether those operations are described as ''recreational'' or ''commercial.'' However, functions, work, or activities proposed by individuals, members of mining clubs, or mining clubs themselves, such as educational seminars, treasure hunts, hunting camps, and summer homes, far exceed the scope of the United States mining laws. Accordingly, the purpose of both the interim rule and the final rule adopted by this rulemaking is to regulate all permissible operations under the United States mining laws. Thus, the interim rule, as well as the final rule being adopted by this rulemaking, apply to every person or entity conducting or proposing to conduct locatable mineral operations on NFS lands under the United States mining laws.

For purposes of the final rule being adopted by this rulemaking, the requirement for prior submission of a notice of intent to operate alerts the Forest Service that an operator proposes to conduct mining operations on NFS lands which the operator believes might, but are not likely to, cause significant disturbance of NFS surface resources and gives the Forest Service the opportunity to determine whether the agency agrees with that assessment such that the Forest Service will not exercise its discretion to regulate those operations. For purposes of both the interim rule and the final rule being adopted by this rulemaking, the requirement for prior submission and approval of a proposed plan of operations ensures that the Forest Service can evaluate the environmental impacts of potentially more impactive proposed mining operations on NFS resources and enables the Forest Service to require less disruptive means of conducting those operations. *Freese* v. *United States*, 6 Cl. Ct. 1, 15 (1984), *aff'd mem.*, 770 F.2d 177 (Fed. Cir. 1985). While these requirements do affect the manner in which mining operations are conducted, they do not deprive operators of the ability to conduct such operations. As such, the requirements fall within the Department's ''broad discretion to regulate the manner in which mining activities are conducted on the national forest lands.''

For these reasons, no change has been made in the final rule as a result of these comments.

Comment: One respondent said that a new provision should be added to the final rule which states that the use of small portable suction dredges, such as those with an intake of four inches or less, does not require prior submission of a notice of intent to operate or prior submission and approval of a proposed plan of operations. The respondent said that various studies, including those by the United States Environmental Protection Agency, the Department of Interior, United States Geological Survey, and the State of Alaska Department of Natural Resources, have shown that these dredges do not cause significant disturbance of streams or rivers. The respondent also stated that such a provision would be consistent with the recommendations of the National Academy of Sciences, National Research Council's 1999 report entitled, ''Hardrock Mining on Federal Lands.''

Response: The environmental impacts of operating suction dredges, even small ones, are highly site-specific depending on the circumstances and resource conditions involved. The environmental impacts of using a suction dredge on two bodies of water which are otherwise similar can vary greatly if a threatened or endangered specie inhabits one body of water but not the other. Even with respect to a particular body of water, the environmental impacts of suction dredge operations can vary by season due to climatic conditions or the life cycles of aquatic species. Given this variability, the Department believes that, insofar as suction dredge operations are concerned, the need for the prior submission of a notice of intent to operate or for the prior submission and approval of a proposed plan of operations must be evaluated on a site-specific basis. While the operation of suction dredges with intakes smaller than four inches may not require either a notice of intent to operate or an approved plan of operations in many cases, the prior submission of a notice of intent to operate will be required in some cases, and the prior submission and approval of a proposed plan of operations will be required in fewer cases.

For these reasons, no change has been made in the final rule in response to this comment.

Comment: Three respondents stated that the interim rule could be considered a taking of private property. Specifically, one of those respondents said that the rule could effect an unconstitutional regulatory taking of State land because States own the beds

beneath all waters and, in certain states, other riparian lands. Another respondent commented that delay inherent in the process of submitting a notice of intent to operate or submitting and obtaining approval of a proposed plan of operations could put a miner out of business or deny the miner the opportunity to extract minerals from the miner's mining claims, either of which could be considered a taking of private property. The remaining individual did not identify the impact of interim rule which he or she believes could constitute a regulatory taking of private property rights.

Response: As previously discussed, NFS surface resources subject to 36 CFR part 228, subpart A, usually include streambeds or other submerged lands. However, where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union, those resources are solely subject to State regulation. The provisions of 36 CFR part 228, subpart A, as amended by the interim rule, are not applicable in a situation where streambeds or other submerged lands passed into a State's ownership upon that State's admission into the Union, because that subpart only applies to ''National Forest System lands'' (§ 228.2). Therefore, the interim rule clearly does not have the potential to take property owned by States.

In evaluating the effect of regulatory action on the property rights associated with a valid mining claim, it is important to remember that mining claims are a ''unique form of property'' (*Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963)), and the ''power to qualify [such] property rights is particularly broad * * *.'' (*United States* v. *Locke*, 471 U.S. 84, 104 (1985)).

> Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests. In addition, the property right here is the right to a flow of income from production of the claim. Similar vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life (*Id.* at 105; citations omitted).

Moreover, as previously discussed, it is well established that a rule, such as the interim rule, which in certain circumstances requires a miner to obtain approval before conducting locatable mineral operations, does not deprive the miner of any property right conferred by a mining claim.

For these reasons, the interim rule does not pose the risk of taking private property and no change has been made in the final rule in response to these comments.

Comment: Several respondents said that the interim rule is fatally flawed because it has no enforcement provision and 36 CFR part 261 cannot be applied to mining operations conducted pursuant to 36 CFR part 228, subpart A, including the interim rule.

Response: The conclusion that 36 CFR part 261 is not applicable to locatable mineral operations conducted pursuant to the interim rule or the remainder of 36 CFR part 228, subpart A, is directly contrary to the holding of *United States* v. *Doremus*, 888 F.2d 630, 631–32 (9th Cir. 1989). In this case, the appellants contended that they are exempted from the prohibitions of 36 CFR part 261(b) which states that ''nothing in this part shall preclude operations as authorized by * * * the U.S. Mining Laws Act of 1872 as amended.'' They also contended that their operations were authorized by statute and, therefore, the regulations do not prohibit such operations. However, the court rejected their argument, stating that:

> Part 228 does not contain any independent enforcement provisions; it only provides that an operator must be given a notice of noncompliance and an opportunity to correct the problem. 36 CFR 228.7(b) (1987). The references to operating plans in § 261.10 would be meaningless unless Part 261 were construed to apply to mining operations, since that is the only conduct for which operating plans are required under Part 228. In addition, 16 U.S.C. 478 (1982), which authorizes entry into national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof, specifically states that such persons must comply with the rules and regulations covering such national forests. This statutory caveat encompasses all rules and regulations, not just those (such as Part 228) which apply exclusively to mining claimants. In this context, § 261.1(b) is merely a recognition that mining operations may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition. *United States* v. *Weiss*, 642 F.2d 296, 299 (9th Cir. 1981).

Further, the interim rule also is enforceable by means of civil litigation seeking declaratory, injunctive, or other appropriate relief.

For these reasons, no change has been made in the final rule as a result of these comments.

Comment: Several respondents commented that the interim rule is preclusive because it requires a bond from miners for small scale mining operations.

Response: The interim rule did not address, or purport to address, bonding of locatable mineral operations. Bonding of locatable mineral operations is governed by 36 CFR 228.13, which was not affected by the interim rule.

For this reason, no change has been made in the final rule in response to these comments.

Comment: A number of respondents expressed concern that the interim rule does not contain limitations on the time allowed for the Forest Service to process either a notice of intent to operate or a proposed plan of operations.

Response: Section 228.4(a)(2)(iii) of the rule in effect prior to adoption of the interim rule provided that ''[i]f a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required. This requirement was not changed in the interim rule, but was moved to § 228.4(a)(2).

Limitations on the time available to process a plan of operations does not appear in § 228.4(a). That issue is addressed in § 228.5(a), which was not affected by the interim rule. However, § 228.5(a) cannot circumscribe the Forest Service's obligation to comply with statutes, such as the National Environmental Policy Act or the Endangered Species Act, even if this compliance takes longer than the time stated in § 228.5(a). *Baker* v. *United States Department of Agriculture*, 928 F. Supp. 1513, 1519–21 (D. Idaho 1996); cf. *United States* v. *Boccanfuso*, 882 F.2d 666, 671 (2d Cir. 1989).

For these reasons, no change has been made in the final rule as a consequence of these comments.

Comment: Several respondents commented that the Forest Service lacks jurisdiction to manage suction dredge mining because suction dredge mining has been exempted through agreements with each of the Western States. Additionally, these respondents said that each of the Western States regulate suction dredge mining thereby precluding Forest Service enforcement of the interim rule insofar as suction dredge mining operations are concerned.

Response: None of the agreements between the Forest Service and a State government exempts persons wishing to conduct locatable mineral operations on NFS lands from complying with the interim rule, or any other provision of 36 CFR part 228, subpart A, in conducting those operations, including suction dredge mining.

A State cannot preclude the Federal Government from regulating those things over which the Federal Government has authority, including Federal lands. Rather, Congress has absolute power to adopt legislation governing the use of Federal lands and to delegate authority to the executive

branch of government to adopt further rules for this purpose, as Congress did in the context of the Organic Administration Act, 16 U.S.C. 478, 482, 551, which made the United States mining laws applicable to NFS lands reserved from the public domain pursuant to the Creative Act of 1891, § 24, 26 Stat. 1095, 1103 (1891), repealed by Federal Land Policy and Management Act of 1976, § 704(a), 90 Stat, 2743, 2792 (1976), but which also made miners subject to regulations adopted by what is now the Department of Agriculture. Thus, it is State regulation of suction dredge mining operations which is pre-empted when it conflicts with Federal law, including rules adopted by executive agencies, such as the interim rule.

For these reasons, no change has been made in the final rule in response to these comments.

Comment: Several respondents stated that the interim rule will effectively revoke State of California Suction Dredge Permits held by miners operating on NFS lands. Those respondents also said that the Forest Service must provide those miners a hearing prior to that revocation.

Response: These comments seem to presume that the Forest Service's regulation of suction dredge mining occurring on NFS lands pursuant to the interim rule will preclude the State of California from issuing suction dredge permits for those same operations. However, as previously stated, this assumption is inaccurate. It is entirely possible that both the Forest Service and a State can permissibly regulate suction dredge mining operations for locatable minerals occurring on NFS lands. Indeed, the Forest Service's locatable mineral regulations (36 CFR 228.8) specifically provide that persons conducting locatable mineral operations on NFS lands also must comply with applicable State imposed requirements, such as water quality requirements.

The State of California itself recognizes that a miner who has obtained a suction dredge permit pursuant to California Fish & Game Code § 5653 must also obtain all required authorizations from the Federal agency managing lands on which proposed suction dredge mining operations will occur. Specifically, Cal. Code Regs. tit. 14, § 228(g) provides that ''[n]othing in any permit issued pursuant to these regulations authorizes the permittee to trespass on any land or property, or relieves the permittee of the responsibility of complying with applicable Federal, State, or local laws or ordinances.'' Similarly, the State of California Department of Fish and Game's Notice to All Suction Dredge Permittees states on the second page under the heading ''General Information Concerning Suction Dredging'' that:

> [t]he regulations in Sections 228 and 228.5 of title 14 in the California Code of Regulations govern suction dredging in California. In addition to those regulations, other laws, regulations, and policies may apply, including, but not limited to, the following:
>
> A suction dredge permit does not allow trespassing. Be sure you have permission from the landowner or the land managing agency before entering private or public lands.

Thus, it is clear that the interim rule will not effect a revocation of State of California Suction Dredge Permits held by miners operating on NFS lands and no change has been made in the final rule as a consequence of these comments.

Comment: A number of respondents said that the interim rule is vague and standardless and consequently a court would construe it in the manner most favorable to mining operators.

Response: If a rule is vague or standardless, which is not the case insofar as the interim rule is concerned, the consequence is that the rule is not enforceable against the public. However, only the judicial branch of government can conclusively resolve the question of the proper interpretation of any rule or decide whether a rule is impermissibly vague.

For these reasons, no change has been made in the final rule in response to these comments.

Comment: Several respondents commented that the interim rule is inconsistent with a National Research Council report entitled ''Hardrock Mining on Federal Lands.''

Response: The comments do not identify or describe in any manner inconsistencies between the interim rule and the National Research Council report, whose main body is 126 pages in length. The Department's review of the National Research Council report identified no inconsistencies between it and the interim rule.

For these reasons, no change has been made in the final rule as a result of these comments.

Comment: One respondent stated that the Forest Service should issue internal guidance documents to its employees about the intent and application of the interim rule. The respondent also commented that the internal guidance document should state that the final rule is not intended to change the long-standing interpretation of § 228.4(a) concerning the circumstances in which prior submission of a notice of intent to operate or prior submission and approval of a proposed plan of operations is required.

Response: The Forest Service has a large and active national minerals and geology training program and certification and training requirements for all of its mineral administrators. The Forest Service will appropriately revise its internal agency guidance documents and the instruction given as part of its national training curriculum to reflect any substantive change to the requirements for prior submission of a notice of intent to operate and prior submission and approval of a proposed plan of operations which are adopted by the final rule.

No change was required in the final rule in response to this comment.

Comments on Specific Sections of the Interim Rule

The following discusses and responds to public comments to specific paragraphs in the interim rule for § 228.4(a) received during the 60-day comment period. As a result of the comments received, the section has been reorganized and revised. The reorganization of § 228.4(a) is displayed in the following table:

TABLE 1.—COMPARISON OF THE INTERIM RULE AND FINAL RULE

Interim Rule	Final Rule
§ 228.4 Plan of operations—notice of intent—requirements	§ 228.4 Notice of intent—plan of operations—requirements
(a) If the District Ranger determines that the operation is causing or will likely cause significant surface disturbance a plan of operations is required.	This provision is redesignated at paragraph (a)(3).
	(a) A notice of intent is required from any person proposing to conduct operations that might cause significant surface disturbance.

TABLE 1.—COMPARISON OF THE INTERIM RULE AND FINAL RULE—Continued

Interim Rule	Final Rule
§ 228.4 Plan of operations—notice of intent—requirements	§ 228.4 Notice of intent—plan of operations—requirements
(1) Unless there are significant surface disturbing activities, a plan of operations is not required when one of the provisions in paragraphs (i) through (iv) are met.	This provision with respect to plan of operations is redesignated at paragraph (a)(3).
	(1) A notice of intent is not required when one of the provisions in paragraphs (i) through (vii) are met.
(i) A plan of operations is not required for operations limited to existing roads.	This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(i).
	(i) A notice of intent is not required for operations limited to existing roads.
(ii) A plan of operations is not required when individuals search for and remove small mineral samples.	This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(ii).
	(ii) A notice of intent is not required for prospecting and sampling not causing significant surface disturbance and other listed examples.
(iii) A plan of operations is not required for prospecting and sampling ...	This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(ii).
	(iii) A notice of intent is not required for monumenting and marking a mining claim.
(iv) A plan of operations is not required for monumenting and marking a mining claim.	This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(iii).
	(iv) A notice of intent is not required for underground operations.
(v) A plan of operations is not required for subsurface operations	This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(iv).
	(v) A notice of intent is not required for operations, which in their entirety, have the same resource disturbance as other users of NFS lands who are not required to get a Forest Service authorization. This provision was not provided for in the interim rule.
	(vi) A notice of intent is not required for operations not involving mechanized earthmoving equipment or the cutting of trees unless these operations might cause significant disturbance to surface resources. This provision was in paragraph (a)(2)(iii) in the interim rule.
	(vii) A notice of intent is not required when a plan of operations is submitted. This provision was in paragraph (a)(2)(i) in the interim rule.
(2) A notice of intent is required from any person proposing to conduct operations that might cause significant surface disturbance; the District Ranger has 15 days to notify the operator if a plan of operations is needed. A notice of intent is not needed if one of the provisions in paragraphs (a)(2)(i) through (iii) are meet.	The provision for filing a notice of intent is redesignated at paragraph (a); the 15-day requirement is redesignated at paragraph (a)(2); and the exceptions for filing a notice of intent are redesignated at paragraphs (a)(1)(i)–(vii).
	(2) The District Ranger has 15 days to notify the operator if a plan of operations is needed.
(i) A notice of intent is not required when a plan of operations is submitted.	This provision is redesigned at paragraph (a)(1)(vii).
(ii) Exempts the requirement for a notice of intent for operations exempt from the requirement of a plan of operation found in paragraph (a)(1).	This provision is redesignated in paragraphs (a)(1)(i)–(iv).
(iii) A notice of intent is not required for operations not involving mechanized earthmoving equipment or the cutting of trees unless these operations might cause significant disturbance to surface resources.	This provision is redesignated at paragraph (a)(1)(vi).
	(3) Requires an operator to submit a plan of operations when proposed operations will likely cause significant disturbance of surface resources, except as exempted in paragraph (a)(1)(i)–(v).
	(4) Requires the District Ranger to notify an operator of the requirement to submit a plan of operations for operations causing or will likely cause significant disturbance of surface resources and that operations can not be conducted until a plan of operations is approved. These provisions were not explicitly provided for in the interim rule.

The analysis and response to comments on the interim rule is organized sequentially by the paragraphs of the interim rule.

Section 228.4(a)

Comment: One respondent commented that the term ''significant'' in the prefatory language of § 228.4(a) of the interim rule, which requires the submission of a proposed plan of operations for operations which a District Ranger determines are causing or will likely cause a significant disturbance of surface resources, was not defined and consequently was arbitrary and capricious.

Response: The interim rule did not change the requirement initially adopted in 1974 that an operator must submit a proposed plan of operations if the applicable District Ranger determines that the proposed operations ''will likely cause significant disturbance of surface resources.'' Questions and Answers developed by the Forest Service when the 1974 rule was adopted explained that it was impossible to precisely define the term ''significant disturbance.''

A definition cannot be given that would apply to all lands subject to these regulations. Disturbance by a particular type of operation

on flat ground covered by sagebrush, for example, might not be considered significant. But that same sort of operation in a high alpine meadow or near a stream could cause highly significant surface resource disturbance. The determination of what is significant thus depends on a case-by-case evaluation of proposed operations and the kinds of lands and other surface resources involved. In general, operations using mechanized earthmoving equipment would be expected to cause significant disturbance. Pick and shovel operations normally would not. Nor would explosives used underground, unless caving to the surface could be expected. Use of explosives on the surface would generally be considered to cause significant disturbance. Almost without exception, road and trail construction and tree clearing operations would cause significant surface disturbance.

The Department continues to believe that a universal definition of the term ''significant disturbance'' cannot be established for NFS lands. The lands within the NFS subject to the United States mining laws stretch from Alaska on the north, the Mississippi River on the east, the border with Mexico on the south, and the Pacific Ocean on the west. NFS lands within that large area occur in widely diverse climates, hydrogeologic conditions, landforms, and vegetative types. Due to the great variability of NFS ecosystems, identical operations could cause significant disturbance in one situation and insignificant disturbance in another.

However, the record for the 1974 rulemaking at 36 CFR part 228, subpart A, does identify tests that are of use in deciding whether proposed disturbance of NFS resources constitutes ''significant disturbance'' for purposes of that rule. A March 28, 1974, letter from Forest Service Chief John McGuire to Senator Ted Stevens in response to Senator Stevens' comments on the rule proposed in 1973 explains that ''significant disturbance'' refers to operations ''for which reclamation upon completion of [that operation] could reasonably be required,'' and to operations that could cause impacts on NFS resources that reasonably can be prevented or mitigated.

The March 28, 1974, letter also emphatically makes the point that the Forest Service's locatable mineral regulations do not use the term ''significant'' in the same manner as that term is used in the National Environmental Policy Act.

Significant disturbance to the environment, we find, needs to be clearly distinguished from ''significant'' disturbance of surface natural resources. The former could be interpreted as an automatic invocation of Section 102(2)(C) of the National Environmental Policy Act of 1969 for an environmental statement. This was never intended. Some few, by no means all, proposals are expected to require environmental statements, which would be prepared by the Forest Service.

Judicial decisions rendered in the 30 years since the rule at 36 CFR part 228, subpart A, was promulgated also give context to the meaning of the term ''significant disturbance.'' For example, it is well established that the construction or maintenance of structures, such as cabins, mill buildings, showers, tool sheds, and outhouses on NFS lands constitutes a significant disturbance of NFS resources. *United States* v. *Brunskill*, 792 F.2d 938, 941 (9th Cir. 1986); *United States* v. *Burnett*, 750 F. Supp. 1029, 1035 (D. Idaho 1990).

For these reasons, no change has been made in the final rule in response to this comment. However, the Department finds that the Forest Service has interpreted the terms ''significant'' and ''significant disturbance'' in the same manner since 1974, including for purpose of the interim rule. It also is how these terms should be interpreted for purposes of the final regulation being adopted by this rulemaking.

Comment: A number of respondents said that the interim rule did not resolve widespread confusion about the level of activity which requires the filing of a proposed plan of operations, and its approval, before mining operations can be conducted.

Response: As previously stated, the interim rule did not alter the requirement initially adopted in 1974 that an operator must submit a proposed plan of operations if the applicable District Ranger determines that the proposed operations ''will likely cause significant disturbance of surface resources.'' The phrase ''will likely cause significant disturbance of surface resources'' means that, based on past experience, direct evidence, or sound scientific projection, the District Ranger reasonably expects that the proposed operations would result in impacts to NFS lands and resources which more probably than not need to be avoided or ameliorated by means such as reclamation, bonding, timing restrictions, and other mitigation measures to minimize adverse environmental impacts on NFS resources.

No change has been made in the final rule in response to these comments.

Comment: One respondent stated that the term ''surface'' in the prefatory language of § 228.4(a) of the interim rule was not defined and that as a consequence suction dredge mining, which occurs underwater, could be considered a subsurface activity which was beyond the regulatory authority of the Forest Service.

Response: As previously discussed, section 228.8 characterizes fisheries habitat as a NFS surface resource and it is clear that for purposes of 36 CFR part 228, subpart A, including § 228.4(a)(1)(v) of the interim rule, water, streambeds, or other submerged lands generally should be construed as a NFS surface resource. Only where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union are those resources solely subject to State regulation. Thus, the Forest Service has clear authority to regulate the effects which locatable mineral operations have on water, streambeds, or other submerged lands, whether or not those operations are taking place wholly or partially in waters themselves, except where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union.

For these reasons, no change was required in the final rule in response to these comments. However, for purposes of the final regulation being adopted by this rulemaking, the term ''surface resources'' should be interpreted as including water, streambeds, or other submerged lands, except where adjudication has established that the applicable watercourse was navigable at the time that the State in which the watercourse occurs was admitted to the Union.

The provisions in § 228.4(a) in the interim rule have been redesignated to § 228.4(a)(3) in the final rule.

Section 228.4(a)(1)

Comment: Numerous respondents commented that the phrase, ''[u]nless the District Ranger determines that an operation is causing or will likely cause a significant disturbance of surface resources'' gives too much discretion to District Rangers. Those respondents stated that the phrase would permit a District Ranger to require a plan of operations for surface disturbance of any magnitude, including that which will likely result from the operations listed in the exemptions in paragraphs 4(a)(1)(i)–(v) of the interim rule, such as vehicle use on existing roads, removal of small mineral samples, and marking or monumenting mining claims. Other respondents characterized the phrase as eliminating the exemptions to the requirement for prior submission and approval of a plan of operations previously in § 228.4(a)(1)(i)–(v).

Two respondents specifically requested the deletion of the phrase and its replacement by the prefatory

language of § 228.4(a)(1) and the language of § 228.4(a)(1)(i)–(v). Those respondents commented that this change would ensure the continuation of the historic application of the terms ''disturbance'' and ''significant disturbance.''

Response: The intent in adopting § 228.4(a)(1) of the interim rule was not to authorize a District Ranger to require a plan of operations for operations which will not exceed the scope of one or more of the exemptions in § 228.4(a)(1)(i)–(v) of the interim rule. To ensure that the final rule is not interpreted in such an unintended manner, the phrase ''unless the District Ranger determines that an operation is causing or will likely cause a significant disturbance of surface resources'' is not included in the final rule. Thus, pursuant to § 228.4(a)(3) of the final rule, it is clear that prior submission and approval of a proposed plan of operations is not required if the proposed operations will be confined in scope to one or more of the exempted operations mentioned in that paragraph.

Comment: Several respondents stated that the Forest Service should add more specific examples of operations which do not require prior submission and approval of a plan of operations to the listing in § 228.4(a)(1)(i)–(v) of the interim rule.

Response: The Department agrees with this suggestion. By virtue of its incorporation by reference of § 228.4(a)(1)(v), § 228.4(a)(3) of the final rule adds an additional category of operations which can be conducted without prior submission and approval of a plan of operations. This includes operations which, in their totality, will not cause surface resource disturbance substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization. Section 228.4(a)(3) of the final rule also adds another category of operations which can be conducted without prior submission and approval of a plan of operations and include operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise will likely cause a significant disturbance of surface resources. The incorporation by reference of § 228.4(a)(1)(ii) in § 228.4(a)(3) of the final rule adds more specificity to two categories of operations exempted from the requirement for prior submission and approval of a plan of operations which were included in the interim rule as section 228.4(a)(1)(ii) and (iii), but are combined into one category in the final rule at § 228.4(a)(1)(ii).

These changes to the final rule better delineate the level of work, functions, or activities which constitutes significant disturbance of NFS resources and requires the filing of a proposed plan of operations, and its approval, before mining operations can be conducted. Conversely, the changes also better identify the level of work, functions or activities which does not constitute significant disturbance of NFS resources and therefore does not trigger the requirement for prior submission and approval of a plan of operations. Section 228.4(a)(3) of the final rule makes it clear that prior submission and approval of a plan of operations is required for any proposed operation which will not be limited to one or more of the categories of exempted work, functions and activities mentioned in that paragraph if the operation will likely cause a significant disturbance of surface resources. Section 228.4(a)(3) of the final rule, also makes it clear that an operator lacking a currently approved plan of operations must submit and obtain approval of a proposed plan of operations in order to continue to conduct ongoing operations which actually are causing a significant disturbance of surface resources. Furthermore, pursuant to § 228.4(a)(3) of the final rule, an operator holding a currently approved plan of operations must submit and obtain approval of a supplemental plan of operations in order to continue to conduct any portion of an ongoing operation not covered by the currently approved plan which actually is causing a significant disturbance of surface resources.

Comment: One respondent said that the use of small portable suction dredges, such as those with an intake of four inches or less, should be added to the listing of operations in 228.4(a)(1) of the interim rule which are exempt from the requirement for prior submission and approval of a proposed plan of operations providing that use of such a dredge is authorized by State law. The respondent said that various studies, including those by the United States Environmental Protection Agency, the Department of Interior, United States Geological Survey, and the State of Alaska Department of Natural Resources, have shown that these dredges do not cause significant disturbance of streams or rivers. The respondent also stated that such a provision would be consistent with the recommendations of the National Academy of Sciences, National Research Council's 1999 report entitled, ''Hardrock Mining on Federal Lands.''

Response: As previously discussed, the environmental impacts of operating suction dredges, even small ones, are highly site-specific depending on the circumstances and resource conditions involved. Given this variability, the Department believes that insofar as suction dredge mining operations are concerned, the need for the prior submission and approval of a proposed plan of operations must be evaluated on a site-specific basis. While the operation of suction dredges with intakes smaller than four inches may not require an approved plan of operations in many cases, the prior submission and approval of a proposed plan of operations will be appropriately required in some cases.

For these reasons, no change has been made in the final rule as a result of this comment.

Comment: Several respondents commented that § 228.4(a)(1) of the interim rule eliminated the exemptions to the requirement that an operator proposing to conduct operations which might cause disturbance of surface resources must submit a notice of intent to operate to the Forest Service before commencing those operations.

Response: Section 228.4(a)(1) in effect prior to the interim rule and § 228.4(a)(1) of the interim rule only set forth exemptions to the requirement for prior submission and approval of a plan of operations. Section 228.4(a)(2) in effect prior to the interim rule and § 228.4(a)(2) of the interim rule set forth the exemptions to the requirement that an operator must submit a notice of intent to operate to the Forest Service before commencing specified operations, although each section did so by incorporating the exemptions in (a)(1)(i)–(v). Specifically, § 228.4(a)(2) of both rules provides that ''[a] notice of intent need not be filed * * * (ii) For operations excepted in paragraph (a)(1) of this section from the requirement to file a plan of operations * * *.''

Technically, the changes to § 228.4(a)(1) of the interim rule had no effect on the exemptions to the requirement for a notice of intent to operate. As a practical matter, however, since § 228.4(a)(2) of the interim rule adopts the same exemptions for purposes of the submission of a notice of intent to operate that § 228.4(a)(1) of the interim rule adopts for the submission and approval of a proposed plan of operations, the changes made in the exemptions at § 228.4(a)(1)(i)–(v) of the interim rule do affect the exemptions to the requirement to submit a notice of intent to operate.

To understand the effect of these changes, please see the comments and responses to § 228.4(a)(1) and § 228.4(a)(1)(ii)–(v).

The provisions in § 228.4(a)(i) in the interim rule have been redesignated at § 228.4(a)(3) in the final rule.

Section 228.4(a)(1)(i)

No specific comments were submitted regarding § 228.4(a)(1)(i) of the interim rule.

Except for redesignation of this provision to paragraph (a)(1)(i) by reference in paragraph (a)(3), no significant changes were made in the final rule

Section 228.4(a)(1)(ii)

Comment: A number of respondents said that § 228.4(a)(1)(ii) of the interim rule, which exempts individuals searching for and occasionally removing small mineral samples or specimens from the requirement for prior submission and approval of a plan of operations, unfairly places those who use gold pans, non-motorized sluices, and metal detectors and who do not cause a significant disturbance of NFS resource in the same category as those who operate heavy earth-moving equipment causing significant disturbance of NFS resources. These respondents stated they should be treated the same as those exempted in 228.4(a)(1)(ii).

Response: The Department believes that a number of operations, such as gold panning and non-motorized hand sluicing, are within the scope of § 228.4(a)(1)(ii) of the interim rule. Nonetheless, to eliminate any question about this concern, the Department is including gold panning, non-motorized hand sluicing, and the use of battery operated dry washers to the exempted category of operations described in § 228.4(a)(1)(ii) of the interim rule.

Metal detecting is another example that is being added to the category of operations which § 228.4(a)(1)(ii) of the interim rule exempts from the requirement for prior submission and approval of a proposed plan of operations. However, the type of metal detecting that is permissible under 36 CFR part 228, subpart A, is metal detecting associated with locating gold or other locatable mineral deposits subject to the United States mining laws. This subpart does not authorize metal detecting for other purposes, such as metal detecting to locate treasure trove, historic or prehistoric artifacts, lost coins, or jewelry.

The Department also notes that comments on § 228.4(a)(1)(iii) of the interim rule, which exempts closely related operations from the requirement for prior submission and approval of a plan of operations, suggest that a virtually identical listing of examples be included in that section. Given the similarity and overlapping nature of paragraphs (a)(1)(ii) and (iii) of the interim rule, these paragraphs are being combined in § 228.4(a)(1)(ii) the final rule, which by virtue of § 228.4(a)(3) of the final rule will exempt specified operations from the requirement for prior submission and approval of a plan of operations.

Comment: One respondent commented that § 228.4(a)(1)(ii) of the interim rule should define the phrase ''small mineral samples or specimens.''

Response: Section 228.4(a)(1)(ii) of the interim rule, which is an exemption to the requirement for prior submission and approval of a plan of operations, applies ''[to individuals desiring to search for and occasionally remove small mineral samples or specimens.'' There are commonly accepted standards for sampling mineral deposits which can vary depending upon surface conditions or the matrix in which the deposit is found. The United States Bureau of Mines' publication ''Standard Procedures for Sampling,'' states that the recommended sample size for a stream sediment sample would be about ''* * * 200 grams collected in streambeds, or pools, or accumulations of fine grained material beneath boulders.'' That publication also recommends a procedure for taking a soil sample: ''a shovel or hoe is usually used with horizons as deep as 2 feet. * * * [A] 50 gram sample is usually sufficient.'' Similarly, in discussing stream sediment sampling, a widely accepted mining industry textbook, ''Exploration and Mining Geology'' by William Peters, states that ''in detailed stream sediment surveys, samples may be taken every 50 to 100 meters along a stream. About 50 to 100 grams of 80 mesh material is taken for each sample. * * *'' With respect to rock sampling, that textbook states that ''a 500 gram sample is commonly taken in fine-grained rocks; up to 2 kilograms are taken in very coarse grained rock.''

Further, the examples in § 228.4(a)(1)(ii) of the final rule will give context to the outer limits of what permissibly can be construed as the removal of ''small mineral samples or specimens.'' Those examples generally include ''gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools.''

For these reasons, the Department believes that the phrase ''small mineral samples or specimens'' should be defined with reference to generally accepted practices appropriate for the operations involved and that it is not necessary to include a definition of this phrase in the final rule. Therefore, no change has been made in the final rule as a result of this comment.

The provisions in § 228.4(a)(1)(ii) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(ii) by reference in § 228.4(a)(3).

Section 228.4(a)(1)(iii)

Comment: One respondent stated that § 228.4(a)(1)(iii) of the interim rule, which exempts certain prospecting and sampling from the requirement for prior submission and approval of a plan of operations, should define the phrase ''a reasonable amount of mineral deposit for analysis and study.''

Response: Section 228.4(a)(1)(iii) of the interim rule applies ''to prospecting and sampling which will not involve removal of more than a reasonable amount of mineral deposit for analysis and study.'' As discussed in response to the previous comment, there are commonly accepted standards for sampling mineral deposits. Further, the examples in § 228.4(a)(1)(ii) of the final rule will give context to the outer limits of what permissibly can be construed as the removal of ''a reasonable amount of mineral deposit for analysis and study.'' For these reasons, the Department believes that the phrase ''a reasonable amount of mineral deposit for analysis and study'' should be defined with reference to generally accepted practices appropriate for the operations involved and that it is not necessary to include a definition of this phrase in the final rule. Consequently, no change has been made in the final rule as a result of these comments.

Comment: One respondent recommended that § 228.4(a)(1)(iii) of the interim rule be revised in the final rule to apply ''to prospecting and sampling which will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, including but not limited to gold panning, metal detecting, hand slushing, dry washers, and the collecting of mineral specimens using hand tools so long as the excavation of the material is by hand and not by mechanized equipment.'' Another respondent recommended that § 228.4(a)(1)(iii) of the interim rule be revised in the final rule to apply ''to prospecting and sampling which will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, including but not limited to gold panning, metal

detecting, non-motorized hand slushing, battery operated dry washers, and the collecting of mineral specimens using hand tools.'' Each respondent explained that the suggested revision would help clarify, for both mining operators and Forest Service employees, the level of work, functions, or activities which do not require prior submission and approval of a plan of operations. Each respondent also characterized the proposed examples of operations which it recommends be listed in this exemption as being similar to the casual use exemptions contained in BLM's regulations at 43 CFR part 3800, subpart 3809.

Response: The Department agrees that the changes suggested by the respondents will provide better guidance to mining operators and Forest Service personnel on the character of mineral operations which do not constitute a significant disturbance of NFS resources and which consequently do not require prior submission and approval of a plan of operations. This change will also improve the consistency of the description of the exempted operations in § 228.4(a)(1)(ii) of the final rule and the ''casual use'' exemption set forth in BLM's regulations at 43 CFR part 3800, subpart 3809.

For these reasons, paragraph (a)(1)(ii) of the final rule will provide an exemption to the requirement for prior submission and approval of a plan of operations, through reference in § 228.4(a)(3), and apply to ''prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools.''

The provisions in § 228.4(a)(1)(iii) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(ii) by reference in § 228.4(a)(3).

Section 228.4(a)(1)(iv)

Comment: Numerous respondents commented that the interim rule unfairly treats prospectors or miners differently than other users of the NFS, such as campers, backpackers, and all terrain vehicle users who cause similar disturbance of NFS resources but are not required to submit and obtain approval of a document comparable to a plan of operations prior to causing such disturbance.

Two respondents recommended the addition of virtually identical language to the final rule to address this discrepancy. One suggested that § 228.4(a)(1)(iv) of the interim rule, which exempts certain operations from the requirement for prior submission and approval of a plan of operations, be revised in the final rule to apply to marking and monumenting a mining claim, or to any mining-related activities and disturbances that are substantially the same as those of other users of the National Forests and which do not require a Forest Service permit or approval.

Response: The Department agrees that it is inappropriate to require prior approval of the disturbance of NFS resources caused by one category of user but not another category of user causing identical surface disturbance. For this reason, the Department agrees that an exemption to the requirement for prior submission and approval of a plan of operations should be included in the final rule to insure that prospectors and miners are not required to obtain approval of operations which will have no effect on the NFS beyond that which other users can permissibly cause without prior approval of that use. However, this exemption should set forth in a separate paragraph, rather than being added to a dissimilar paragraph, such as paragraph 4(a)(1)(iv) of the interim rule.

Therefore, a new paragraph (a)(1)(v) is being added to the final rule. This paragraph, incorporated by reference in § 228.4(a)(3), is an exemption to the requirement for prior submission and approval of a plan of operations involving operations which, in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the NFS who are not required to obtain a Forest Service special use authorization, contract, or other written authorization.

The provisions in § 228.4(a)(1)(iv) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(iii) by reference in § 228.4(a)(3).

Section 228.4(a)(1)(v)

Comment: Several respondents said that § 228.4(a)(1)(v) of the interim rule, which exempts ''subsurface operations'' from the requirement for prior submission and approval of a plan of operations, applies to the use of suction dredges because suction dredge mining operations occur below the water's surface and consequently are ''subsurface'' operations. One respondent also stated that if the term ''subsurface operations'' means underground operations, § 228.4(a)(1)(v) should be revised to say precisely that.

Response: As previously discussed, fisheries habitat is a NFS surface resource, and for purposes of 36 CFR part 228, subpart A, water, streambeds, or other submerged lands generally should be construed as a NFS surface resource. Only where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union are those resources solely subject to State regulation. Thus, § 228.4(a)(1)(v) of the interim rule does not to strip the Forest Service of the clear authority which the agency generally has to regulate the effects which locatable mineral operations have on water, streambeds, or other submerged lands, whether or not those operations are taking place wholly or partially in waters themselves.

Nevertheless, the Department agrees with the suggestion that for purposes of clarity the term ''underground operations'' be substituted for the term ''subsurface operations'' in the exemption to the requirement for prior submission and approval of a plan of operations in § 228.4(a)(1)(iv) of the final rule.

The provisions in § 228.4(a)(1)(v) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(iv) by reference in § 228.4(a)(3).

Section 228.4(a)(2)

Comment: A number of respondents said that the interim rule did not resolve widespread confusion about the level of activity which requires the submission of a notice of intent to operate before proposed mining operations can be conducted.

Response: The interim rule did not change the requirement initially adopted in 1974 that a notice of intent to operate ''is required from any person proposing to conduct operations which might cause disturbance of surface resources,'' although the interim rule moved that requirement from the prefatory language of 36 CFR 228.4(a) to paragraph 4(a)(2) of the interim rule for clarity.

The requirement for a notice of intent to operate was added to the final rule adopted in 1974 in response to comments on that proposed rule. A June 20, 1974, letter from Congressman John Melcher to Forest Service Chief John McGuire explains why the Forest Service was urged to provide for the submission of notices of intent to operate in the 1974 final rule.

The National Wildlife Federation * * *, the American Mining Congress * * *, and the Idaho Mining Association * * * all seem

to agree that prior notification of proposed operations is a reasonable requirement. The Subcommittee therefore recommends that the Forest Service provide a simple notification procedure in any regulations it may issue. The objective in so doing would be to assist prospectors in determining whether their operations would or would not require the filing of an operating plan. Needless uncertainties and expense in time and money in filing unnecessary operating plans could be avoided thereby.

Questions and answers developed by the Forest Service when the 1974 rule was adopted explain the purpose of a notice of intent to operate in similar terms. In response to the question ''What should an operator do if the operator isn't sure that the proposed operations will be significant enough to require a plan of operations?'' the document states:

[y]ou should file a ''notice of intent[] to operate'' with the District Ranger. It should describe briefly what you intend to do, where and when it is to be done, and how you intend to get yourself and your equipment to the site. The District Ranger will analyze your proposal and will, within 15 days, notify you as to whether or not an operating plan will be necessary. In this way, you can avoid advance preparation of an operating plan until you know that it is necessary to do so and have some information as to what must be included.

This record makes it clear that a notice of intent to operate was not intended to be a regulatory instrument; it simply was meant to be a notice given to the Forest Service by an operator which describes the operator's plan to conduct operations on NFS lands. Further, this record demonstrates that the intended trigger for a notice of intent to operate is reasonable uncertainty on the part of the operator as to the significance of the potential effects of the proposed operations. In such a circumstance, the early alert provided by a notice of intent to operate would advance the interests of both the Forest Service and the operator by facilitating resolution of the question, ''Is submission and approval of a plan of operations required before the operator can commence proposed operations?''

Given the intended function of a notice of intent to operate, there can be no definitive answer to the question of what level of activity requires the submission of a notice of intent to conduct operations. As previously mentioned in the discussion on § 228.4(a), that given the variability of the lands within the NFS subject to the United States mining laws, identical operations could have vastly different effects depending upon the condition of the lands and other surface resources which would be affected by those mining operations. Thus, while it is possible to identify some categories of operations which will never require the prior submission of a notice of intent to operate, in many cases the need for the submission of a notice of intent to operate must be determined based upon a case-by-case evaluation of the proposed operations and the kinds of lands and other surface resources involved.

However, the Department notes that it is likely that some operators will not have the same perception or understanding of the impacts which their proposed operations may have on NFS resources that trained Forest Service specialists will have. Indeed, Congress recognized this in Congressman John Melcher's June 20, 1974, letter to Forest Service Chief John McGuire:

It is unreasonable, in the judgment of the Subcommittee, to expect operators—particularly for small prospectors and miners—to describe * * * the effects their operations are having or may have upon the environment and surface resources. Most operators do not have the knowledge to do so and many cannot afford to hire environmental consultants to do it for them.

Accordingly, in § 228.4(a)(4) of the final rule, the District Ranger shall retain final authority to decide whether prior submission and approval of a plan of operations is required and can make this determination at any time, whether or not the operator first submits a notice of intent to operate.

For these reasons, no change was made in the final rule in response to these comments.

Comment: Numerous respondents commented on the requirement in § 228.4(a)(2) of the interim rule that ''a notice of intent to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources'' stating that the test ''might cause disturbance of surface resources'' was far too broad. Some respondents noted that wading in a stream or rolling over a rock would require a notice of intent to operate if a District Ranger interpreted the term ''disturbance'' as it is commonly understood to mean ''any change from the existing condition.'' Many of these respondents suggested that the requirement be revised to read: ''a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources.'' Some respondents reasoned that this change would rationalize § 228.4(a) of the interim rule by bringing to the attention of the Forest Service, by means of the submission of a notice of intent to operate, only those operations which an operator thinks might cause a significant disturbance of NFS surface resources. This act would give the District Ranger the opportunity to evaluate the likelihood that the operations would result in such significant disturbance and require prior submission and approval of a proposed plan of operations, if appropriate.

Response: As discussed in the response to the previous comment, the interim rule did not change the requirement initially adopted in 1974 that a notice of intent to operate ''is required from any person proposing to conduct operations which might cause disturbance of surface resources,'' although the interim rule moved that requirement within § 228.4(a) for purposes of clarity. However, the Department examined the record for the 1974 rulemaking to see what light it sheds on the question of the appropriate test for assessing the need for the submission of a notice of intent to operate before an operator conducts proposed operations. That record reveals that the Department never intended to require an operator to submit a notice of intent to operate whenever there is a possibility that the proposed operations would cause even the most inconsequential disturbance of NFS resources. Indeed, the Questions and Answers pamphlet developed by the Forest Service when the 1974 rule was adopted leaves no doubt that it was the Department's intent that the test for the submission of a notice of intent to operate should be whether the proposed operations might cause significant disturbance of NFS surface resources. This issue was further explained in the following question and answer in the 1974 pamphlet:

Question:

I'm a rockhound or mineral collector. How are my activities covered by requirements for [plans of operations] or notices of intent[ ] to operate?

Answer:

Your activities do not generally require either an operating plan or a notice of intent[ ] to operate. However, if you have any doubt about whether or not your activities will cause significant surface resource disturbance, you should file a notice of intent[ ].

The Department's intent that the test for the submission of a notice of intent to operate should be whether the proposed operations might cause significant disturbance of NFS surface resources also is reflected by a second question in the 1974 pamphlet which states: ''What should an operator do if the operator isn't sure that the proposed

operations will be significant enough to require a plan of operations?''

After considering this issue again, the Department agrees that an operator only should be required to submit a notice of intent to operate for those operations which might cause significant disturbance of NFS resources and, therefore, conceivably might require prior submission and approval of a proposed plan of operations. Requiring the submission of a notice of intent to operate for operations which will cause insignificant disturbance of NFS surface resources places an unjustified burden upon persons exercising the rights granted by the United States mining laws. Requiring Forest Service professionals to review notices of intent to operate submitted for operations which have no potential to significantly disturb NFS resources also diverts those specialists from the important task of regulating those operations which are likely to significantly disturb those resources.

Therefore, section 228.4(a) of the final rule will require the operator's prior submission of a notice of intent to operate for ''operations which might cause significant disturbance of surface resources.'' This means that the trigger for the submission of a notice of intent to operate is the operator's reasonable uncertainty as to the significance of the disturbance which the proposed operations will cause on NFS resources. If the operator reasonably concludes that the proposed operations will not cause significant disturbance of NFS resources, the operator is not required to submit a notice of intent to operate (or a proposed plan of operations). If the operator reasonably concludes that the proposed operations more probably than not will cause a significant disturbance of NFS resources, the operator should submit a proposed plan of operations to the District Ranger. However, if the operator reasonably concludes that the proposed operations might, but probably will not, cause significant disturbance of NFS resources, the operator should submit a notice of intent to operate to the District Ranger.

Once a notice of intent to operate is filed, the Forest Service has an opportunity to determine whether the agency agrees with the operator's assessment that the operations are not likely to cause significant disturbance of NFS resources such that the Forest Service will not exercise its discretion to regulate those operations. If the District Ranger, based on past experience, direct evidence, or sound scientific projection, disagrees with the operator's assessment and determines that the proposed operations, more probably than not, would cause significant disturbance of NFS resources, the District Ranger shall require the operator to submit and obtain approval of a proposed plan of operations before commencing those operations. By means of the approved plan of operations, the District Ranger shall obtain the operator's agreement to perform specific reclamation, post a reclamation performance bond, avoid unnecessary or unreasonable impacts on NFS resources, and implement other mitigation measures, as appropriate.

However, as noted in the response to the previous comment, it is likely that some operators will not have the same perception or understanding of the impacts which their proposed operations may have on NFS resources that trained Forest Service specialists will have. Therefore, in § 228.4(a)(4) of the final rule the District Ranger retains final authority to decide whether prior submission and approval of a plan of operations is required and can make this determination at any time, whether or not the operator first submits a notice of intent to operate.

Comment: Numerous respondents said that the interim rule treats prospectors or miners unfairly compared to other users of the NFS, such as hikers, fishermen, hunters, and rock climbers, who cause similar limited disturbance of NFS resources but are not required to submit a document comparable to a notice of intent to operate prior to causing this disturbance.

Response: The Department agrees that it is inappropriate to require prior notice of the disturbance of NFS resources caused by one category of user but not other categories of users of the NFS causing identical surface disturbance. Therefore, for the reasons discussed in the response to the comment on paragraph 4(a)(1)(iv) of the interim rule, a new paragraph 4(a)(1)(v) is included in the final rule which provides that a notice of intent to operate is not required for ''operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization.''

Comment: A number of respondents stated that the Forest Service should add more specific examples of operations which do not require prior submission of a notice of intent to operate to the exemptions listed in § 228.4(a)(1)(i) through (v) of the interim rule. Several other respondents said that the interim rule should contain a well-defined description of operations that do not require the submission of a notice of intent to operate.

Response: For the reasons cited in the response to the first comment on § 228.4(a)(2) of the interim rule, the need in many situations for the submission of a notice of intent to operate must be determined through a case-by-case evaluation of the proposed operations and the kinds of lands and other surface resources which those operations will effect. However, it is possible to identify some categories of operations which will never require the prior submission of a notice of intent to operate and the Department agrees that the final rule should identify those categories with more specificity as suggested by the respondents.

Therefore, the Department is adding to § 228.4(a)(1) of the final rule another category of operations which can be conducted without prior submission of a notice of intent to operate. This category will include ''operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization.'' In addition, the final rule also adds more specificity to two categories of operations exempted from the requirement for prior submission of a notice of intent to operate which are included in the interim rule at § 228.4(a)(1)(ii) and (iii) but combined into one category in the final rule at § 228.4(a)(1)(ii).

These changes to the final rule better delineate the level of work, functions, or activities which clearly do not constitute a significant disturbance of NFS resources and, therefore, do require the submission of a notice of intent to operate before proposed mining operations can be initiated.

Comment: One respondent said that § 228.4(a)(2) of the interim rule, which requires a District Ranger to advise the operator, within 15 days of the Ranger's receipt of a notice of intent to operate, whether approval of a plan of operations is required before the proposed operations commence fails to give the miner any recourse if the District Ranger does not respond within that period.

Response: The respondent's characterization of § 228.4(a)(2) of the interim rule is accurate. However, this does not mean that the operator lacks a remedy for a District Ranger's failure to comply with the requirement to respond within 15 days of receipt of a notice of intent to operate. Indeed, as the respondent observed, the operator could

consider filing an administrative appeal or a civil lawsuit challenging the District Ranger's noncompliance with this requirement. These are same remedies which an operator has with respect to any other duty which the operator believes a District Ranger has not fulfilled. The Department sees no reason to provide a unique remedy for a District Ranger's failure to comply with this particular paragraph of the interim rule.

For these reasons, no change has been made in the final rule as a consequence of this comment.

The provisions of § 228.4(a)(2) of the interim rule have been redesignated as follows: provisions for filing a notice of intent redesignated to § 228.4(a); the 15-day requirement redesignated at § 228.4(a)(2); and exceptions for filing a notice of intent at § 228.4(a)(1)(i)–(vii).

Section 228.4(a)(2)(i)

No specific comments were submitted on § 228.4(a)(2)(i) of the interim rule. Except for redesignation of this provision to paragraph (a)(1)(vii) in the final rule, no changes were made in the final rule.

Section 228.4(a)(2)(ii)

No specific comments were submitted on § 228.4(a)(2)(ii) of the interim rule. Except for redesignation of this provision to paragraphs (a)(1)(i)–(iv) in the final rule, no changes were made in the final rule.

Section 228.4(a)(2)(iii)

Comment: With respect to the phrase ''[u]nless those operations otherwise might cause a disturbance of surface resources'' found in § 228.4(a)(2)(iii) of the interim rule, and which qualifies an exemption to the requirement that an operator must submit a notice of intent to operate, numerous respondents commented that this phrase gives too much discretion to District Rangers. Those respondents stated that the test ''might cause a disturbance of surface resources'' was far too broad and would permit a District Ranger to require a notice of intent to operate for any virtually any surface disturbance. Many of those respondents also suggested that the exemption to the requirement for prior submission of a notice of intent to operate in § 228.4(a)(2)(iii) of the interim rule be revised to apply to: ''operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources.''

Response: As previously discussed, the Department agrees that an operator should only be required to submit a notice of intent to operate for those operations which might cause significant disturbance of NFS resources and conceivably might require prior submission and approval of a proposed plan of operations. Accordingly, § 228.4(a)(1)(vi) of the final rule, which corresponds to § 228.4(a)(2)(iii) of the interim rule, has been revised to apply to ''operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources.''

Comment: Several respondents said that an exception to the requirement for prior submission of a notice of intent to operate in 36 CFR § 228.4(a)(2)(iii) should be broadened.

Response: 36 CFR 228.4(a)(2) provided that ''[a] notice of intent need not be filed * * * (iii) [f]or operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees.''

As previously discussed, identical operations could have vastly different effects depending upon the condition of the lands and other surface resources which would be affected by those mining operations. In fact, identical operations might cause significant disturbance of NFS resources in one situation and insignificant disturbance of those resources in another. Thus, determining whether operations might cause a significant disturbance of NFS resources necessarily depends upon a case-by-case evaluation of a proposed operation and the kinds of lands and other NFS surface resources involved. Consequently, the Department does not believe that it is possible to develop exemptions to the requirement to submit a notice of intent to operate in addition to those in paragraphs 4(a)(1)(i) through (vii) of the final rule which would be universally appropriate.

For these reasons, no change has been made in the final rule in response to these comments.

The provisions in § 228.4(a)(2)(iii) in the interim rule have been redesignated at § 228.4(a)(1)(vi) in the final rule.

Regulatory Certifications

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive E.O. 12866 of September 30, 1993, ''Regulatory Planning and Review.'' This final 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 final rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this final rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients of such programs. Therefore, it has been determined that this final rule is not an economically significant regulatory action.

This final rule also has been considered in light of the Regulatory Flexibility Act, as amended, (5 U.S.C. 601 *et seq.*). In promulgating this final rule, publication of a general notice of proposed rulemaking was not required by law. Further, it has been determined that this final rule will not have a significant economic impact on a substantial number of small business entities as defined by that Act. Therefore, it has been determined that preparation of a final regulatory flexibility analysis is not required for this final rule.

Environmental Impacts

This final rule clarifies the criteria for determining when a notice of intent to operate or a plan of operations should be submitted by a mining operator. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43168; Sept. 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction.'' This final rule clearly falls within this category of actions and the Department has determined that no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement. Moreover, this rule itself has no impact on the human environment. Rather, in the context of 36 CFR part 228, subpart A, of which this final rule will be a part, the action which the agency takes which might have an impact on the human environment is approving a proposed plan of operations. Therefore, it has been determined that preparation of an environmental assessment or an environmental impact statement is not required in promulgating this final rule.

Energy Effects

This final rule has been reviewed under E.O. 13211 of May 18, 2001, ''Actions Concerning Regulations That

Significantly Affect Energy Supply, Distribution, or Use.'' This final rule will not have a significant adverse effect on the supply, distribution, or use of energy. Nor has the Office of Management and Budget designated this rule as a significant energy action. Therefore, it has been determined that this final rule does not constitute a significant energy action requiring the preparation of a Statement of Energy Effects.

Controlling Paperwork Burdens on the Public

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or reporting requirements for notices of intent to operate and plans of operation contained in this final rule were previously approved by the Office of Management and Budget and assigned control number 0596–0022, expiring on July 31, 2005. This final rule does not contain any new recordkeeping or reporting requirements or other information collection requirements as defined by the Act or its implementing regulations (5 CFR part 1320) that are not already required by law or not already approved for use. Accordingly, it has been determined that the review provisions of the Paperwork Reduction Act of 1995 and its implementing regulations do not apply to this final rule.

Federalism

This final rule has been considered under the requirements of E.O. 13132 of August 9, 1999, ''Federalism.'' This final rule conforms with the Federalism principles set out in this E.O.; 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. Therefore, it has been determined that this final rule does not have federalism implications.

Consultation With Indian Tribal Governments

This final rule has been reviewed under E.O. 13175 of November 6, 2000, ''Consultation and Coordination With Indian Tribal Governments.'' This final rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nor does this final rule impose substantial direct compliance costs on Indian tribal governments or preempt tribal law. Therefore, it has been determined that this final rule does not have tribal implications requiring advance consultation with Indian tribes.

No Takings Implications

This final rule has been analyzed in accordance with the principles and criteria contained in E.O. 12630 of March 15, 1988, ''Governmental Actions and Interference With Constitutionally Protected Property Rights.'' It is well established that a rule, such as the final rule, which in certain circumstances requires a miner to obtain Federal approval before conducting mineral operations on Federal lands, does not deprive the miner of any property right. Therefore, it has been determined that the final rule does not pose the risk of a taking of Constitutionally protected private property.

Civil Justice Reform

This final rule has been reviewed under E.O. 12988 of February 7, 1996, ''Civil Justice Reform.'' The Department 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 final rule. Nevertheless, in the event that such a conflict was to be identified, this final rule would preempt State or local laws and regulations found to be in conflict with this final rule or that impede its full implementation. However, in that case, (1) no retroactive effect would be given to this final rule; and (2) this final rule does not require use of 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), the effects of this final rule on State, local, and tribal governments and the private sector have been assessed. This final rule does not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Nor, in promulgating this final rule, was the publication of a general notice of proposed rulemaking required by law. Therefore, it has been determined that a statement under section 202 of the Act is not required for this final rule.

List of Subjects in 36 CFR Part 228

Environmental protection, Mines, National forests, Oil and gas exploration, Public lands—mineral resources, Public lands—rights-of-way, Reporting and-recordkeeping requirements, Surety bonds, Wilderness areas.

Therefore, for the reasons set forth in the preamble, amend part 228 of title 36 of the Code of Federal Regulations as follows:

PART 228—MINERALS

Subpart A—Locatable Minerals

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 478, 551); 41 Stat. 437, as amended sec. 5102(d), 101 Stat. 1330–256 (30 U.S.C. 226); 61 Stat. 681, as amended (30 U.S.C. 601); 61 Stat. 914, as amended (30 U.S.C. 352); 69 Stat. 368, as amended (30 U.S.C. 611); and 94 Stat. 2400.

■ 2. Amend § 228.4 to revise paragraph (a) to read as follows:

§ 228.4 Notice of intent—plan of operations—requirements.

(a) Except as provided in paragraph (a)(1) of this section, a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport.

(1) A notice of intent to operate is not required for:

(i) Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes;

(ii) Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

(iii) Marking and monumenting a mining claim;

(iv) Underground operations which will not cause significant surface resource disturbance;

(v) Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users

of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization;

(vi) Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources; or

(vii) Operations for which a proposed plan of operations is submitted for approval;

(2) The District Ranger will, within 15 days of receipt of a notice of intent to operate, notify the operator if approval of a plan of operations is required before the operations may begin.

(3) An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources. An operator also shall submit a proposed plan of operations, or a proposed supplemental plan of operations consistent with § 228.4(d), to the District Ranger having jurisdiction over the area in which operations are being conducted if those operations are causing a significant disturbance of surface resources but are not covered by a current approved plan of operations. The requirement to submit a plan of operations shall not apply to the operations listed in paragraphs (a)(1)(i) through (v). The requirement to submit a plan of operations also shall not apply to operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise will likely cause a significant disturbance of surface resources.

(4) If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.

* * * * *

Dated: May 31, 2005.

David P. Tenny,

Deputy Under Secretary, NRE.

[FR Doc. 05–11138 Filed 6–3–05; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU31

Endangered and Threatened Wildlife and Plants; Opening of the Comment Period for the Proposed and Final Designation of Critical Habitat for the Klamath River and Columbia River Populations of Bull Trout (Salvelinus confluentus); Clarification

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; opening of comment period; clarification.

SUMMARY: We are publishing additional information pertaining to a recent **Federal Register** document that opened a comment period on a proposed and final rule to designate critical habitat for the Klamath River and Columbia River populations of bull trout. This information provides clarification to that document. We hope that this additional information will benefit the public in understanding our actions in regard to the bull trout critical habitat designation.

DATES: We will accept public comments on the proposed and final rules until June 24, 2005.

ADDRESSES: Please see our May 25, 2005, **Federal Register** document (70 FR 29998) for information regarding how and where to submit comments.

FOR FURTHER INFORMATION CONTACT: John Young, 503–231–6194.

SUPPLEMENTARY INFORMATION:

Background

We published a document in the May 25, 2005, **Federal Register** (70 FR 29998) that announced the opening of a public comment period on the proposed and final designations of critical habitat for the Klamath River and Columbia River populations of bull trout. The proposed rule published on November 29, 2002, at 67 FR 71236, and the final rule published on October 6, 2004, at 69 FR 59996. The following information provides clarification to the May 25, 2005, document.

On April 28, 2005, the government filed a motion for voluntary remand. If the court grants this motion, the October 6, 2004, final critical habitat designation will be remanded to the Service for a new decision. The voluntary remand would have the effect of reinstating the November 29, 2002, proposed rule. In a declaration supporting the motion for voluntary remand, the Service informed the court that in mid-May the Service would reopen the comment period on the November 29, 2002, proposed rule and seek comment on the exclusions made in the October 6, 2004, final rule. Further, the Service indicated that the culmination of the administrative process initiated with the opening of the comment period would be conditional upon the court's ruling. In other words, the Service will only be making a new final determination on the November 2002 proposed rule to the extent that this is consistent with the court's ruling on the government's motion.

Subsequently, we published the May 25, 2005, document that announced the opening of a public comment period. Should the court deny the government's motion, the Service will still collect and analyze all comments received as a result of the May 25, 2005, notice for use in any future rulemaking regarding bull trout critical habitat, and comply with any court order issued. The Service published the notice reopening the comment period before the court ruled on the government's motion to ensure that a new final determination could be made as quickly as possible.

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: May 31, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 05–11166 Filed 6–3–05; 8:45 am]

BILLING CODE 4310–55–P