

**§ 3.10 Registration of futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators and leverage transaction merchants.**

\* \* \* \* \*

(c) *Exemption from registration for certain persons.* (1) A person trading solely for proprietary accounts, as defined in § 1.3(y) of this chapter, is not required to register as a futures commission merchant: *Provided*, that such a person remains subject to all other provisions of the Act and of the rules, regulations and orders thereunder.

(2)(i) A foreign broker, as defined in § 1.3(xx) of this chapter, is not required to register as a futures commission merchant if it submits any commodity interest transactions executed on or subject to the rules of designated contract market or derivatives transaction execution facility for clearing on an omnibus basis through a futures commission merchant registered in accordance with section 4d of the Act.

(ii) A foreign broker acting in accordance with paragraph (c)(2)(i) of this section remains subject to all other provisions of the Act and of the rules, regulations and orders thereunder.

**PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS**

7. The authority citation for part 4 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 4, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a and 23.

**§ 4.10 [Amended]**

8. Section 4.10 is amended by removing and reserving paragraph (a).

**PART 15—REPORTS—GENERAL PROVISIONS**

9. The authority citation for part 15 continues to read as follows:

**Authority:** 7 U.S.C. 2, 5, 6(c), 6a, 6c(a)–(d), 6f, 6g, 6i, 6k, 6m, 6n, 7, 9, 12a, 19 and 21, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

**§ 15.00 [Amended]**

10. Section 15.00 is amended by removing and reserving paragraph (g).

**PART 166—CUSTOMER PROTECTION RULES**

11. The authority citation for part 166 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 6b, 6c, 6d, 6g, 6h, 6k, 6l, 6o, 7, 12a, 21, and 23, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

**§ 166.1 [Amended]**

12. Section 166.1 is amended by removing and reserving paragraph (b).

Dated: March 23, 2007.

By the Commission.

**Eileen A. Donovan,**

*Acting Secretary of the Commission.*

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**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**36 CFR Part 261**

**RIN 0596–AC30**

**Clarifying Prohibitions for Failure To Maintain Control of Fires That Damage National Forest System Lands**

**AGENCY:** Forest Service, USDA.

**ACTION:** Proposed rule; request for comment.

**SUMMARY:** The Forest Service is proposing to revise 36 CFR part 261, Prohibitions, to establish a new prohibition for starting and negligently failing to maintain control of a prescribed fire. Proof of criminal negligence is required of this offense. The Forest Service also is proposing to clarify that the prohibition for causing and failing to maintain control of all other fires is a strict liability offense, not requiring proof of criminal intent. In implementing the National Fire Plan, the Forest Service has encouraged adjacent landowners to develop integrated fire management plans for the use of prescribed fire for the restoration and protection of private lands adjacent to National Forest System lands. Without the proposed changes, adjacent landowners might be discouraged from using prescribed fire.

**DATES:** Comments must be received in writing by June 1, 2007.

**ADDRESSES:** Written comments concerning this notice should be addressed to USDA Forest Service, State and Private Forestry, Stop 1109, 1400 Independence Avenue, SW., Washington, DC 20250–1109. Comments may also be sent via e-mail to [spf@fs.fed.us](mailto:spf@fs.fed.us) or via facsimile to 202–205–1174. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at USDA Forest Service, State and Private Forestry, 1400 Independence Avenue, SW., Washington, DC 20250–1109. Visitors are encouraged to call ahead to 202–

205–1331 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Denny Truesdale, State and Private Forestry, 202–205–1588. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The following outline contains the contents of the **SUPPLEMENTARY INFORMATION** section of this proposed rule:

Background  
Regulatory Certifications  
Regulatory Impact  
Environmental Impact  
Federalism  
Consultation With Tribal governments  
No takings Implications  
Controlling Paperwork Burdens on the Public  
Energy Effects  
Civil Justice Reform  
Unfunded Mandates

List of Subjects in Part 261

**Background**

A new paragraph (c) would be added to section 261.1, Scope, to clarify that unless criminal intent (“*mens rea*”) is expressly required in the provision setting forth the offense, strict liability would apply. Whether criminal intent is a required element of an offense is a question of statutory construction. Where a statute or regulation does not expressly require criminal intent, “silence on this point by itself does not necessarily suggest that Congress intended to dispense with the conventional *mens rea* element \* \* \*” *Staples v. United States*, 511 U.S. 600, 605 (1994). As a general rule, absent a clear indication of legislative intent, courts require proof of intent for criminal offenses. See *Id.* at 605, for a discussion of cases that support this well-established principle.

However, the general presumption that some guilty intent or purpose is required does not apply to “public welfare offenses.” These are offenses that typically impose penalties to serve as an effective means of regulation. *Id.* At 606 (“[i]n construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense”). Public welfare offenses are those that “are not of the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes duty.” *Morissette v. United States*, 342 U.S. 246, 255 (1952). Public

welfare offenses “render[s] criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health and safety.” *Liparota v. United States*, 471 U.S. 419, 426 (1985). A person should know that the use of Federal lands is subject to stringent regulation, and that action or inaction in violation of such regulation can cause irreparable harm to the public or the land and its resources.

The proposed clarification to section 261.1 would make express the agency’s long-standing interpretation of its criminal prohibitions as public welfare offenses and confirm that, as such, they generally are strict liability offenses. Proof of criminal intent would be required only where expressly provided by the specific prohibition.

To this end, section 261.5(e) would be revised to remove the term “allowing.” Section 261.5(e) currently prohibits “allowing a fire to escape from control.” The term “allowing” has been interpreted differently by courts in some cases to require proof of criminal intent. *United States v. Semenza*, 835 F.2d 223 (9th Cir. 1987); *United States v. Osgudthorpe*, 13 F. Supp.2d 1215 (D. Utah, 1998). In other cases, courts have found that the term does not require proof of criminal intent. *United States v. Larson*, 746 F.2d 455 (8th Cir. 1984), citing *United States v. Wilson*, 438 F.2d 525 (9th Cir. 1971). The revision would clarify that the prohibition in section 261.5(e) is a strict liability offense.

In addition to removing the term “allowing,” section 261.5(e) also would be revised to limit its application to fires that are not prescribed fires. As clarified, the prohibition would be a strict liability offense for causing and failing to maintain control of a fire that is not a prescribed fire that damages National Forest System (NFS) lands.

Section 261.5 also would be revised to add a new prohibition to address prescribed fires. Paragraph (g) would be added to prohibit the negligent failure to maintain control of a prescribed fire that damages NFS lands. This prohibition would not be a strict liability offense. It would require proof that the offender acted with criminal negligence. Section 261.2 would be revised to add a definition of “prescribed fire.” The term would be defined to mean a planned and intentionally lit fire allowed to burn within the applicable requirements of Federal or State laws, regulations, or permits. Many States do not have laws establishing requirements for prescribed fires. Under the definition, if a prescribed fire is allowed under applicable law (even if the law does not limit how the burn is to be conducted)

and the fire was intentionally lit and planned to some extent, section 261.5(g) would apply and the Federal government would need to prove that the defendant acted with criminal negligence.

The distinction between failure to maintain control of a prescribed fire (requiring proof of criminal negligence) and another fire (requiring no proof of criminal intent) is necessary to support efforts to reduce hazardous fuels on properties adjacent to National Forest System lands. These efforts are intended to restore ecosystems and, by doing so, protect communities in the wildland urban interface. In implementing the National Fire Plan, the Forest Service and the Department of the Interior land managing agencies have increased the amount of prescribed burning on lands under their jurisdiction. The agencies also have encouraged adjacent landowners to develop integrated fire management plans, including the use of prescribed fire, for the restoration and protection of private lands. If the prohibition for lighting and failing to maintain a prescribed fire were a strict liability offense, adjacent landowners might be discouraged from using prescribed fire as a tool on their lands out of concern that, if the fire were to escape control, they could be cited for a criminal violation without regard to whether they acted with criminal intent. New paragraph (g) would alleviate this impediment.

### Regulatory Certifications

#### Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order (E.O.) 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this is a non-significant rule as defined by E.O. 12866. This proposed 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 proposed rule would not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this proposed 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 proposed rule is not an economically significant regulatory action.

This proposed rule also has been considered in light of the Regulatory

Flexibility Act, as amended, (5 U.S.C. 601 *et seq.*). In promulgating this proposed rule, publication of an advance notice of proposed rulemaking was not required by law. Further, it has been determined that this proposed 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 regulatory flexibility analysis is not required for this proposed rule.

#### Environmental Impact

Section 31.11a of Forest Service Handbook 1909.15 (69 FR 40591; July 6, 2004) excludes from documentation in an environmental assessment or environmental impact statement “civil and criminal law enforcement and investigative activities.” This proposed rule clearly falls within this category of actions and the agency has determined that no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement. Moreover, this proposed rule itself has no impact on the human environment. Therefore, it has been determined that preparation of an environmental assessment or an environmental impact statement is not required in promulgating this proposed rule.

#### Federalism

The agency has considered this proposed rule under the requirements of Executive Order 12612 and has made a preliminary assessment that the proposed rule will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the agency has determined that no further assessment on federalism implications is necessary at this time.

#### Consultation With Tribal Governments

This proposed rule has been reviewed under E.O. 13175 of November 6, 2000, “Consultation, and Coordination with Indian Tribal Governments.” This proposed 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 proposed rule impose substantial direct compliance costs on Indian tribal governments or preempt tribal law. Therefore, it has been determined that this proposed rule does

not have tribal implications requiring advance consultation with Indian Tribes.

#### *No Takings Implications*

This proposed rule has been reviewed for its impact on private property rights under Executive Order 12630. It has been determined that this proposed rule does not pose a risk of taking private property; in fact, the proposed rule honors access to private property pursuant to statute and to outstanding or reserved rights.

#### *Controlling Paperwork Burdens on the Public*

This proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 and, therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR Part 1320 do not apply.

#### *Energy Effects*

This proposed rule has been reviewed under E.O. 13211 of May 18, 2001, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." This proposed 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 proposed rule does not constitute a significant energy action requiring the preparation of a Statement of Energy Effects.

#### *Civil Justice Reform*

This proposed rule revision has been reviewed under Executive Order 12988, Civil Justice Reform. The proposed revision: (1) Preempts all State and local laws and regulations that are found to be in conflict with or that would impede its full implementation; (2) does not retroactively affect existing permits, contracts, or other instruments authorizing the occupancy and use of National Forest System lands, and (3) does not require administrative proceedings before parties may file suit in court challenging these provisions.

#### *Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Department has assessed the effects of this proposed rule on State, local, and tribal governments, and on the private sector. This proposed rule does not compel the expenditure of \$100 million or more by any State, local, or tribal government, or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

#### **List of Subjects in 36 CFR Part 261**

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend Part 261 of Title 36 of the Code of Federal Regulations as follows:

#### **PART 261—PROHIBITIONS**

1. The authority citation for part 261 continues to read:

**Authority:** 7 U.S.C. 1011(f); 16 U.S.C. 4601–6(d) 472, 551, 620(f), 1133(c), (d)(1), 1246(i).

#### **Subpart A—General Prohibitions**

2. In § 261.1, add paragraphs (c) and (d) to read as follows:

##### **§ 261.1 Scope.**

\* \* \* \* \*

(c) Unless an offense set out in this part specifies that intent is required, intent is not an element of any offense under this part.

(d) None of these prohibitions apply to any person engaged in fire suppression actions.

3. In § 261.2, add a definition for "Prescribed fire" to read as follows

##### **§ 261.2 Definitions.**

\* \* \* \* \*

*Prescribed fire* means a planned and intentionally lit fire allowed to burn within the requirements of Federal or State laws, regulations, or permits.

\* \* \* \* \*

4. Amend § 261.5 by revising paragraph (e) and by adding paragraph (g) to read as follows:

##### **§ 261.5 Fire.**

\* \* \* \* \*

(e) Causing and failing to maintain control of a fire that is not a prescribed fire that damages National Forest System.

\* \* \* \* \*

(g) Negligently failing to maintain control of a prescribed fire on Non-National Forest system lands that damages the National Forest System.

Dated: March 8, 2007.

**Abigail R. Kimball,**

*Chief, Forest Service.*

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