

[3410-11-P]

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**36 CFR Part 215**

**RIN 0596-AB89**

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

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule.

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**SUMMARY:** This final rule revises the notice, comment, and appeal procedures for projects and activities implementing land and resource management plans on National Forest System lands. The final rule changes the procedures in the current rule to clarify and reduce the complexity of certain provisions, to improve efficiency of processing appeals, to encourage early and effective public participation in the environmental analysis of projects and activities, and to ensure consistency with the provisions of the statutory authority. Changes address emergency situations; notice and comment procedures and time periods; substantive comments; who may appeal; Deciding Officers; content of an appeal; and the formal disposition process.

**EFFECTIVE DATE:** This rule is effective June 4, 2003, except for those provisions concerning electronic comments and electronic appeals at 36 CFR 215.5(b)(vi-vii), 215.6(a)(4)(iii), 215.7(b)(2)(i) and (iii), and 215.15(c)(1) and (3), which are effective July 7, 2003.

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**SUPPLEMENTARY INFORMATION:**

**Background**

The Forest Service is responsible for managing 192 million acres in National Forests, National Grasslands, and other areas known collectively as the National Forest System. The Chief of the Forest Service, through a line organization of regional foresters, forest supervisors and district rangers, manages the surface resources and, in some instances, the subsurface resources of these lands.

The United States Department of Agriculture (Department), at its own discretion, provides processes by which persons or organizations may appeal or object to significant amendment, revision, or approval of a land and resource management plan (36 CFR part 219). For plans prepared using the 1982 planning regulations, Appendix A to §219.35(b) provides the option to select the objection process of §219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (see 36 CFR parts 200 to 299, Revised as of July 1, 2000). A separate process for notice, comment, and appeal of National Forest System projects and activities was mandated by section 322 of Interior and Related Agencies Appropriation Act of Fiscal Year 1993 (Pub. L. 102-381,

106 Stat. 1419) (hereinafter “Appeals Reform Act” (ARA)), with implementing regulations promulgated on November 4, 1993 at 36 CFR part 215 (58 FR 58904).

On December 18, 2002, the Forest Service published a proposal to amend the rule at 36 CFR part 215 (67 FR 77451). A 60-day comment period was provided. In addition, the Forest Service gave direct notice of the proposed amendment and invited comment from more than 150 national organizations and Federal agencies.

Approximately 25,000 comment letters were received from individuals; representatives of Federal, State, and local government agencies; environmental groups; Indian tribes; professional associations; and both commodity and non-commodity industry groups. The responses were form letters as well as unique individual letters, some sent electronically and others mailed hard copy. All suggestions and comments have been reviewed and considered in preparation of this final rule.

### **General Comments**

Comments were received from those who favored and those who disagreed with the same proposed changes, addressing many of the same issues from opposing viewpoints. Many requests for clarifications were received as well as numerous suggestions for additional changes.

Those who generally supported the proposed rule changes stated that the changes would improve procedural effectiveness and efficiency, reduce the abuse of the appeals process, and improve forest health.

Those who generally opposed the proposed rule changes contended that the changes would reduce a citizen's right to participate in the project planning process, might result in increased litigation, and would decrease forest health.

Comments were received on nearly every section asserting that various portions of the proposed rule were in violation of the Appeals Reform Act (ARA). Rather than answer each ARA violation assertion individually, the Department is choosing to respond generally. The Department does not believe that any provision, requirement, section, or paragraph is in violation of the ARA. The Department has carried out the intent of Congress with this rule and the changes in the final rule reflect that intent. The preamble to the proposed rule (67 FR 77451, December 18, 2002) contains an extensive discussion of the ARA and the response to the ARA provisions in the development of the 1993 rule (58 FR 58904, November 4, 1993) and the changes proposed to the rule in 2002.

Native American tribes commented on almost every aspect of the proposed rule. The tribes expressed a general concern that the proposed rule failed to recognize particular rights granted under various statutes, treaties, and other legal instruments. They believed that tribal participation in many Forest Service decisions would be greatly reduced by the proposed changes, and that consultation is required to negotiate a process for harmonizing the proposed rule with their concerns. Because the concerns expressed were primarily general in nature, the Department is responding generally, rather than including a response in every section. Native Americans have a special and unique legal and political relationship with the United States government, including the Department of Agriculture and the Forest Service. Tribal governments are sovereign governments that are separate and distinct from other governmental entities. In addition, land and resources hold a special and unique meaning in the spiritual and everyday lives of many Native Americans. National Forest System lands contain many traditional, historic, and contemporary use areas of critical importance to Native Americans. Tribal cultural

practices occur commonly on National Forest System lands. Thus, it is critical that the Forest Service respect and work with all tribes in a Government-to-Government relationship during project planning and engage in consultation regarding Government actions affecting tribal rights and interests, consistent with Government policy. However, the Department does not believe it is appropriate to include special provisions relating to tribes in the final rule.

After publication of the proposed rule, the Department became aware of an inconsistency with the use of the terms “substantive comment” and “comment.” Respondents noted this inconsistency also. Throughout the final rule, only the phrase “substantive comment(s)” is used, as defined at §215.2.

### **Section-by-Section Comments**

The following discusses and responds to the public comments on the proposed changes to 36 CFR part 215 received during the Department’s 60-day comment period. It also discusses differences between the proposed rule and the final rule and why those changes were made. The final rule has been reorganized. As a result, some sections have new titles and/or a new designation as shown in the table below:

<b>Proposed section number and title</b>	<b>Final section number and title</b>
§215.1 Purpose and scope	§215.1 Purpose and scope
§215.2 Definitions	§215.2 Definitions
§215.3 Proposed actions subject to legal notice and opportunity to comment	§215.3 Proposed actions subject to legal notice and opportunity to comment
§215.4 Proposed actions not subject to legal notice and opportunity to comment	§215.4 Proposed actions not subject to legal notice and opportunity to comment
§215.5 Legal notice of proposed action and opportunity to comment	§215.5 Legal notice of proposed actions
§215.6 Consideration of comments	§215.6 Comments on proposed actions
§215.7 Legal notice of decision	§215.7 Legal notice of decision
	§215.8 Appeal Deciding Officer
§215.8 Decision implementation	§215.9 Decision implementation
§215.9 Emergency situations	§215.10 Emergency situations
§215.10 Decisions subject to appeal	§215.11 Decisions subject to appeal
§215.11 Decisions and actions not subject to appeal	§215.12 Decisions and actions not subject to appeal
§215.12 Who may appeal	§215.13 Who may appeal
§215.13 Where to file appeals	[incorporated in §215.8]
§215.14 Appeal time periods and process	[redesignated at §215.15]
§215.15 Appeal content	§215.14 Appeal content
	§215.15 Appeal time periods and process
§215.16 Dismissal of appeal without review	§215.16 Dismissal of appeal without review
§215.17 Informal disposition	§215.17 Informal disposition
§215.18 Formal review and disposition procedures	§215.18 Formal review and disposition procedures
§215.19 Appeal Deciding Officer’s authority	[redesignated at §215.8]
§215.20 Appeal Reviewing Officer’s responsibilities	§215.19 Appeal Reviewing Officer

§215.21 Secretary's authority	§215.20 Secretary's authority
§215.22 Judicial proceedings	§215.21 Judicial proceedings
§215.23 Applicability and effective date	§215.22 Applicability and effective date
§215.24 Information collection requirements	[removed]

**Proposed section 215.1** discussed the purpose and scope of the rule.

*Comment.* Some of the respondents believed that the purpose should include a reference to the public law or statute that established the requirement for the rule; others wanted to know which phase of public comment was affected by this rule; and some wondered what scope of activities were covered, specifically activities concerning special uses.

*Response.* Every rule is required to cite its authority. The Authority citation (including the U.S. Code, public law, and statute) for this rule follows the table of contents and precedes §215.1.

The 30-day comment period provided for proposed actions documented in an environmental assessment (EA) is not a “phase of public comment” pursuant to the National Environmental Policy Act (NEPA). It is a separate action mandated by the Appeals Reform Act (ARA). In the case of proposed actions documented in a draft environmental impact statement (EIS), the requirements of the ARA for notice and comment utilize existing procedures in NEPA’s implementing regulations at 40 CFR parts 1503 and 1506.10 and agency policy in Forest Service Handbook (FSH) 1909.15.

In response to confusion about the scope of activities covered, specifically activities affecting special uses, the final rule clarifies in §215.1(b) that decisions which affect an authorized use or occupancy of National Forest System lands are subject to appeal procedures in either part 215 or part 251, subpart C, but not both. Also, in response to public comment, the final rule removes the issue preclusion language from paragraph (b); the proposed rule at §§215.1 and 215.15 would have limited appeals to those issues raised during the comment period. The reason for this change is discussed further under §215.15 below.

**Proposed section 215.2** clarified and revised definitions for specific terms used in the proposed rule. The proposed revision added six new definitions, removed three definitions, and revised and updated several other definitions from the 1993 rule.

*Comment.* Several comments were received regarding both the proposed changes and definitions without proposed changes. One definition that generated a number of comments, both supporting and disagreeing with the change, was emergency situation. Those supporting the proposed definition believe that the threat of substantial economic loss to adjacent communities and property owners, as well as the loss of resource value, should be factored into an emergency situation determination. Some of those commenting believed that it minimized the economic burden “shouldered by local communities” that “results from delayed decisions.” Those disagreeing with the proposed definition were unhappy that the definition had been broadened to include substantial loss of economic value as a factor in determining emergency situations. They believe this change places economic interests above environmental and social concerns. Others said that it would lead to increased logging because the definition has been broadened to the point that almost any timber sale would fit the new definition. Others believe that the new definition was arbitrary and capricious, and that it violated the ARA.

Some respondents wanted the reference “to the Government” omitted because potential economic losses to anyone should be considered. Others wanted the definition to apply to county- or State-declared emergencies because such actions are aligned with the Department philosophy of cooperation, consideration, and collaboration with local governments.

*Response.* The ARA does not provide a statutory definition for emergencies nor does it specify particular criteria for making such determinations. The definition in the 1993 rule attempted to provide the necessary guidance. Experience has shown there is a need for refinement and clarification because of the belief by some that emergencies were limited to those situations included as examples. The result has sometimes been additional taxpayer cost when timber could not be sold, but was still in need of removal for fuel reduction. Fire-impacted forest ecosystems and damaged watersheds impose a variety of environmental and economic costs to communities, particularly when immediate action is not taken. These implementation delays often result in lost opportunities for the Department to address resource problems in an environmentally sound and fiscally responsible manner. The Department believes the intent of an emergency situation determination is to allow immediate implementation of all or part of a proposed action when necessary to remedy these problems.

*Comment.* In addition to comments related to emergencies discussed above, one commenter suggested changing the definition of the Appeal Deciding Officer to specify that the Appeal Deciding Officer is only one level above the “decisionmaking officer’s” (Responsible Official) position.

*Response.* After careful consideration, the Department concurs. The Department believes that it is appropriate that the position deciding an appeal should be at the field level. The final rule reflects this change. A corresponding change is made in §215.8 Appeal Deciding Officer.

*Comment.* Other commenters believed there was a need for both further clarification and new definitions.

*Response.* The final rule adds 10 new definitions that did not appear in the 1993 rule. The final rule also revises 13 definitions, removes 4 definitions, and leaves 4 definitions unchanged from the 1993 rule. The Department believes these changes will help clarify the requirements and intent of the rule.

The 10 new definitions are: *Address, Appeal disposition, Emergency situation, Lead appellant, Name, National Forest System land, Newspaper(s) of record, Projects and activities implementing a land and resource management plan, Substantive comments, and Transmittal letter.*

The 13 revised definitions are: *Appeal, Appeal Deciding Officer, Appeal period, Appeal record, Appeal Reviewing Officer, Appellant, Categorically excluded (CE), Comment period, Decision documentation, Environmental Assessment (EA), Forest Service line officer, Proposed action, and Responsible Official.*

The 4 removed definitions are: *Decision document, Decision Memo, Interested party, and Proposed timber harvest categorically excluded from documentation under Forest Service Handbook 1909.12, section 31.2, paragraph 4.*

The 4 unchanged definitions are: *Decision Notice (DN), Environmental Impact Statement (EIS), Finding of No Significant Impact (FONSI), and Record of Decision (ROD).*

**Proposed section 215.3** discussed projects and activities subject to legal notice and opportunity to comment.

*Comment.* Respondents questioned the term “nonsignificant amendment to a land and resource management plan” (part 219) and whether “private party actions” are subject to this part.

*Response.* The term “nonsignificant amendment to a land and resource management plan” is a term used in the Department’s 1982 implementing regulation at part 219 for the National Forest Management Act (as discussed in the **Background** section). Any proposed action implementing a land and resource management plan and resulting in a Decision Notice (DN) or Record of Decision (ROD) is subject to part 215, including those referred to by respondents as “private party actions” and “private projects,” assuming that the respondents were referring to special use authorizations.

**Proposed section 215.4** revised current regulatory text concerning actions not subject to legal notice and comment. The proposed rule redefined *paragraph (b)* on categorical exclusions and added *paragraph (d)* addressing determinations by the Responsible Official concerning revision of an environmental assessment. **Proposed paragraph (a)** excluded from notice and comment draft environmental impact statements (EIS) because notice and comment procedures are provided pursuant to CEQ’s regulations at 40 CFR parts 1500-1508.

*Comment.* Those commenting believed that the rule should state that these documents are subject to notice and comment but clarify that it may be a different mechanism.

*Response.* After review of the comments, the Department concurs that it may be confusing to say that draft EISs are excluded from notice and comment. In the final rule, proposed paragraph (a) is now §215.3 (b) and the remaining paragraphs in §215.4 are redesignated accordingly.

*Comment.* Respondents requested clarity or questioned all of the actions not subject to legal notice and comment. *Proposed paragraph (b)*, which discussed proposed actions categorically excluded from documentation in an environmental assessment (EA) or environmental impact statement (EIS), generated the majority of the comments related to this section. Respondents supportive of this provision felt it was consistent with the intent and purpose of the ARA. Those opposed raised a variety of concerns, including their belief that categorical exclusions not being subject to this part would increase litigation, exempt a majority of projects from comment, and preclude proper analysis.

Some questioned specifically why Categorical Exclusion 4, Timber Harvest, is no longer included in this section.

*Response.* While respondents questioned all of the actions not subject to legal notice and comment, it should be noted that only one is new; the remainder have been in place since the rule was promulgated in 1993 (58 FR 58904). Regarding categorical exclusions (paragraph (b)), Congress did not express a specific intent regarding where the “line should be drawn” regarding which activities would be subject to notice, comment, and appeal. While both agency policy in FSH 1909.15 and regulations at 40 CFR 1508.4 made provision for public involvement in categorically excluded actions for many years prior to passage of the ARA, Congress knew that not every decision of the Forest Service was subject to appeal before they passed the ARA. There was no indication in the ARA that Congress intended to extend the notice, comment, and appeal requirements to all

classes of categorically excluded activities. This was a determination left to the discretion and judgment of the Secretary. It is evident in the language of the ARA that Congress granted the Secretary authority to establish a flexible process through rulemaking. The Department believes that Congress used the phrase “proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans” to delineate between administrative appeals of forest plans and project level decisions, rather than define a comprehensive or precise set of activities. Congress could, of course, have provided a specific definition; but Congress did not do so. The Department believes that both the current and revised regulations are within the scope of the Secretary’s delegated authority to establish a notice, comment, and appeal process as set forth in the ARA. Further, this assumption is supported by the fact that during the 10 years of implementation of the current regulations, Congress has not sought to amend the ARA to adjust the agency’s implementation.

It is important to note that, absent a statutory definition, the courts have recognized that agencies are free, indeed expected, to fill in the gaps and that such regulatory interpretations are due deference. Through the 1993 rulemaking process, the Secretary concluded that the Forest Service’s categorically excluded activities were generally not of the sort for which Congress intended to apply additional notice, comment, and appeal requirements given the generally minor potential for environmental effects. By their very nature, activities that have been categorically excluded generally have no significant environmental effect. Proposed actions that are categorically excluded were determined not to cross the NEPA “significance threshold” based on the agency’s experience, judgment, and analysis from implementing similar activities over many years. Therefore, they typically do not include preparation of extensive records; in fact, decision documents or project files are not required by Forest Service procedures to be maintained for many categorical exclusions. Congressional intent was to streamline the appeal process, not entangle the agency in a costly and time-consuming exercise for minor decisions by Forest Service decisionmakers. While projects and activities that the Forest Service categorically excludes are not subject to this rule, nothing in this part exempts them from NEPA. Agency procedures at FSH 1909.15, Chapter 10, section 11 state that, “Although the Council on Environmental Quality (CEQ) Regulations require scoping only for EIS preparation, the Forest Service has broadened the concept to apply to all proposed actions.” The Department believes that including affected and interested individuals in project planning early in the process is more effective than applying the additional procedures for notice, comment, and appeal contained in this rule and that applying the provisions of this rule to categorically excluded actions is neither intended nor required by the ARA. Thus, proposed activities that are categorically excluded are exempt from the final rule.

Regarding Categorical Exclusion 4, Timber Harvest, the preamble of the proposed rule discussed Categorical Exclusion 4 being removed because the Forest Service no longer used a timber harvest categorical exclusion of that nature. That situation remains true. However, subsequent to publication of the proposed revision to part 215, the Forest Service published proposals for new categorical exclusions for limited timber harvest (67 FR 1026, January 8, 2003) and for fire management activities (67 FR 77038, December 16, 2002). It is important to note that the proposed categorical exclusions are not of the same nature and not intended to replace the former Categorical Exclusion 4. These new

categorical exclusions are limited by size and application and are more specific about the types of harvest methods when compared to the Forest Service's former Categorical Exclusion 4. The proposed categorical exclusions are, therefore, much more limited in scope than the former Categorical Exclusion 4.

*Comment.* Several comments referenced the *Heartwood, Inc. v. United States Forest Service* litigation, Civ. No. 99-4255 (S.D. Ill).

*Response.* On September 15, 2000, a Federal District Court approved an agreement to settle litigation challenging the Department's 1993 regulations at 36 CFR part 215 implementing the ARA. In that agreement, the Forest Service agreed to provide notice, comment, and appeal opportunities for certain defined categories of projects and activities. The Forest Service agreed to make these procedural opportunities available, first through a nationwide directive published in the **Federal Register**. On October 17, 2000, the Forest Service, in compliance with section I(A) of the settlement agreement, published the nationwide directive in the **Federal Register** (65 FR 61302) announcing the terms of the settlement and notifying the public that notice, comment and appeal procedures would be applied to the projects and activities set forth in the settlement agreement for decisions made after October 24, 2000. Second, the Forest Service agreed to issue an interim final rule announcing the same procedural changes, with opportunity for public comment, within 5 months from the date the District Court issued an order approving the terms of the settlement. The settlement anticipated that a subsequent rulemaking process, with an opportunity for public comment, would supersede these interim procedures.

On September 27, 2000, several groups filed motions with the District Court to intervene and set aside the settlement agreement. The District Court subsequently allowed the intervention and on February 6, 2001, the District Court vacated the order approving the settlement agreement. In response, the Forest Service reinstated the procedures for notice, comment, and appeal, as they existed prior to the settlement. The Heartwood plaintiffs appealed the District Court's orders involving intervention and setting aside the settlement agreement. On January 14, 2003, the United States Circuit Court of Appeals for the Seventh Circuit reversed and remanded the District Court's intervention order and vacated the District Court's February 6, 2001, order that vacated the settlement agreement.

During the pendency of the Heartwood appeal in the Seventh Circuit, the Forest Service commenced the current rulemaking process. This process was envisioned by the parties to the settlement as a final step in addressing the Forest Service's 1993 rule governing notice, comment, and appeal procedures at part 215. In other words, the Heartwood settlement resolved those plaintiffs' legal challenge to the Forest Service's 1993 rule for notice, comment, and appeal at part 215 by establishing interim procedures that provided additional notice, comment, and appeal opportunities for a set of defined types of activities, that, under the 1993 rule, would not be required. These interim measures, however, would remain viable only as long as the 1993 rule was in place.

Prior to the District Court's vacation of the settlement and subsequent to the Seventh Circuit's reinstatement of the settlement, the Forest Service began implementation of the settlement agreement's "initial commitment" phase allowing for notice, comment, and appeal of certain projects and activities that may not have been previously subject to these procedures. However, the current rulemaking for part 215

constitutes a step anticipated by the settlement agreement whereby the Forest Service would promulgate new regulations that would replace both the existing regulations and the interim measures set forth in the settlement agreement. This rulemaking was commenced during the time that the settlement agreement was vacated, but was anticipated by all parties as a final step that would supersede the interim procedures provided by the settlement agreement. Therefore, upon the effective date of this final rule, the Forest Service will cease to implement the procedures set forth in the “interim” provisions and the settlement agreement will no longer have any applicability.

*Comment.* Other paragraphs in §215.4 that generated comments were proposed paragraphs (d), (e), and (f). Some commenters felt that determinations not to revise an EA or supplement an EIS, based on new information or changed circumstances, should be subject to notice, comment, and appeal. Comments related to proposed paragraph (e) included the belief that Forest Service Manual and Handbook changes should be subject to this rule. Those expressing concerns about proposed paragraph (f) questioned why nonsignificant amendments to a land and resource management plan made separately were excluded from notice and comment.

*Response.* With regard to proposed paragraph (d), determinations regarding whether or not to revise an EA are not “decisions” of the nature discussed in the ARA. Guidance for making such determinations is found in FSH 1909.15, Chapter 10, section 18. With regard to paragraph (e), changes to the Manual and Handbooks are not subject to this part because they also are not projects or activities implementing a land and resource management plan. Similarly, in regard to proposed paragraph (f), these types of amendments are not associated with a proposed action; therefore, they are not the type of decision discussed in the ARA. However, as discussed above, they are subject to either the objection process of §219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (see 36 CFR parts 200 to 299, Revised as of July 1, 2000).

**Proposed section 215.5** described the requirements for legal notice of proposed actions and the opportunity to comment. **Proposed paragraph (a)** gave the Responsible Official discretion to determine the most effective timing for providing the 30-day comment period.

*Comment.* Those favoring the proposed change believed that it would help focus participation earlier in the process and allow for more effective decisionmaking. Those who disagreed thought the proposed change would reduce the public’s ability to be involved, was contrary to NEPA, and were concerned that it would be applied unevenly. Some respondents wanted a longer comment period, while others wanted a shorter one.

*Response.* It is critical to achieving the goals of the ARA that those interested in or affected by a proposed action make their concerns and objections known to the Responsible Official when they can be considered and responded to meaningfully, i.e., before a decision has been made. The change in the final rule is intended to clarify and highlight this important point. And, allowing the Responsible Official flexibility in determining when to give legal notice for the opportunity to comment meets the intent of the ARA. It provides a clearly defined, uniform period when public comment on specific Forest Service projects and activities is solicited. Comments referring to the “removal of the current two or three scoping periods allowed presently” lead the Department to believe further clarification is needed here to differentiate between the notice and

comment provisions of this rule pursuant to the ARA and scoping pursuant to NEPA. The 30-day comment period in this section meets the requirements of the ARA. This rule is not related to nor does it affect anything in the implementing regulations for NEPA (40 CFR parts 1500-1508) or agency policy in FSH 1909.15. Further, nothing in the proposed rule or this final rule inhibits public participation in project planning. In the case of EISs, the Department has chosen to meet the ARA requirements by utilizing the notice and comment period on a draft EIS required by 40 CFR parts 1503 and 1506.10 rather than provide two separate comment periods. Forest Service Handbook 1909.15 and 40 CFR parts 1500-1508 do not specify a comment period for EAs.

*Proposed section 215.5, paragraph (b)* described giving notice. One proposed change was that the actual date the comment period ended would not be stated in the legal notice. Other changes included a provision for accepting electronic comments, specifying that the 30 days could not be extended, and noting that appeal eligibility is tied to providing substantive comments during the 30-day comment period.

*Comment.* Those responding had concerns about not publishing the actual end date of the comment period in the legal notice and not allowing for extension of the 30-day period.

*Response.* Currently, the rule directs that the last date for submission of public comment must be published. As a result, in many cases the agency has had to estimate the date of publication when preparing legal notices. While the agency can request that newspapers publish legal notices on a certain date, a publication date is not guaranteed. When publication occurs on a different date than estimated, the result has been conflicting dates and confusion. The Department believes that removing this requirement resolves the potential for conflicts and leaves all parties with the same information.

In the final rule, proposed paragraph (b)(1)(iv) is modified to apply only to proposed actions documented in an EA. A new paragraph (b)(1)(v) is added for proposed actions documented in draft EISs, and the remaining subparagraphs are redesignated accordingly. These changes are made to accommodate the change discussed in §215.4 above. New paragraph (b)(1)(vii) is modified to say that the legal notice shall include the business hours for the Responsible Official's office for those wishing to hand-deliver their comments. The final rule also modifies paragraph (b)(2)(ii) to state that if the proposed action is a Regional Forester or Chief's decision, notice shall be given in the appropriate newspaper(s) of record for the affected Forest Service unit(s) and to explicitly state that the newspaper of record is the exclusive means for calculating the time to submit comments for EAs and the Notice of Availability in the **Federal Register** is the exclusive means for calculating the time to submit comments for EISs. Here and throughout the rule, the term "principal newspaper" is changed to "newspaper of record." While the term "principal newspaper" has been used since the rule was promulgated, the Department believes the term "newspaper of record" better defines this concept.

*Proposed section 215.5, paragraph (c)* described the requirements regarding the content of comments, including the submission of substantive comments. Other changes included requiring signatures and clarifying where and how oral comments will be accepted. Also included was a provision noting that if an organization provides comments, then only the organization is eligible to appeal. Individual members of the organization would not be eligible to appeal simply by membership in that organization.

*Comment.* Those supporting the changes thought they would be instrumental in ensuring the Forest Service is aware of who is providing comments and their specific issues. Those disagreeing with the changes expressed concerns regarding the signature requirement and oral commenters. Several respondents questioned why an organization's comments did not apply to an individual member's appeal.

*Response.* Because appeal eligibility is linked to commenting, the Department must be able to verify who submitted substantive comments. However, after reviewing the public comment on the proposal to require a signature, the final rule clarifies that verification of the commenter's identity is required for appeal eligibility but that a signature will normally satisfy that requirement. If a signature is not provided or is illegible, the commenter may be asked to verify authorship. With regard to those who provide oral comments, the final rule addresses the concern of verification in the same manner as those providing comments by other means.

Concerning the comments about why an organization's comments did not apply to an individual member's appeal eligibility, the ARA discusses "a person who was involved in the public comment process through submission . . . of written or oral comments." The Department believes an organization is its own entity for purposes of submitting comments. There is nothing in this section that prohibits individual members of an organization from submitting the same or similar comments.

After additional review of the proposed rule, the Department determined it would add clarity if the requirements for legal notice were separate from the requirements for commenting. Therefore, in the final rule this section is now titled "Legal notice of proposed actions" and is reorganized. Paragraph (a) outlines the Responsible Official's duties and paragraph (b) describes legal notice procedures. While paragraph (a) is new, the contents are not. Proposed paragraph (c) is moved to §215.6.

**Proposed section 215.6** set out procedures for the consideration of comments, emphasizing that while the Responsible Office accepts all comments, only substantive comments would be considered for project planning purposes.

*Comment.* The proposed requirement that comments must be substantive generated a number of comments. While some were supportive, "a must to have responsible and constructive comments," the majority did not support this change. Those disagreeing gave a variety of reasons, including: the definition for "substantive comment" was too vague; it limited the public's ability to participate; substantive issues may arise after the comment period is past; the Department would label comments in opposition to the proposed action as non-substantive and therefore unfairly limit the public's ability to appeal; and the Department wants to reduce the number of comments it has to consider. The question of who would decide whether or not a comment was substantive was also asked.

*Response.* As discussed in a Congressional colloquy during enactment of the ARA and in the **Federal Register** notice announcing the proposed revision to this rule (67 FR 77451), the notice and comment period is intended to solicit information, concerns, and any issues specific to the proposed action and to provide such comments to the Responsible Official before the decision is made. Experience has shown that when comments are received that are not within the scope of the proposed action or are not specific to the proposed action, or do not include supporting reasons for concerns, they are not useful for consideration in project planning. The intent in requiring substantive

comments is to obtain meaningful and useful information from individuals about their concerns and issues, and use it to enhance project analysis and project planning. If new information comes to light after the decision, the agency provides guidance for this eventuality in FSH 1909.15, Chapter 10, section 18.

In the final rule, this section is now titled “Comments on proposed actions.” Paragraph (a) discusses the opportunity to comment in terms of time period, computation of the time period, comment requirements, and evidence of timely submission (proposed §215.5(b)(5)). In conjunction with the changes discussed in proposed §215.4 and §215.5 concerning draft environmental impact statements (EIS), the final rule modifies paragraph (a)(1)(i), addressing only environmental assessments (EAs); adds a new paragraph (a)(1)(ii) addressing draft EISs; and redesignates the remaining paragraphs accordingly. Paragraph (a)(2) is modified to accommodate computation of both time periods. Paragraph (a)(4)(i) is rewritten to clarify the difference between EAs and EISs as discussed earlier and to indicate that the end of the calendar day is 11:59 p.m.; paragraph (4)(ii) is clarified to indicate that for hand-delivered comments the end of the calendar day is the close of the business day; and paragraph (4)(iii) is rewritten to be consistent with the e-mail provisions in §215.15 (c), clarifying that when comments are submitted electronically, the sender should receive an automatic acknowledgment. This was an oversight in the proposed rule. The final rule revises the definition of the term “substantive comments” (§215.2) to clarify the meaning and address the concerns about this definition. And, §215.5(a)(6) clarifies that it is the Responsible Official’s responsibility to determine if comments received meet the definition of “substantive comments.” Paragraph (b) discusses consideration of comments (proposed §215.6).

**Proposed section 215.7** detailed the content of the legal notice for the decision. **Proposed paragraph (a)** changes included a provision that the ending date for the appeal period would not be stated in the legal notice and a provision for acceptance of electronic appeals.

*Comment.* Concerns similar to those expressed for §215.5 regarding legal notice, were expressed in regard to not having the deadline to file an appeal stated in the legal notice. Those wanting the deadline published said it is just as easy for the Forest Service to calculate as it is for members of the public and that not publishing it places an undue burden on potential appellants. Some respondents stated that the appeal period should start when the appeal decision is made; others wanted it to state that a dated photocopy of the legal notice is an exception to not using information provided by any other source. Some commenters objected to what they described as the Forest Service requiring them to subscribe to each newspaper of record for every Forest for which they have an interest. Some respondents stated that the appeal period should start when the appeal decision is made.

*Response.* While the Department is sympathetic to those having to subscribe to several different newspapers of record, the requirement for publishing the legal notice in the newspaper of record is not a change. The Department believes the rule as stated is the most accurate method for potential appellants to know the filing end date. The Department made the decision to link the appeal period to publication of a legal notice when the final rule was promulgated in 1993 to give those wishing to appeal the benefit of a level playing field, even though the ARA does not require a notice as it does for requesting comments. There is no need to address acceptance of a dated photocopy of

the legal notice because nothing in this paragraph prohibits it. In fact, the legal notice is the exclusive means for calculating the time to file an appeal. The reasons for not stating the date of publication in the legal notice are addressed in the response to §215.5. The Department believes that past inconsistencies in informing the public of the correct date resulted in more problems than will occur with having the appellant calculate the appeal filing deadline.

**Proposed section 215.7, paragraph (b)** required the decision documentation to be mailed to those who requested it and those who commented.

*Comment.* Respondents questioned when the mailing of the decision document would occur, being of the opinion that it should occur before the legal notice so that time would not be lost within the 45-day appeal period. Other respondents wanted a requirement that each unit keep a list of persons who are interested in Forest Service decisionmaking and mail them a copy of all decisions.

*Response.* Inadvertently, the order of the paragraphs made it appear that the notice would be published prior to mailing the decision notice. In the final rule, proposed paragraphs (a) and (b) are reversed to indicate that the documents should be mailed prior to the legal notice being published. New paragraph (b)(2)(i) is modified to include the business hours for the Deciding Officer's office for those wishing to hand-deliver their appeals and paragraph (b)(2)(ii) now states that the newspaper of record is the exclusive means for calculating the time to submit comments. Maintaining a list of persons interested in Forest Service project planning is outside the scope of this rulemaking. However, some units may choose to maintain such a list.

**Proposed section 215.8** discussed decision implementation.

*Comment.* Comments were received on proposed paragraph (b), opposing automatic stays of projects during the appeal process.

*Response.* The stay provisions in paragraph (b) implement a statutory requirement of the ARA and cannot be changed. In the final rule, paragraph (a) is rewritten for clarity and proposed §215.8 is now §215.9.

**Proposed section 215.9** set out procedures for emergency situations in a separate section for ease of use in finding all pertinent information quickly. Additionally, the proposed rule clarified that an emergency situation determination can be delegated to the Regional Forester or Station Director, and the examples were removed.

*Comment.* Those supporting the proposed change stated that it made sense to place the decision at the local level with those familiar with the situation and that it would improve the Forest Service's ability to address emergency situations in a timely manner. Some of those not supporting this change said they believed that it was not allowed by the ARA and expressed the concern that it may not be equally applied and could be abused. Some of those commenting asked that some of the examples be retained.

*Response.* Authorities granted by statute to the Chief may be delegated to subordinate officials within the Forest Service to carry out, unless the Chief specifically reserves the authority or is prohibited by law, regulation, or order from delegating the authority. The ARA does not prohibit delegation of the authority granted by this act. Delegations of authority and responsibility to Forest Service officials are provided in the agency's regulations and directives, with the broad delegations set out in Forest Service Manual (FSM) chapter 1230. This chapter delegates to the Associate Chief the authority to perform all duties and exercise all functions vested in the Chief (except for those the

Chief reserves or is prohibited from delegating). The final rule has been revised to acknowledge that the Associate Chief, by virtue of the authority inherent in this position, is authorized to carry out the Chief's responsibilities related to determinations of emergency situations. The final rule also identifies the officials to whom the Chief or Associate Chief may delegate the authority for emergency situation determinations. The Secretary of Agriculture and the Chief expect those responsible for making emergency situation determinations as provided in this rule do so in a judicious manner, applying the provisions of this rule in a professional and equitable way.

The final rule clarifies that the Chief or the Associate Chief may delegate the authority for making emergency situation determinations and that this authority may be delegated only to the Deputy Chief for National Forest System and Regional Foresters. The rule also clarifies that persons acting in these positions may exercise this authority for making emergency situation determinations only when they are filling vacant positions and have been formally delegated full acting authority for the positions; persons acting in positions during temporary absences of the incumbents shall not be delegated this authority. Station Directors were inadvertently included in the proposed rule, and this reference is removed in the final rule. Also, proposed §215.9 is redesignated §215.10 in the final rule; paragraph (a) is split in the final rule into paragraph (a), titled Authority, and paragraph (b), titled Determination.

*Comment.* Some of those commenting wanted clear standards established for making emergency situation determinations. Some respondents thought that the determination should be subject to appeal, while other respondents suggested that appeals should not be allowed when an emergency situation determination has been made. Some respondents commented that when an emergency situation is not stayed it should be declared the final agency action so that the appellant is free to go to court.

*Response.* There is no indication that Congress intended that the determination itself would be subject to appeal. The final rule sets out the procedures and criteria by which agency officials will determine whether an emergency situation exists. The ARA itself makes an exception to the automatic stay provision for emergency situations. While the determination that an emergency situation exists eliminates the automatic stay, it does not exempt the activity from appeal.

***Proposed section 215.9, paragraph (b)*** clarified when implementation of the project or activity may begin and differentiated between decisions documented in a ROD and a DN.

*Comment.* Some commenters suggested that the implementation requirements for decisions documented in a DN be the same as for a ROD.

*Response.* The regulations at 40 CFR 1506.10(b)(2) govern implementation of decisions documented in a Record of Decision. However, this rule governs implementation of decisions documented in an appeal. In the final rule, this paragraph is now paragraph (c) of §215.10.

***Proposed section 215.9, paragraph (c)*** clarified how legal notice for emergency situations would occur.

*Comment.* This paragraph elicited concern that the Responsible Official could notify the public of emergency situation determinations only when the legal notice of the decision was published.

*Response.* The Responsible Official has the discretion to request an emergency situation determination as the need arises. However, if an emergency determination has been requested or determined when public comment is sought on a proposed action (§215.5), then the Responsible Official is required to so state in the legal notice. In the final rule, this paragraph is now paragraph (d) of §215.10.

*Comment.* As noted in §215.2 above, the proposed rule included substantial loss of economic value as a consideration in determining an emergency situation. Some respondents commented that the Department has not demonstrated the need for using economics as a factor in emergency situation determinations. Quite a few comments disagreed with adding economic considerations as a factor in determining an emergency situation.

*Response.* These comments are addressed earlier in §215.2.

The final rule designates proposed §215.9 Emergency situation as §215.10.

**Proposed section 215.10** addressed decisions subject to appeal. Two paragraphs were added: **paragraph (a)(2)** concerning new decisions resulting from new information or changed circumstances and **paragraph (a)(3)** concerning decisions affecting National Forest System lands made in conjunction with other Federal agencies.

*Comment.* Commenters responding to *proposed paragraph (a)(2)* expressed the opinion that if a new decision results from new information or changed circumstances, then the entire decision should be subject to appeal, not just the portion that changed.

*Response.* Agency guidance in FSH 1909.15 Chapter 10, section 18 provides that upon completion of a revised EA, the original decision must be reconsidered based on the EA and FONSI. When a Responsible Official issues a new decision, it may address all or a portion of the original decision. It is this new decision that is subject to appeal.

*Comment.* Some respondents suggested that *proposed paragraph (b)*, regarding holders of special use authorizations, should be deleted. They believed that it allowed such parties to appeal the same decision twice using the two appeal processes.

*Response.* It is appropriate to have paragraph (b). Many decisions affecting special use authorizations implement a land and resource management plan, meeting the intent of the ARA. Allowing a holder of a permit to choose between part 251, subpart C and this rule does not make two methods of appeal available. Paragraph (b) specifically says that holders may use one appeal process or the other but not both for a given decision.

In the final rule, proposed paragraphs (a)(1)-(3) are designated (a)-(c), proposed paragraph (b) is designated (d); and proposed §215.10 is designated §215.11.

**Proposed section 215.11** listed decisions not subject to appeal. Two new paragraphs were added in the proposed rule: (b) new information not requiring a new decision, and (g) concurrences and recommendations to other Federal agencies.

*Comment.* Some of those commenting on the proposed section requested that additional types of decisions be included in this section. They cited the following: emergency situations; catastrophic damaged timber; certain low impact operations; decisions that may affect treaty rights and trust resources (federally recognized Indian tribes); and a determination that a new decision is not needed when an EIS is modified (paragraph (b)). Other respondents thought there should be fewer decisions listed, citing all the decisions currently not subject to appeal.

*Response.* The decisions and actions listed in §215.11 as not subject to appeal, with the exception of paragraphs (b) and (g), have been in effect since 1993. The Department has reviewed what is listed, as well as the additions and deletions suggested, and believes those listed in the final rule meet the intent of the ARA.

*Comment.* A number of commenters said they believed that *proposed paragraph (e)* regarding categorical exclusions should not be included.

*Response.* Similar comments were received about categorical exclusions not being subject to notice and comment. All comments concerning categorical exclusions are addressed in §215.4.

*Comment.* Some of those commenting believed that the addition of *proposed paragraph (g)* regarding concurrences and recommendations to other Federal agencies, meant that Forest Service “terms and conditions” under Section 4(e) of the Federal Power Act (FPA) would no longer be appealable under this rule.

*Response.* This paragraph was added to clarify situations when the agency was asked for concurrences and/or recommendations on other Federal agencies' projects where the Forest Service had no jurisdiction for making a decision. The preamble for the proposed rule incorrectly referred to "concurrences and recommendations *from* other agencies" instead of "concurrences and recommendations *to* other agencies” as stated correctly in the text of the proposed rule.

The addition of proposed paragraph (g) "concurrences and recommendations to other agencies" has no bearing upon the Forest Service's issuance of terms and conditions under section 4(e) of the FPA. The proposed language was intended to clarify that there would be no appeal opportunity in those instances where the Forest Service is only concurring with another agency's decision or issuing non-binding recommendations. The proposed language of paragraph (g) is inapplicable in the FPA context, as the Forest Service's issuance of 4(e) terms and conditions does not constitute a "concurrence" with the Federal Energy Regulatory Commission's (FERC's) licensing decision and is binding in nature. The Forest Service is in the process of reviewing its Hydropower Manual and Handbook, in coordination with the current ongoing FERC hydropower licensing rulemaking and will clarify portions addressing NEPA disclosure documents.

Additional comments on section 4(e) terms and conditions of the FPA were beyond the scope of this rule; e.g., comments suggesting how the Forest Service should develop 4(e) terms and conditions and what should and should not be included. These comments were referred to appropriate agency officials.

The final rule makes clear in paragraph (a) that if an amendment, revision, or adoption of a land and resource management plan has a project embedded in it, the project decision will be subject to this rule after the appeal/objection process is completed on the land and resource management plan decision. Proposed §215.11 is designated as §215.12 in the final rule; paragraph (c) is split and a new paragraph (d) is added; and paragraphs (d) through (g) in the proposed rule are redesignated as (e) through (h) in the final rule.

***Proposed section 215.12*** designated who can appeal. The proposed revision removed the provision for “interested party” because the Department does not believe the provision fulfills the intent of the ARA.

*Comment.* Comments both supported and opposed this change. Those supporting the change stated that interested parties should be involved early in project planning.

Those opposed believed that this change could lead to more appeals and that it would restrict public involvement. They believed there is no other way for non-appellants to be involved in settlement meetings with appellants. Others said that interested parties provide helpful information to the Reviewing Officer. Some of those commenting believed that the appeal process was a continuation of public involvement. There was a suggestion that parties who receive funding from the Forest Service or who have a contractual involvement with the proposed action should not be allowed to appeal Forest Service decisions.

*Response.* The ARA provides distinct provisions regarding predecisional notice and comment and post decisional appeal opportunities. The intent is for interested persons to participate early in the project planning process and not wait until after the decision has been issued to become involved. While the appeal process is an opportunity to voice concerns about a decision, it is more advantageous to both the Responsible Official and the public for those who have helpful and important information that could affect a decision, to bring it forward during project planning. The belief that informal disposition meetings between the Responsible Official and an appellant are “settlement agreement meetings” is a misconception. The informal disposition meeting between an appellant(s) and Responsible Official is not for the purpose of making a new decision. Rather, it is an opportunity for the Responsible Official and appellant(s) to discuss the appeal, agree on facts, and explore opportunities to resolve the issues by means other than formal review and decision on the appeal. As an example, there have been occasions when appellants had a better understanding of the decision after meeting with the Responsible Official and withdrew their appeal.

***Proposed section 215.12, paragraph (a)*** restricted appeal eligibility to those who submitted substantive comments during the comment period and included a provision making it clear that membership in an organization submitting comments on behalf of the organization does not grant appeal eligibility to individuals with membership in that organization.

*Comment.* Those supporting the change stated that it facilitated the intent of the ARA and strengthened constructive and meaningful public participation. Some respondents suggested that the Forest Service should impose additional requirements for those who wish to appeal. Those opposing the change cited such reasons as substantive comments are not easily defined; it denies “standing” to appeal to persons who submitted comments deemed to be nonsubstantive or “expressed an interest”; and it was not right to not allow individual members of an organization to appeal when the organization submitted comments because the organization represents its members.

*Response.* The Department believes that an “expression of interest,” such as someone who simply requests a copy of the decision, does not meet the Congressional intent for participation by those who have the “right to appeal” as expressed in the ARA language. This conclusion is based on a reading of those portions of the ARA and the Congressional colloquy regarding the appeal process, which make clear that an individual’s participation in the statutorily mandated public comment period is required to establish standing to appeal. One of the basic goals of this rulemaking was to encourage early and meaningful public participation when it is most useful to the Responsible Official during project planning. The proposed rule restructured both the comment and appeal procedures to encourage early and meaningful public involvement

by requiring the submission of substantive comments and linking appeal eligibility to those who submitted substantive comments. The Department believes it is appropriate to require individual members of an organization to meet appeal eligibility standards. The ARA itself does not mention “organizations”; it makes reference to “a person who was involved in the public comment process.” However, as discussed in the response to similar comments in §215.5, the Department has always considered an organization the same as a “person.” While the Department believes it is appropriate to accord an organization eligibility to appeal as an organization when it submits substantive comments, it is not appropriate to give individual members in that organization appeal eligibility just because their organization submitted comments.

**Proposed section 215.12, paragraph (b)** clarified that if an appeal listed multiple names or multiple organizations, each individual or organization listed must meet the test of having submitted comments during the comment period.

*Comment.* One commenter asked if a new group formed of individuals and groups who provided comments could appeal.

*Response.* The ability to appeal as a newly formed group rests on whether each member of the group met the comment requirements as individuals during the notice and comment period.

**Proposed section 215.12, paragraph (c)** does not allow Federal agencies to appeal.

*Comment.* Those who commented on this paragraph suggested Federal agencies should have the opportunity to appeal under this part.

*Response.* Other avenues are available to Federal agencies for working through concerns they might have with a proposed action. It is more appropriate, and in fact expected, that the Department and other Federal agencies work cooperatively during project planning.

**Proposed section 215.12, paragraph (d)** allowed Federal employees to appeal as individuals but limited the information they could use to that information already released to the public.

*Comment.* One commenter was opposed to the limitation, stating that information available under the Freedom of Information Act (FOIA), even if not released to the public, should be available to Federal employees to use.

*Response.* The Department agrees, and this was the intent of the proposed paragraph. The final rule clarifies this point. Additionally, the final rule clarifies that the requirements of paragraph (a) of this section must be met also.

In the final rule, proposed section §215.12 is designated as §215.13.

**Proposed section 215.13** set forth where appeals are filed.

*Comment.* One supportive comment was received for the inclusion of Research Station Directors as Responsible Officials.

*Response.* In the final rule, the table in proposed §215.13 showing Appeal Deciding Officers is revised to reflect the change discussed in §215.2. In past appeal rules, appeals were filed with the decisionmaker’s direct supervisor. When the 1993 rule was promulgated, the Forest Service thought a more centralized approach would promote both better and more efficient appeal decisionmaking. However, the ARA did not require elevating decisions to a central point. The current rule has had unintended adverse consequences. With the agency’s decentralized organization, it has interfered with the

healthy relationship existing in the chain of command as well as creating disincentives for collaboration at the decisionmaking level. Therefore, in the final rule, the Appeal Deciding Officer is the next level above the Responsible Official. And, proposed §215.13 and proposed §215.19 are combined and designated §215.8, titled Appeal Deciding Officer. This change is made to set forth all the information concerning the Appeal Deciding Officer in one section.

**Proposed section 215.14** discussed appeal time periods and process.

*Comment.* Some comments suggested additional changes such as creating a specific entity to hear Forest Service appeals, similar to the Department of the Interior Board of Land Appeals; requiring a filing fee for appeal submission (to be returned if appeal is upheld); setting a penalty proportional to any timber devaluation as a result of delays caused by appeals that are not upheld; and setting higher fees for Freedom of Information Act (FOIA) requests.

*Response.* The Department did not address the requested changes because they are beyond the scope of this rulemaking and/or existing authorities granted to the Department.

**Proposed section 215.14, paragraph (a)** set out the time period for appeals to be filed. **Proposed paragraph (b)** described the computation of the 45-day period, which includes weekends and holidays.

*Comment.* Some commenters suggested changes or flexibility in filing period and in how the 45-day period is calculated, i.e., not counting holiday or weekend days in the 45-day calculation.

*Response.* The ARA specifically provides that appeals must be filed within 45 days.

**Proposed section 215.14, paragraph (c)** described evidence for timely filing, including filing appeals electronically.

*Comment.* One comment supported electronic filing of appeals, while another said that electronic appeals should not be allowed since an appellant should make the effort to sign an appeal. One comment suggested the rule address what happens if the Forest Service's "email goes down." Respondents also questioned how to determine when an appeal is due.

*Response.* The proposed rule discusses how timeliness (45 days) is determined for each of the methods available for filing appeals. Concerning the specific requests for addressing potential problems with various means of delivery, the rule is not the appropriate place to address possible scenarios. Each circumstance is more appropriately addressed on a case-by-case basis. The final rule stipulates that if appellants do not receive an automatic acknowledgment electronically that their filing was received, it is their responsibility to file a timely appeal by some other method.

**Proposed section 215.14, paragraph (d)** specified that there will be no time extensions.

*Comment.* Several commenters thought that provision should be made allowing for extensions under certain circumstances.

*Response.* The ARA does not provide for time extensions. In the final rule, paragraphs (a) and (c) are rewritten for clarity and paragraph (d) now requires the Responsible Official to include a list of individuals and organizations who submitted

substantive comments during the comment period. This change is linked to appeal eligibility and dismissal. And, proposed §215.14 is designated §215.15.

**Proposed section 215.15** described appeal content. **Proposed paragraph (b)** of this section and proposed §215.1(b) limited appeal issues to those raised during the comment period.

*Comment.* Commenters responding to this proposed paragraph expressed both support and disagreement with the limitation. Some respondents suggested that appeal issues should be limited to those that have a significant effect on the environment, or should be limited to violations of law, regulation, or policy. Those who disagreed expressed several concerns: the inability to raise issues in an appeal that might not arise until after the comment period; changes between a draft and final EIS; the FONSI determination; and loss of the ability to challenge the record.

*Response.* Limiting appeal issues to those raised during the comment period was proposed as a means of encouraging early participation in project planning rather than raising concerns for the first time after a decision is made. However, after reviewing comments, the Department understands and agrees with the concerns. The final rule removes the requirement from this section and §215.1 that precluded issues from being raised in an appeal that were not raised during the comment period and paragraph (b) of this section is further rewritten and reorganized. And, as discussed in §215.19 below, paragraph (b)(3) now asks those filing an appeal with more than one individual or organization to identify a lead appellant as defined in §215.2.

**Proposed section 215.15, paragraph (c)** addressed non-acceptance of an appeal.

*Comment.* Those commenting opposed not accepting an appeal without a signature, and questioned how authors of electronic appeals will be verified. Additional criteria for not accepting appeals were suggested also.

*Response.* After consideration of the comments, this paragraph has been rewritten in the final rule clarifying the intent of requiring a signature. The phrase “not accept” is replaced with “not process,” reflecting what was actually intended by “not accept.” It is important for the Department to know the identity of appellants and how to contact them. Not having this information has caused problems in the past. The final rule makes clear that if an appeal is filed and the appellant cannot be identified, and a way to contact the appellant has not been provided, the appeal will not be processed. Further, paragraph (c)(1) is added to clarify that if an appeal is deemed illegible for any reason, it will not be processed. The suggested additional criteria for not accepting appeals (a notarized signature, copy of site visit certification, and description of economic or environmental impact the appellant will suffer by approval of the proposed action) are contrary to the ARA. Proposed §215.15 is designated §215.14 in the final rule.

**Proposed section 215.16** detailed when an appeal would be dismissed. It added allowing dismissal when an appellant withdraws an appeal.

*Comment.* All of the comments were in the form of suggestions for additional reasons to dismiss or to delete some of the reasons for dismissal. One commenter cautioned that dismissal without review for reasons of insufficient information should be employed judiciously (paragraph (a)(8)).

*Response.* Many of the suggestions do not comply with the ARA. The Department agrees that proposed paragraph (8) should be used only with great care. Concerning paragraph (a)(1), it was not the intent of the Department to imply in the

proposed rule that if an attachment is untimely, the appeal itself is untimely and would be dismissed. Therefore, the final rule makes clear in paragraph (b) that any additional information that is untimely will not be considered as a part of the appeal. Proposed paragraph (b) is designated paragraph (c).

**Proposed section 215.17** discussed the informal disposition process.

*Comment.* Two general suggestions were received. One suggested clarifying whether the Responsible Official is to meet with each of the appellants together or separately. A second suggested making a specific provision for all appellants and interested parties to communicate with the Responsible Official during the informal disposition process.

*Response.* The Department believes there is a better chance of achieving a successful outcome if the rule does not regulate how such meetings are conducted but rather allows the Responsible Official maximum discretion and flexibility in holding informal disposition meetings. Neither does the Department see a need to impose further regulatory requirements regarding communications between the Responsible Official and the appellant.

**Proposed section 215.17, paragraph (a)** discussed the Responsible Official's responsibility to contact the appellant with an offer to meet.

*Comment.* One comment suggested that the Responsible Official be required to contact each appellant when an appeal listed multiple names, while another wondered what the phrase "as soon as practicable" meant.

*Response.* The question about contacting each appellant from an appeal listing multiple names or organizations is clarified in the final rule and explained more fully in §215.15 above and §215.19 below. The phrase "as soon as practicable" means there is an expectation that it will be done at the earliest possible time.

**Proposed section 215.17, paragraph (b)** discussed the time and location of informal resolution meetings.

*Comment.* Comments requested that the Forest Service build discretion into the requirements to ensure that meetings are in a location convenient and accessible to all parties; that time extensions for the initial meeting should be allowed if all parties agree; and a deadline for completion of the informal disposition process should be specified.

*Response.* While not specifically requiring meetings in a location convenient and accessible to all parties, the agency believes this request is met with the requirement that meetings should generally be held at a location within or near the National Forest. However, when that is not possible, this paragraph allows for teleconference. Concerning the timeframe comments, the ARA statutorily sets the 15-day requirement for meeting. The timeframe for completing informal disposition meetings is limited only by the 45-day requirement for the appeal disposition to be completed.

**Proposed section 215.17, paragraph (c)** discussed the structure of the meeting.

*Comment.* Many of the comments received discussed who participates in the informal disposition meeting, including allowing "other participants" at informal disposition meetings and having the meeting open to the public. Other comments requested that the recording of informal disposition meetings and telephone meetings be allowed.

*Response.* After reviewing the comments and the intent of the informal disposition meeting as previously discussed earlier in this section, the final rule omits the

reference to “any other participants.” However, meetings are still open to the public. Telephone meetings are allowed. Recording of informal disposition meetings is allowed; however, submitting the tape to the Reviewing or Deciding Official is not because the Reviewing Official’s recommendation and Deciding Officer’s appeal disposition must be based on the same information that was available to the Responsible Official, as well as the appeal.

***Proposed section 215.17, paragraph (d)*** described outcomes.

*Comment.* There was a suggestion about the “Forest Service making a good faith effort to resolve the appeal” should be addressed, and a suggestion to eliminate the requirement for the Responsible Official to advise the Appeal Deciding Officer when an appellant declines to meet. One comment pointed out an inconsistency between paragraphs (d)(1) and (d)(3).

*Response.* The Department expects Responsible Officials to meet the intent of the ARA and put forth a good faith effort to achieve a successful outcome at the informal disposition meeting. However, it does not see the need to regulate this expectation. The requirement for the Responsible Official to provide information on the outcome of the informal disposition meeting to the Appeal Deciding Officer is necessary as it lets both the Appeal Reviewing Officer and Appeal Deciding Officer know whether the appeal has or has not been resolved and whether formal review should continue. Whether or not an appellant meets with the Responsible Official does not prejudice review of an appeal.

The final rule is rewritten, clarifying that the only information transmitted to the Appeal Deciding Officer is the outcome. It also modifies paragraph (d)(3) to read “unresolved portion,” removing the inconsistency pointed out in the comments.

***Proposed section 215.18*** described the appeal review and disposition process. It added a paragraph clarifying procedures for the Responsible Official when an appeal decision includes instructions and added other clarifications regarding appeal disposition.

*Comment.* General comments received expressed concerns about what should be in the appeal decision letter and availability of appeal decisions.

*Response.* The Department believes it is not appropriate for a rule to specify the information an appeal decision should include. However, it is appropriate to provide such guidance through other means, and this has been done through Forest Service guidance. Appeal decisions also are posted on the Forest Service and Regional Office World Wide Web/Internet pages.

***Proposed section 215.18, paragraph (b)*** described the formal disposition process.

*Comment.* Some of the comments received disagreed with the provision allowing for disposing of an appeal without issuing a decision or giving the reason for not issuing a decision. Other comments addressed length of time (45 days) for responding to an appeal and when notification of an appeal decision occurs.

*Response.* Paragraph (b)(2) was added to ensure that appellants would be notified of the final agency action. The statutory language in the ARA controls not only the length of time within which an appeal decision must be issued (45 days), but also provides for the disposition of an appeal after 45 days has elapsed without an appeal decision. To alleviate concerns about the timing between when an appeal decision is mailed to the appellant(s) and when implementation of the project begins, the final rule clarifies that an appeal decision (paragraph (b)(1)) must be sent within 5 days of its being rendered.

**Proposed section 215.19** detailed the Appeal Deciding Officer's authority.

*Comment.* Some of those commenting wanted the Appeal Deciding Officer's independence from the Responsible Official clarified; others sought to have the Appeal Deciding Officer publish the procedures under which an appeal is reviewed. Some respondents thought the rule should clarify the level of communication permissible between the Responsible Official and the Appeal Deciding Officer, while others wanted the difference between the Appeal Deciding Officer and Appeal Reviewing Officer roles better defined.

*Response.* The Department believes the roles of the Appeal Deciding Officer and Appeal Reviewing Officer are clearly defined in the rule. Concerning the question about the level of communication permissible between the Responsible Official and the Appeal Deciding Officer, one must keep in mind the need to maintain a fair and objective review. The Appeal Deciding Officer's decision must be based on the same information that was available to the Responsible Official, as well as the appeal. Therefore, in order to maintain fairness and objectivity, discussions between the Appeal Deciding Officer and the Responsible Official, or between the Appeal Deciding Officer and the appellant(s), concerning the merits of the appeal are not allowed. The rule already states that the Appeal Deciding Officer's review is based on the appeal record and Appeal Reviewing Officer's recommendation, and §215.2 states what is included in the appeal record and its use by the Appeal Deciding Officer.

**Proposed section 215.19, paragraph (a)** discussed procedural determinations.

*Comment.* One suggestion was to make a provision addressing what happens when certain situations are not addressed in the rule.

*Response.* The Department understands the concern and believes the current policy of addressing unique situations on a case-by-case basis is working. It would be impossible to identify and provide for all possible scenarios.

**Proposed section 215.19, paragraph (b)** allowed the Appeal Deciding Officer to consolidate appeals and issue one or more appeal decisions while **proposed paragraph (c)** gave the Appeal Deciding Officer the authority to select a representative when an appeal lists multiple names and/or organizations.

*Comment.* Some respondents wanted clarification for dealing with appeals by multiple groups; some wanted clarification on how paragraph (c) relates to paragraph (b); some wanted the rule to ensure that when multiple appeals are combined, that the combination is based on similar issues, while others stated the Forest Service has no legal authority to consolidate multiple appeals with multiple appellants and multiple issues or appoint a representative. Some respondents did not see the need for the Forest Service to appoint a representative, while others suggested the Appeal Deciding Officer should have the discretion to request appellants to select their own representative.

*Response.* There is not a direct relationship between proposed paragraph (b) and proposed paragraph (c). For efficiency, proposed paragraph (b) allowed the Appeal Deciding Officer to consolidate appeals for the purpose of issuing one or more appeal decisions. Proposed paragraph (c) allowed the Appeal Deciding Officer to appoint a representative when an appeal lists several different organizations and/or individuals. The Department does have the authority to implement both paragraphs as the ARA left the discretion to the Department to develop and implement a process. If individuals and groups meeting appeal eligibility want to join together to appeal, the Department agrees

that it is better for them to appoint their own representative for the purposes of communications. Therefore, in the final rule, §215.14 (b)(2)(i) now asks those filing an appeal with more than one individual or organization to identify a lead appellant as defined in §215.2. However, the final rule clarifies in this section that the Appeal Deciding Officer has the authority to appoint the first individual/organization listed if a lead appellant is not identified in the appeal (§215.8(b)(2)(ii)).

**Proposed section 215.19, paragraph (d)** clarified that the Appeal Deciding Officer's decision could be different from the Appeal Reviewing Officer's recommendation.

*Comment.* The only comment on this proposed paragraph requested that when this happens, it should be disclosed to the appellants.

*Response.* Currently, the rule already provides for releasing the Appeal Reviewing Officer's recommendation after the appeal decision is rendered. The Appeal Deciding Officer's decision is based on review of the appeal record, including the Appeal Reviewing Officer's recommendation, so releasing it after the decision is appropriate.

In reviewing the proposed rule, the Department determined that it would be more efficient to combine the two sections concerning the Appeal Deciding Officer. Therefore, the final rule combines proposed §215.13, Where to file appeals, and proposed §215.19, Appeal Deciding Officer's authority, into one section designated at §215.8, Appeal Deciding Officer, in the final rule.

**Proposed section 215.20** discussed the Appeal Reviewing Officer's responsibilities.

*Comment.* One respondent wanted to delete the Appeal Reviewing Officer's position.

*Response.* The Secretary does not have the authority to remove the Appeal Reviewing Officer from the process. The ARA mandates an Appeal Reviewing Officer and the responsibilities.

**Proposed section 215.20, paragraph (b)** discussed the Appeal Reviewing Officer's recommendation.

*Comment.* Some of those commenting on the proposed paragraph asked that the Appeal Reviewing Officer address all procedural issues that develop after an appeal is filed. Others thought the Appeal Reviewing Officer should consult with the Responsible Official whenever there is a question about the record; that their recommendation should always be made public; and review procedures they must follow should be detailed.

*Response.* Because the authority for making the appeal decision lies with the Appeal Deciding Officer, the Department believes it is more appropriate for the Appeal Deciding Officer to make the procedural decisions. While the ARA discusses the Appeal Reviewing Officer's responsibilities, it does not mandate the details of the review process. The Department believes that maximum flexibility should be given to an Appeal Deciding Officer to decide what is expected from the Appeal Reviewing Officer in terms of their recommendation. The final rule does limit the review to the decision documentation and appeal. The current rule already states that the Appeal Reviewing Officer's recommendation is available once the disposition of the appeal is concluded. The appeal process, including the Appeal Reviewing Officer's recommendation, is intended to be an independent review at the same or higher organizational level as the

Responsible Official. The integrity of the appeal record must be maintained consistently because the Appeal Reviewing Officer's recommendation must be based on the same information that was available to the Responsible Official, as well as the appeal. To maintain a fair and objective review, communication between the Responsible Official and the Appeal Reviewing Officer, or between the Appeal Reviewing Officer and the appellant(s), concerning the merits of the appeal is not appropriate.

**Proposed section 215.20, paragraph (c)** allowed the Appeal Reviewing Officer to consolidate appeals for the purpose of issuing one or more recommendations.

*Comment.* Those commenting on the proposed paragraph disagreed with this provision, expressing the opinion that it is inequitable for them to have the authority to consolidate multiple appeals and appoint a single individual to represent all appellants on all issues raised in all appeals.

*Response.* It appears there might be some confusion between combining appeals for purposes of reviewing issues in this section and the Appeal Deciding Officer's authority to select a representative when a single appeal lists multiple names and/or organizations. Appeals may be consolidated for purposes of reviewing issues and rendering one or more recommendations.

The final rule designates proposed §215.20 as §215.19 and retitles it Appeal Reviewing Officer, consistent with §215.8, Appeal Deciding Officer.

**Proposed section 215.21** detailed the Secretary's authority. **Proposed paragraph (b)** exempts decisions signed by the Secretary or Under Secretary of Agriculture from the provisions of this rule.

*Comment.* All of those responding to this provision opposed it. Reasons cited included concerns that: it evades the appeal process; it excludes local expertise and the public in general; it will cost the taxpayer money because it will cause the public to go directly to court; it violates NEPA, NFMA, and the ARA; it should be a regulatory issue regardless of which administration is in power; sound science will be removed from decisions made at this level; and an entire class of decisions will be exempt from appeal based solely on the origin of the decision.

*Response.* Congress has charged the Secretary with the responsibility to protect, manage and administer the national forests. The Secretary has delegated that mission to the Under Secretary for Natural Resources and Environment and the Forest Service. USDA's general regulations make it clear that the Secretary and Under Secretary of Agriculture retain authority to make decisions on matters that have been delegated to the Forest Service. Nothing in the ARA alters the Secretary's long-established authority to make decisions affecting the Forest Service. The ARA directed the Secretary to promulgate rules to "establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans . . . and shall modify the procedure for appeals of decisions concerning such projects." Secretarial decisions have never been subject to appeal under any of the Forest Service's administrative appeal systems and there is no indication that Congress intended to work such a change through the ARA. Nothing in this section allows a Responsible Official, Departmental or Forest Service, to avoid any applicable notice and comment requirements; for example, circulating a draft or supplemental EIS for comment (40 CFR 1505.2). This should alleviate some of the concerns from the public about not having an opportunity to comment.

The final rule is rewritten to improve clarity; however, the changes do not alter the original intent. Proposed §215.21 is designated §215.20 in the final rule.

**Proposed section 215.22** discussed judicial proceedings and deleted the opportunity to waive this rule and proceed directly to court.

*Comment.* The only comment received wanted the waiver of the exhaustion requirement from the current rule retained.

*Response.* The USDA Reorganization Act of 1993 details when judicial proceedings can occur.

Proposed §215.22 is designated §215.21 in the final rule.

**Proposed section 215.23** discussed when this rule would become effective.

*Comment.* No comments were received on this section.

*Response:* In the final rule, proposed §215.23 is designated §215.22, and this section provides that the rule is effective June 4, 2003, except as noted in paragraph (b) discussed below. Pursuant to the requirements of 5 U.S.C. 553, the Department has elected not to delay the effective date of the final rule. In doing so, confusion resulting from implementation of interim procedures established through the settlement agreement cited in the response to §215.4 will be reduced. See the discussion in paragraph (c) below for further discussion.

Paragraph (a) makes clear that the notice, comment, and appeal procedures of this part apply to all projects and activities for which legal notice is published on or after the effective date of this rule, June 4, 2003, with one exception, discussed in paragraph (b) below.

Paragraph (b) provides for a 30-day delay in implementation of the provisions for electronic comments and appeals (§§215.5, 215.6, 215.7, 215.15). Even though the final rule becomes effective immediately, it will take some time to establish electronic mailboxes across the Forest Service to receive electronic comments and appeals, as provided for in the final rule.

Paragraph (c) makes clear that projects and activities for which legal notice is published prior to the effective date of the final rule are subject to the notice, comment, and appeal procedures of part 215 in effect prior to June 4, 2003. This rule can be found in the edition of 36 CFR parts 200 to 299, Revised as of July 1, 2002. As explained in the discussion of §215.4, effective June 4, 2003, the Forest Service will cease to implement the procedures set forth in the interim provisions of the settlement agreement addressed in the §215.4 discussion above.

**Proposed section 215.24** stated that this rule contained information collection requirements and would be assigned an OMB control number.

*Comment.* No comments were received on this section.

*Response.* Subsequent to the publication of the proposed rule, the Forest Service and the Department determined that the proposed rule did not contain any information collection or recordkeeping requirements and therefore is not subject to OMB review pursuant to the Paperwork Reduction Act. See “Controlling Paperwork Burdens on the Public” in the following Regulatory Certifications for further discussion. Proposed §215.24 is not included in the final rule.

## **Regulatory Certifications**

### ***Regulatory Impact***

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant action. 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.

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

### ***Environmental Impacts***

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

### ***Energy Effects***

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

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

This final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 and thereby imposes no paperwork burden on the public and is not subject to the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. part 3501 *et seq.*) and implementing regulations at 5 CFR part 1320.

### ***Federalism***

The agency has considered this final rule under the requirements of Executive Order 13132, Federalism. The agency has determined that the final rule conforms with the federalism principles set out in this Executive order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the

relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Based on comments received on the proposed rule, the Department has determined that additional consultation is not needed with State and local governments prior to adopting a final rule.

***Consultation and Coordination with Indian Tribal Governments***

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

***No Takings Implications***

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

***Civil Justice Reform***

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

***Unfunded Mandates***

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), which the President signed into law on March 22, 1995, the agency has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.