

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