

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