

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