

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