



[3410-11-P]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 218

RIN 0596-AD07

Project-Level Predecisional Administrative Review Process

AGENCY: Forest Service, USDA.

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule establishes the sole process by which the public may file objections seeking predecisional administrative review for proposed projects and activities implementing land management plans, including projects authorized pursuant to the Healthy Forests Restoration Act of 2003 (HFRA). The Consolidated Appropriations Act of 2012 directs the Secretary of Agriculture, acting through the Chief of the Forest Service, to provide for a pre-decisional objection process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974, and documented with a Record of Decision (ROD) or Decision Notice (DN). Section 428 further directs the Secretary to apply these procedures in lieu of the Appeal Reform Act (ARA), which provided for a postdecisional administrative appeal process. The proposed rule also establishes procedures concerning how the Forest Service will provide notice for such projects and activities. The Forest Service invites written comments on this proposed rule.

DATES: Comments on this proposed rule must be received in writing by [Insert date 30 days from date of publication in the **FEDERAL REGISTER**]. Comments concerning the information collection requirements contained in this proposed rule must be received in writing by [Insert date 60 days from date of publication in the **FEDERAL REGISTER**].

ADDRESSES: Send written comments to USDA Forest Service, Objection Regulation Comments, P.O. Box 4654, Logan, UT 84323; by electronic mail to *ObjectionRegulation@fscomments.us*; by fax to 435-750-8799; or by the electronic process available at the Federal eRulemaking portal at <http://www.regulations.gov>.

The public may inspect comments received on this proposed rule at USDA, Forest Service, Ecosystem Management Coordination Staff, 1400 Independence Ave. SW, Washington, DC, between 8 a.m. and 4:30 p.m. on business days. Those wishing to inspect comments should call ahead 202-205-0895 to facilitate an appointment and entrance to the building.

Comments concerning the information collection requirements contained in this proposed rule should reference OMB No. 0596-0172 and the docket number, date, and page number of this issue of the **Federal Register**. Comments concerning the information collection requirements may be submitted as provided for comments on the proposed rule. For more information, see **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Deb Beighley, Assistant Director, Appeals and Litigation at 202-205-1277.

Individuals using telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m. Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: If comments are sent by electronic mail or by fax, the public is requested not to send duplicate written comments via regular mail. Please confine written comments to issues pertinent to the proposed rule; explain the reasons for any recommended changes; and, where possible, reference the specific section or paragraph being addressed.

The <http://www.regulations.gov> Web site is an “anonymous access” system, which means the Forest Service will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to the Forest Service without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public record. If you submit an electronic comment, the Forest Service recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the Forest Service cannot read your comment due to technical difficulties and cannot contact you for clarification, the Agency may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

All timely and properly submitted comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received on this proposed rule at USDA, Forest Service, Ecosystem Management Coordination Staff, 1400 Independence Ave. SW,

Washington, DC, between 8:00 a.m. and 4:30 p.m. on business days. Those wishing to inspect comments should call ahead 202-205-0895 to facilitate an appointment and entrance to the building.

Background

On December 23, 2011, President Obama signed into law the Consolidated Appropriations Act of 2012. Section 428 of the Act (hereafter “Section 428”) directs the Secretary of Agriculture (Secretary), acting through the Chief of the Forest Service (Chief), to provide for a predecisional objection process based on Section 105(a) of the Healthy Forests Restoration Act of 2003 (HFRA) (16 U.S.C. 6515(a), for proposed actions of the Forest Service concerning projects and activities implementing land management plans and documented with a Record of Decision or Decision Notice. The Act further directs that these procedures be applied in lieu of subsections (c), (d), and (e) of Section 322 of Public Law 102-381 (16 U.S.C. 1612 note) (Appeal Reform Act or ARA) that collectively provide for a postdecisional administrative appeal process for projects and activities implementing land management plans. The Department has developed this proposed rule to: (1) preserve the predecisional objection process already in place for proposed hazardous fuel reduction projects authorized under the HFRA; (2) expand the scope of that objection process to include other covered actions; and (3) establish a process for providing the notice and comment provisions of the ARA.

President Bush signed into law the Healthy Forests Restoration Act of 2003 (HFRA) to reduce the threat of destructive wildfires while upholding environmental standards and encouraging early public input during planning processes. One of the provisions of the Act (sec. 105) required the Secretary to issue an interim final rule

establishing a predecisional administrative review process for hazardous fuel reduction projects authorized by the HFRA. The interim final rule was promulgated at 36 CFR part 218 on January 9, 2004 (69 FR 1529), followed by a final rule on September 17, 2008 (73 FR 53705) that incorporated the results of public comment and the knowledge gained through the Agency's experience with implementing the rule.

Congress enacted the ARA in 1992. The ARA states that "the Secretary of Agriculture, acting through the Chief of the Forest Service, shall 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." ARA section 322(a), 106 Stat. 1419. The ARA (ARA § 322(c), 106 Stat. 1419) further provided that qualifying individuals may file an appeal "[n]ot later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a)...." The Department promulgated implementing regulations for the ARA at 36 CFR part 215 in 1993 and revised them in 2003.

Prior to passage of the HFRA, public notice and comment for hazardous fuel reduction project proposals, and appeal of the decisions, would have been conducted according to the procedures set out at 36 CFR part 215. The HFRA objection rule exempts qualifying hazardous fuel reduction projects from the notice, comment, and appeal procedures set out at part 215 and establishes separate objection procedures specifically for hazardous fuel reduction projects, pursuant to 36 CFR part 218.

Now, through Section 428, Congress has directed the Secretary to apply the predecisional objection established in part 218, in place of the appeal provisions at

part 215, for proposed actions regarding projects and activities implementing land management plans and documented with a Record of Decision (ROD) or Decision Notice (DN). The Department has determined the most appropriate way to carry out this direction is to revise part 218, by amending subparts A and B, and creating subpart C.

Subpart A includes general provisions applicable to HFRA and non-HFRA covered projects and activities.

Subpart B provides additional direction that is specific to proposed actions not authorized under the HFRA. This subpart includes the notice and comment requirements directed by subsection (b) of the ARA and the emergency situation provisions directed by Section 428.

Subpart C provides additional direction that is specific to proposed hazardous fuel reduction projects authorized under the HFRA.

Administrative Review of Categorically Excluded Projects

On March 19, 2012, the U.S. District Court for the Eastern District of California found that Forest Service regulations exempting project decisions from notice, comment, and appeal when they are categorically excluded from analysis under the National Environmental Policy Act (NEPA) are in violation of the ARA and enjoined the Forest Service from following these regulations. The court's nationwide injunction precludes use of Forest Service notice, comment, and administrative appeal regulations, 36 CFR 215.4(a) and 215.12(f). The court held the 215 regulations conflict with the plain language of the ARA, claiming that Congress did not intend to exclude from notice, comment, and appeal actions that were categorically excluded from documentation under the NEPA. The Department promulgated the regulations pursuant to the Agency's

reasonable interpretation of the ARA and the Government has appealed the ruling to the U.S. Court of Appeals for the Ninth Circuit.

The Department is concerned that statements made in the District Court's opinion regarding prudential mootness of litigation concerning 36 CFR part 215 may confuse the public regarding the Congressional intent with respect to the enactment and promulgation of regulations implementing Section 428. While the District Court noted that Section 428 did not change Section 322(a) and (b) of the ARA, the Court's order did not address the full implication of the enactment of Section 428. Section 428 is an amendment of Section 322, and the revised statutory scheme must be read as whole; the existing provisions of Section 322 must be read in harmony with the new provisions of Section 428.

Section 322(a) commands an integrated regulatory system of notice, comment, and appeal for covered projects. Section 322(b) establishes the notice system for such projects. Through Section 428, the post-decisional appeal system of Section 322(c)-(e) has been replaced by a predecisional objection process that is similar to the HFRA administrative review process in that it is exclusively applicable to projects and activities evaluated in an environmental analysis (EA) or environmental impact statement (EIS). Congress gave no indication that it intended differential treatment between the scope of coverage for the notice and comment provisions for "such projects" compared to the activities to be covered by the new predecisional objection process (which are expressly limited in the statutory text to decisions documented in DNs and RODs).

The Department is aware that plaintiffs proffered an alternative view suggesting Congress intended to create a third separate administrative review system with the result

being the use of three appeal processes: an administrative review system under Section 105 of HFRA for HFRA predecisional objections; an administrative review system under Section 428 establishing a non-HFRA predecisional objection process; and an independent, residual post-decisional appeal system under Section 322.

During the pendency of the appeal of the District Court's ruling, the Forest Service has instructed its line officers to abide and comply with the District Court's orders. Further, the Department is aware that Congress is presently considering legislation clarifying notice, comment, and appeal of categorical exclusions. Rather than delay in their entirety the implementation regulations under Section 428, the Department has elected to move forward with the portion of the Section 428 rulemaking that addresses projects associated with EAs and EISs, but reserves and defers promulgation of regulations addressing categorically excluded projects and activities. Within the comment period provided for by this proposed rule, the public may provide written comments concerning treatment of such projects in the future by the Forest Service.

Use of Legal Notices to Initiate Opportunities to Comment and Object

Since 1990 the Agency has relied on the publication of notices in the legal notices section of newspapers of general circulation as the means to make interested and affected parties aware that a plan or project decision has been made. Even more significantly, because the legal notice is not the only means used to provide decision notification, the publication date of legal notices has been used as the sole trigger initiating the start of an appeal filing period. Beginning in 1993, legal notices have also been used to notify and initiate the 30-day comment period mandated by the Appeal Reform Act.

Prior to 1990, the beginning of appeal filing periods were based on the date of the plan or project decision. Deciding officers were required to promptly mail the appropriate decision document to those who had requested it and those who were known to have participated in the decision making process, with the intention that those wishing to utilize the administrative appeal process would have the maximum time available to them.

The switch to requiring the publication of legal notices and using the publication date to initiate the appeal filing period was made to address problems notifying all potentially affected individuals and organizations in enough time that they had the full time available to file an appeal. The causes of these problems included inadvertent failure to identify all interested or potentially affected individuals and organizations, and the delay between when a decision was signed and when a potential appellant received a mailed notice of the decision or otherwise learned of the decision. The reliance on a legal notice publication date was seen as providing an additional and reliable source of notification that would maximize the time available for filing a notice of appeals, and establishing a uniform, service-wide mechanism that provides convincing evidence that the Agency has given timely and constructive notice of decisions to the public.

Although legal notices have been used, generally with success, in this manner for the past two decades, they are still an imperfect solution for some potential appellants. Not all appellants have ready access to the newspaper of record used for the project decision they are interested in and, even if access is available, it can be a burden to keep close watch on the legal notices section of a paper for the appearance of a notice announcing the decision for a particular project.

There are also issues from the Agency's perspective with the use of legal notices. Some newspapers only publish weekly, which can cause delays in getting a notice published in a timely manner. Also, legal notices can be quite expensive, costing in the hundreds of dollars in a newspaper of larger circulation.

The rationale in support of, and the arguments against, the use of legal notices have changed little in the past 20 years. One thing that has changed is the availability of new communications technology, including email, web pages, and social media. The Department believes that within these tools is the potential to provide more effective means of providing timely notifications to those who may be interested in providing comment on a project proposal or who wish to be eligible to submit an objection for administrative review. Even so, these technologies may still not be a solution for all. As wide spread as communications technology has become, it is still not used by all citizens.

This proposed rule does not vary from the standard practice of requiring legal notices to notify and establish the beginning dates for the 30-day comment periods and objection filing periods. Still, the Department is open to suggestions on an improved means of providing timely notification to all interested and affected individuals so that the full comment period or objection filing period is available. Comments and suggestions concerning this aspect of the administrative review procedures will be considered when developing a final rule.

Page Limits for Objections

Several persons within and outside the Forest Service have suggested imposing a limitation on the number of pages permitted for objections and appeals. These proponents contend that limiting the number of pages would encourage a more focused presentation

of issues regarding an Agency proposal or decision and provide for a more effective review of the issues being raised.

The Agency’s appeal and objection regulations have had no limitations on the number of pages that could be filed, and historically these filings have included from 1 to well over 100 pages, exclusive of attachments or exhibits. The Department of the Interior’s Board of Land Appeals currently imposes a 30-page limitation on appeals, and some have suggested this would be an appropriate limitation for Forest Service objections and appeals. Consideration would also be given to including documents incorporated by reference, attachments, or exhibits as part of any page limitation that might be imposed.

Although there is no page limitation on objections included in this proposed rule, the Department is taking public comment on this topic now for consideration when a final rule is developed.

Section-by-Section Description of Proposed Rule

Part 218 – Project-level Predecisional Administrative Review Process

Subpart A – General Provisions

Section 218.1 - Purpose and Scope

This section describes the purpose and scope of a predecisional administrative review (hereinafter “objection”) process for projects and activities implementing land management plans, including proposed hazardous fuel reduction projects authorized by the Healthy Forests Restoration Act (HFRA).

Section 218.2 - Definitions

This section defines some of the commonly used terms and phrases in the proposed rule.

Section 218.3 - Reviewing officer

Paragraph (a) of this section establishes who has the authority to carry out the responsibilities of the reviewing officer.

Paragraph (b) provides the reviewing officer with the authority to make all procedural determinations not specifically explained in this part, including those procedures necessary to ensure compatibility, to the extent practicable, when undertaking a joint proposed project subject to each agency's administrative review procedures. The section also provides that such procedural determinations are not subject to further review.

Section 218.4 - Proposed projects and activities not subject to objection

This section establishes that when no timely and qualifying comments (§§ 218.2 and 218.25) are received, a proposed project or activity is not subject to objection. This is because there would be no eligible objectors (§ 218.5) if no timely and qualifying comments are submitted.

Section 218.5 - Who may file an objection

This section of the rule identifies the qualifying requirements for who may file an objection under this subpart.

Paragraph (a) provides that those individuals and non-Federal entities who have submitted specific and timely written comments regarding the proposed project or activity during a designated opportunity for public comment provided during preparation of an environmental assessment or environmental impact statement for the proposed project or activity are eligible to file an objection. Paragraph (a) further states that for a proposed project or activity described in an environmental impact statement, the

opportunity for public comment would be fulfilled during scoping, by the formal comment process for draft environmental impact statements set forth in 40 CFR 1506.10, and any other periods public comment is specifically requested. For proposed actions described in an environmental assessment, the opportunity for public comment will be fulfilled during scoping or any other periods public comment is specifically requested, as environmental assessments are not required to be circulated for public comment in draft form.

Paragraph (b) states that when an organization submits specific written comments, eligibility is conferred on that organization only, not on individual members of that organization. The Department will treat an organization as its own entity for purposes of submitting comments and determining eligibility to file objections. The Department will not accept individual members of organizations to establish eligibility to file individual objections. Any individual member of an organization may submit written comments on his or her own behalf.

Paragraph (c) clarifies that if an objection is submitted on behalf of a number of named individuals or non-Federal entities, each individual or entity listed must meet the eligibility requirement of having submitted specific written comments during scoping or the other opportunities to comment.

Paragraph (d) states that Federal agencies are not allowed to file an objection. Other avenues are available to Federal agencies for working through concerns regarding a proposed action. It is expected that the various Federal agencies will work cooperatively during project development.

Paragraph (e) allows Federal employees to file objections as individuals in a manner consistent with Federal conflict of interest requirements.

Section 218.6 – Computation of time periods

Paragraphs (a) and (b) describe how time periods are computed.

Paragraph (c) states that the time to file an objection is determined exclusively by the publication date of the legal notice of the EA or final EIS, and draft DN or ROD, in the newspaper of record or, when the Chief is the responsible official, in the **Federal Register**. Although other notifications may be provided, only the legal notice or **Federal Register** publication dates may be used to calculate the objection filing period.

Paragraph (d) states that time extensions are not permitted except as necessary to avoid having a time period end on a non-business day or as permitted at § 218.26.

Section 218.7 – Giving notice of objection process for proposed projects and activities subject to objection

This section describes the methods to be used when giving notice that an EA or final EIS, and draft Decision Notice (DN) or Record of Decision (ROD) for a proposed action is available for administrative review and how the proposed action must be described in this notice.

Paragraph (a) states that the responsible official should provide early disclosure during scoping and in the EA or EIS, whether a proposed action is a hazardous fuel reduction project under the HFRA or other project implementing a land management plan, and which part 218 objection procedures will be applicable.

Paragraph (b) requires that the responsible official must make available the EA or final EIS, and a draft DN or ROD, to those who have requested the documents or meet

the objection eligibility requirements at § 218.4(a). Making a draft decision document available at this time provides the public with a clear statement of the Agency's intent and rationale for the decision to be made following the objection process, even more so than that provided by identification of a preferred alternative in the NEPA analysis documents.

Paragraph (c) states that the responsible official must announce through notice in a previously designated newspaper of record when an EA or final EIS, and draft DN or ROD, are available for administrative review, except for proposals of the Chief where **Federal Register** publication is provided. The legal notice begins the objection-filing period of either 30 or 45 days as specified at §§ 218.26(a) and 218.33(a).

Paragraph (c) further outlines the format and content of the legal notice, including a statement that incorporation of documents by reference is permitted only as provided for at § 218.7(b). This provision ensures that the contents of an objection, including all attachments, are readily available to the reviewing officer for timely completion of the objection process. Similarly, objectors cannot meet the requirements of this process by attempting to incorporate substantive materials and arguments from other objectors. The Federal courts have taken a similar view of such procedural strategies; see *Swanson v. U.S. Forest Service*, 87 F.3d 339 (9th Cir. 1996).

The content requirement for a legal notice also includes a statement that issues raised in objections must be based on previously submitted specific written comments regarding the proposed project or activity unless the issue is based on new information arising after the opportunities for comment.

Paragraph (d) requires annual publication in the **Federal Register** of the newspapers to be used for giving legal notice of proposed actions subject to this rule.

Section 218.8 - Filing an objection

This section provides information on how to file an objection.

Paragraph (a) provides for an objection to be filed with the reviewing officer in writing.

Paragraph (b) provides that incorporation of documents by reference shall not be allowed except for certain specified documents. The reasons for not permitting other documents by reference are addressed in preceding § 218.6(c).

Paragraph (c) specifies that issues raised in objections must be based on previously submitted specific written comments regarding the proposed project or activity and attributed to the objector. This requirement does not apply to objection issues based on new information arising after the opportunities for comment. The paragraph also places the burden of demonstrating compliance with this requirement on the objector.

Paragraph (d) provides a detailed list of information that must be included in an objection. The information in the list is needed for timely and effective processing and review of the objections.

Section 218.9 – Evidence of timely filing

This section describes the objector's responsibilities for ensuring the timely filing of an objection, including the means to be used by the Forest Service for determining timeliness.

Section 218.10 – Objections set aside from review

Paragraph (a) specifies when the reviewing officer must set aside an objection without review or response on the concerns raised, including when an objection is not filed within the objection period; the proposed project is not subject to the procedures of this part and, therefore, is not subject to the objections process; the objector did not submit specific written comments regarding the proposed project or activity during the opportunities for public comment; there is insufficient information to review and respond; the objector withdraws the objection; the objector's identity is not provided or cannot be determined from the signature; or the objection is illegible for any reason.

Paragraph (b) states that when an objection is set aside and not processed, the reviewing officer must give written notice to the objector and responsible official, and document the set aside in the appeal record.

Section 218.11 - Resolution of objections

This section describes the objection resolution process.

Paragraph (a) allows for either the reviewing officer or the objector to request a meeting to discuss the objection and attempt resolution. The reviewing officer has the discretion to determine if sufficient time remains in the review period to make a meeting practical. To assist with identifying areas of potential resolution, the responsible official should be a participant in objection resolution meetings. The paragraph further requires that all meetings with objectors are open to the public.

Paragraph (b) provides for a written response to the objection. The response is not required to be point-by-point and the reviewing officer may issue a single response to

multiple objections of the same proposed action. Paragraph (b) also states that there is no higher level review of the reviewing officer's written response to the objection.

§218.12 - Timing of project decision

This section describes when a responsible official may make a final decision regarding a proposed action subject to the provisions of this part.

Paragraph (a) allows decisions to be made on proposed actions only when responses have been made to all objections, and paragraph (b) specifies that the decisions documented in a DN or ROD must be consistent with the reviewing officer's response to the objections.

Paragraph (c) states that a decision can be made on a proposed action on the 5th business day following the close of the filing period when no timely objections are filed. This is to allow for receipt of any objections that might have been mailed and postmarked prior to the close of the objection filing period. National Environmental Policy Act regulations (40 CFR 1506.10) require a minimum of 30 days between notice of the final environmental impact statement and issuance of a ROD when administrative appeal of the ROD is not available.

Section 218.13 - Secretary's authority

Paragraph (a) identifies the Secretary's authority.

Paragraph (b) identifies that projects and activities authorized by the Secretary or Under Secretary of Agriculture are not subject to these procedures. Nothing in the Consolidated Appropriations Act (CAA), Appeal Reform Act (ARA), or HFRA alters the Secretary's long-established authority to exercise any delegated authority and such decisions constitute the final administrative determination of the USDA.

Section 218.13 - Judicial proceedings

Section 218.13 reflects the Department's interpretation and implementation of the ARA, CAA, and HFRA, the statutory foundation for these regulations. Statutory and judicial exhaustion requirements ensure that an agency is able to develop full factual records, to apply technical and managerial expertise to identified problems, to exercise its judgment and discretion, and to correct its own mistakes. Exhaustion requirements are credited with promoting accuracy, efficiency, public participation, agency autonomy, and judicial economy.

Generally, statutory exhaustion requirements are jurisdictional and cannot be waived by courts. The CAA and HFRA permit plaintiffs to undertake the burden of demonstrating that a "futility or inadequacy" exception should be invoked as to a specific plaintiff or claim. The Department understands these statutory provisions are to be read together, narrowly construed, and invoked only in rare instances such as where information becomes available only after the conclusion of the administrative process.

Congress stated that National Environmental Policy Act (NEPA) documents are to be in complete or final form when made available for objection. The objection process is, therefore, not a second comment period on a draft document, but rather a final opportunity to ensure full understanding of public concerns shortly preceding a decision.

Congress' view on the purpose or intent for the objection process likewise narrows the operation of the futility exemption to those situations where information, which dramatically changes the picture with regard to environmental effects, or the need for the project, comes to light after the NEPA document has been completed.

A contrary reading would be inconsistent with Congress' expectation that the exception provisions are not applicable to information which has not been brought to the attention of the Agency. The objection process protects against the possibility of a "futile" objection due to delay because final decisions on proposed actions cannot be issued prior to conclusion of the objection process and any issue brought to the attention of the agency during project or activity development can be assessed through the objection process. Similarly, predecisional review of each proposed action avoids the criticism sometimes leveled against postdecisional appeals that reviewers are unfairly disposed to a particular or predetermined outcome. Instances of futility or inadequacy should be rare indeed as the administrative review is conducted through a process Congress created specifically for authorized hazardous fuel reduction projects and then applied to this broader class of actions, and which occurs prior to the Agency's final decision. Moreover, the participatory requirements for these projects are predicated on Congress's determination, expressed through the statutory scheme, that predecisional collaboration is vital to avoiding potential disputes and that the land managers are in the optimal position to identify and correct any errors and to fine-tune the design of proposed actions if they are made aware of concerns before final decisions are made. Sweeping exceptions to the participatory requirements are at odds with Congress' intent.

Section 218.15 - Information collection requirements

This section explains that the rule contains information collection requirements as defined in 5 CFR part 1320 by specifying the information that objectors must supply in an objection. Public comment is being sought on this information collection requirement,

as discussed in the Regulatory Certifications section. See the Addresses section for instructions on how to submit comments on the information collection requirement.

Section 218.16 - Effective dates

This section sets out the effective date of this rule and provides for a rapid, yet smooth, transition from the use of a postdecisional appeal process for most project proposals to this predecisional objection process. Transition provisions are necessary to assure that interested and affected parties have full opportunity to be notified of the applicable administrative review procedures and to gain eligibility to file objections under these regulations regardless of what stage of planning and decision making the proposal is at when the final rule becomes effective.

Subpart B – Provisions Specific to Project-level Proposals Not Authorized Under the Healthy Forests Restoration Act

Section 218.20 – Applicability and scope

This section explains that the subpart is applicable to proposed actions regarding projects and activities implementing land management plans and documented with a Record of Decision (ROD) or Decision Notice (DN), except those authorized under the Healthy Forests Restoration Act. These are the proposals for which Section 428 of the Consolidated Appropriations Act of 2012 (hereafter “Section 428”) directed that final regulations be issued that provide for a predecisional objection process for proposed projects and activities documented with a ROD or DN, in lieu of subsections (c), (d), and (e) of Section 322 of the Appeal Reform Act (ARA). The provisions of this subpart implement the notice and comment requirements of the ARA and the emergency situation

requirements of Section 428. These provisions are to be used for applicable projects in combination with the general provisions of subpart A.

Section 218.21 – Emergency situations

This section sets out the procedures for emergency situations. Section 428 specifies that if the Chief of the Forest Service determines an emergency situation exists for which immediate implementation of a proposed action is necessary, the proposed action shall not be subject to the predecisional objection process, and implementation shall begin immediately after the Forest Service gives notice of the final decision for the proposed action.

Paragraph (a) establishes that authority for making an emergency situation determination rests with the Chief and Associate Chief.

Paragraph (b) describes the process of making an emergency situation determination. Emergency situation is defined in § 218.2. This paragraph also notes that an emergency situation determination is not subject to review.

Paragraph (c) clarifies when implementation of a project or activity decision may begin if an emergency situation determination has been made. It differentiates between decisions determined to be an emergency documented in a DN and in a ROD. This differentiation is necessary to clarify compliance with Council on Environmental Quality regulations governing final environmental impact statement and ROD timeframes.

Paragraph (d) explains that the decision notification required by Forest Service NEPA regulations at part 220 shall include notification that the proposed action has been determined to be an emergency situation.

Section 218.22 – Proposed projects and activities subject to legal notice and opportunity to comment

Although the Consolidated Appropriations Act of 2012 superseded subsections (c), (d), and (e) of the Appeal Reform Act (ARA), the Department understands Congress' intent to be that the notice and comment provisions of the ARA would continue to operate for the set of projects and activities subject to predecisional objection. The ARA established an integrated system of notice, comment, and appeal for certain Forest Service projects and activities. Congress has reformed this system with the Consolidated Appropriations Act of 2012.

This section describes the proposed actions that are subject to the notice and comment requirements established by Section 322(b) of the ARA.

Paragraphs (a) and (b) establish that proposed projects and activities for which an environmental assessment (EA) or environmental impact statement (EIS) are prepared are subject to the legal notice and opportunity to comment requirements of this subpart.

Paragraph (c) requires that legal notice and opportunity to comment will be provided for proposed amendments to a land management plan that are included as part of a proposed project or activity for which an EA is prepared and that are applicable only to the proposed project or activity.

This section also provides that proposed projects or activities resulting from a supplement or revision of an EA or EIS based on consideration of new information or changed circumstances (paragraph (d)) and proposed research activities to be conducted on National Forest System land (paragraph (e)) are subject to legal notice and opportunity to comment procedure.

Section 218.23 – Proposed projects and activities not subject to legal notice and opportunity to comment

Paragraph (a) is reserved pending consideration of further developments concerning whether proposed actions that are categorically excluded from documentation in an EA or EIS should be subject to the notification and public involvement requirements.

Land management plan proposals that are made separately from any proposed projects are not subject to the legal notice and opportunity to comment provisions of this subpart (paragraph (b)), nor are proposed projects and activities that are not subject to provisions of the NEPA and its implementing regulations.

As with prior project appeal procedures, paragraph (d) excludes from legal notice and opportunity to comment determinations by the responsible official that a correction, supplement, or revision of an EA or EIS is not required and paragraph (e) excludes rules promulgated in accordance with the Administrative Procedure Act and policies and procedures issued in the Forest Service directives system.

Paragraph (f) excludes from legal notice and opportunity to comment hazardous fuel reduction projects authorized under the HFRA. Public notice and comment opportunities for these projects are guided by the provisions of the HFRA and of the NEPA and its implementing regulations.

Section 218.24 – Notification of opportunity to comment on proposed projects and activities

This section establishes the requirements for providing legal and other notice of the opportunity to comment on proposed projects and activities implementing land management plans.

Paragraph (a) describes general responsibilities of the responsible official regarding publication of a legal notice of opportunity to comment.

Paragraph (b) provides the content requirements of a legal notice of opportunity to comment.

Paragraph (c) provides for where legal notices of opportunity to comment must be published.

Section 218.25 – Comments on proposed projects and activities

Paragraph (a) establishes specific provisions regarding the opportunity to comment, including the time periods for submission, requirements associated with the comments, and the means by which the Agency will establish timeliness of comments submitted.

Paragraph (b) provides requirements for the acceptance and use of submitted comments.

Section 218.26 – Objection time periods

Paragraph (a) specifies that the objection-filing period is 45 days following publication of the legal notice of the EA or final EIS, and draft decision, in the newspaper of record or the publication date of the notice in the **Federal Register** when the Chief is

the responsible official. This is the same filing period length that has been provided for postdecisional appeals of project decisions since 1993.

Paragraph (b) states that a written response to the objection shall be issued within 45 days following the end of the objection-filing period. The reviewing officer has the discretion to extend the time for up to 10 days when he or she determines that additional time is necessary to provide adequate response to objections or to participate in resolution discussions with the objector(s). This provision for optional extension of the review and response time increases the potential for constructive resolution of objection concerns when fruitful discussions are occurring.

Subpart C – Provisions Specific to Proposed Projects Authorized Under the Healthy Forests Restoration Act

Section 218.30 - Applicability and scope

This section explains that the subpart is applicable to proposed hazardous fuel reduction projects authorized under the Healthy Forests Restoration Act (HFRA). The provisions of this subpart are to be used for applicable projects in combination with the general provisions of subpart A.

Section 218.31 – Authorized hazardous fuel reduction projects subject to objection

This section describes projects subject to the objection process provisions of subpart C. Hazardous fuel reduction projects that are subject to the provision of subpart C, in combination with the provision of subpart A, are not subject to the requirements of subpart B.

Section 218.32 – Objection time periods

Paragraph (a) specifies that the objection-filing period is 30 days following publication of the legal notice of the EA or final EIS in the newspaper of record or the publication date of the notice in the **Federal Register** when the Chief is the responsible official.

Paragraph (b) states that a written response to the objection shall be issued within 30 days following the end of the objection-filing period.

These are the same filing and response timeframes provided for proposed hazardous fuel reduction projects authorized under the HFRA since 2004. The shorter timeframes for this class of projects, as compared to those for proposed actions not authorized under the HFRA (subpart B of the proposed rule), are appropriate because of the interest in expediting the reduction of hazardous fuels as a means to reduce the threat of destructive wildfires.

Regulatory Certifications

Regulatory Impact

This proposed 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 rule. This proposed 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 proposed rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action 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 proposed 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 proposed rule.

Environmental Impacts

This proposed rule establishes a predecisional administrative review (objection) process for proposed actions regarding projects and activities implementing land management plans, including authorized hazardous fuel reduction projects on National Forest System land. Agency NEPA regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction.” This proposed 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. Previous Forest Service administrative appeal rulemakings have applied this categorical exclusion and been confirmed by the courts.

Energy Effects

This proposed 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 proposed rule does not constitute a significant energy action as defined in the Executive order.

Controlling Paperwork Burdens on the Public

This proposed rule represents an extension with revision of a currently approved information collection requirement as defined in 5 CFR Part 1320, Controlling Paperwork Burdens on the Public. The information to be collected from those who choose to participate in the predecisional administrative review process under the Consolidated Appropriations Act of 2012 and the Healthy Forests Restoration Act is the minimum needed for the reviewing officer to make an informed decision on an objection.

Description of Information Collection

Title: Project-Level Predecisional Administrative Review Process.

OMB Number: 0596-0172

Expiration Date of Approval: February 28, 2014

Type of Request: Extension with Revision

Abstract: The information collected is needed for a citizen or organization to explain the nature of the objection being made to a proposed project or activity undertaken under the authority of the Consolidated Appropriations Act of 2012 or the Healthy Forests Restoration Act, and the reason(s) why the individual or organization objects. Specifically, an objector must provide:

1. A name, mailing address, and if possible, telephone number;
2. Signature or other verification of authorship upon request;
3. The name of the proposed project or activity, the name and title of the responsible official, the National Forest(s) and/or Ranger District(s) on which the proposed project or activity will be implemented; and

4. Any specific changes that the objector seeks and the rationale for those changes.

Estimate of Burden: The public reporting burden to provide information when filing an objection to a proposed project or activity is estimated to average 8 hours per response.

Respondents: Individuals, businesses, not-for-profit institutions, State, local or Tribal Government.

Estimated Number of Respondents: 375

Estimated Number of Responses per Respondent: 1 response per year.

Estimated Total Annual Burden on Respondents: 3,000 hours.

Comments are Invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of this Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Use of Comments: All comments received in response to this information collection will be summarized and included in the request for final OMB approval. All comments, including names and addresses when provided will become a matter of public record.

Federalism

The Agency has considered this proposed rule under the requirements of Executive Order 13132, Federalism, and Executive Order 12875, Government Partnerships. The Agency has made a preliminary assessment that the proposed rule conforms with the federalism principles set out in these Executive orders; 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 this proposed rule, the Agency will consider if any additional consultation will be needed with State and local governments prior to adopting a final rule.

Consultation and Coordination with Indian Tribal Governments

On March 21, 2012, the Regional Foresters were instructed by the Deputy Chief for the National Forest System to send letters inviting more than 600 federally recognized Tribes and Alaska Native Corporations to begin consultation on the proposed rule for a project-level predecisional review process. The Forest Service will continue to conduct government-to-government consultation on the project-level predecisional review process rule until the date 30 days after publication of the proposed rule in the **Federal Register**. The Department considers tribal consultation as an ongoing, iterative process that encompasses development of the proposed rule through the issuance of the final rule.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the proposed rule does not pose the risk of a taking of private property.

Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988 on civil justice reform. After adoption of this proposed rule, (1) all State and local laws and regulations that conflict with this rule or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this proposed rule; and (3) it will not require 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 proposed rule on State, local, and tribal governments and the private sector. This proposed 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.

List of Subjects in 36 CFR Part 218

Administrative practice and procedure, National Forests.

Therefore, for the reasons set forth in the preamble, part 218 of Title 36 of the Code of Federal Regulations is revised to as follows:

**PART 218 – PROJECT-LEVEL PREDECISIONAL ADMINISTRATIVE
REVIEW PROCESS**

Subpart A – General Provisions

Sec.

218.1 Purpose and scope.

218.2 Definitions.

218.3 Reviewing officer.

218.4 Proposed projects and activities not subject to objection.

218.5 Who may file an objection.

218.6 Computation of time periods.

218.7 Giving notice of objection process for proposed projects and activities subject to objection.

218.8 Filing an objection.

218.9 Evidence of timely filing.

218.10 Objections set aside from review.

218.11 Resolution of objections.

218.12 Timing of project decision.

218.13 Secretary's authority.

218.14 Judicial proceedings.

218.15 Information collection requirements.

218.16 Effective dates.

**Subpart B – Provisions Specific to Project-level Proposals Not Authorized Under
the Healthy Forests Restoration Act**

218.20 Applicability and scope.

218.21 Emergency situations.

218.22 Proposed projects and activities subject to legal notice and opportunity to comment.

218.23 Proposed projects and activities not subject to legal notice and opportunity to comment.

218.24 Notification of opportunity to comment on proposed projects and activities.

218.25 Comments on proposed projects and activities.

218.26 Objection time periods.

Subpart C – Provisions Specific to Proposed Projects Authorized Under the Healthy Forests Restoration Act

218.30 Applicability and scope.

218.31 Authorized hazardous fuel reduction projects subject to objection.

218.32 Objection time periods.

Authority: Pub. L. 108-148, 117 Stat 1887 (Healthy Forests Restoration Act of 2003); Sec. 428, Pub. L. 112-74 (Consolidated Appropriations Act, 2012); 125 Stat 1046 (16 U.S.C. 6515 note).

Subpart A—General Provisions

§218.1 Purpose and scope.

This subpart establishes a predecisional administrative review (hereinafter referred to as “objection”) process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans and documented with a Record of Decision or Decision Notice, including proposed authorized hazardous fuel reduction projects as defined in the Healthy Forests Restoration Act of 2003 (HFRA). The objection process is the sole means by which administrative review of qualifying project proposals on National Forest System land may be sought.

(a) Subpart A provides the general provisions of the objection process, including who may file objections to proposed projects and activities, the responsibilities of the participants in an objection, and the procedures that apply for review of the objection.

(b) Subpart B includes provisions that are specific to proposed projects and activities implementing land and resource management plans and documented with a Record of Decision or Decision Notice, except those authorized under the HFRA.

(c) Subpart C includes provisions that are specific to proposed hazardous fuel reduction projects authorized under the HFRA.

§218.2 Definitions.

Address. An individual’s or organization’s current physical mailing address. An e-mail address is not sufficient.

*Authorized hazardous fuel reduction project--*A hazardous fuel reduction project authorized by the Healthy Forests Restoration Act of 2003 (HFRA).

Comments--Specific written comments submitted to the responsible official or designee during a designated opportunity for public participation provided for a proposed project that are in regard to that project.

Decision notice (DN)--A concise written record of a responsible official's decision based on an environmental assessment and a finding of no significant impact (FONSI) (40 CFR 1508.13; 36 CFR 220.7). The draft decision document made available pursuant to § 218.7(c)(1) will include a draft FONSI unless an environmental impact statement is being prepared.

Emergency situation--A situation on National Forest System (NFS) lands for which immediate implementation of a decision is necessary to achieve one or more of the following: relief from hazards threatening human health and safety; mitigation of threats to natural resources on those NFS or adjacent lands; avoiding a loss of commodity value sufficient to jeopardize the agency's ability to accomplish project objectives directly related to resource protection or restoration.

Entity--For purposes of who may file an objection (§ 218.5), an entity includes non-governmental organizations, businesses, partnerships, state and local governments, Alaska Native Corporations, and Indian Tribes.

Environmental assessment (EA)--A public document that provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact (FONSI), aids an agency's compliance with the National Environmental Policy Act (NEPA) when no EIS is necessary, and facilitates preparation of a statement when one is necessary (40 CFR 1508.9; 36 CFR 220.7).

Environmental impact statement (EIS)--A detailed written statement as required by Section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 (40 CFR 1508.11; 36 CFR 220.5).

Forest Service line officer--A Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions approving projects subject to this part.

Lead objector--For an objection submitted with multiple individuals and/or entities listed, the individual or entity identified to represent all other objectors for the purposes of communication, written or otherwise, regarding the objection.

Name--The first and last name of an individual or the name of an entity. An electronic username is insufficient for identification of an individual or entity.

National Forest System land--All lands, waters, or interests therein administered by the Forest Service (36 CFR 251.51).

Newspaper(s) of record--Those principal newspapers of general circulation annually identified in a list and published in the **Federal Register** by each regional forester to be used for publishing notices of projects and activities implementing land management plans.

Objection--The written document filed with a reviewing officer by an individual or entity seeking predecisional administrative review of a proposed project or activity implementing a land management plan, including proposed HFRA-authorized hazardous fuel reduction projects, and documented with an environmental assessment or environmental impact statement.

Objection period--The period following publication of the legal notice in the newspaper of record of an environmental assessment (30 calendar days) or final environmental impact statement (45 calendar days) for a proposed project or activity during which an objection may be filed with the reviewing officer. When the Chief is the responsible official the objection period begins following publication of a notice in the **Federal Register**.

Objection process--The procedures established in this subpart for predecisional administrative review of proposed projects or activities implementing land management plans, including proposed HFRA-authorized hazardous fuel reduction projects.

Objector--An individual or entity filing an objection who submitted comments specific to the proposed project or activity during scoping or other opportunity for public comment. The use of the term “objector” applies to all persons or entities who meet eligibility requirements associated with the filed objection (§ 218.5).

Record of decision (ROD)--A document signed by a responsible official recording a decision that was preceded by preparation of an environmental impact statement (EIS) (40 CFR 1505.2; 36 CFR 220.5).

Responsible official--The Forest Service employee who has the delegated authority to make and implement a decision approving proposed projects or activities subject to this part.

§218.3 Reviewing officer.

(a) The reviewing officer is the U. S. Department of Agriculture (USDA) or Forest Service official having the delegated authority and responsibility to review an objection filed under this part. The reviewing officer is a Forest Service line officer at the next higher administrative level above the responsible official, or the respective Associate Deputy Chief, Deputy Regional Forester, or Deputy Forest Supervisor with the delegation of authority relevant to the provisions of this part.

(b) The reviewing officer determines procedures to be used for processing objections when the procedures are not specifically described in this part, including such procedures as needed to be compatible to the extent practicable, with the administrative review processes of other Federal agencies, for projects proposed jointly with other agencies. Such determinations are not subject to further administrative review.

§218.4 Proposed projects and activities not subject to objection.

Proposed projects and activities are not subject to objection when no specific and timely written comments regarding the proposed project or activity (see § 218.2) are received during a designated opportunity for public comment (see § 218.5(a)). The responsible official must issue an explanation with the Record of Decision or Decision Notice that the project or activity was not subject to objection.

§218.5 Who may file an objection.

(a) Individuals and entities as defined in § 218.2 who have submitted specific and timely written comments as defined in § 218.2 regarding the proposed project or activity during a designated opportunity for public comment provided during preparation of an EA or EIS for the proposed project or activity may file an objection. For proposed

projects or activities described in a draft EIS, such opportunity for public comment will be fulfilled during scoping, by the comment period on the draft EIS in accordance with procedures in 40 CFR 1506.10, and any other periods public comment is specifically requested. For proposed projects or activities described in an EA, such opportunity for public comment will be fulfilled during scoping or any other periods public comment is specifically requested.

(b) Comments received from an authorized representative(s) of an entity are considered those of the entity only. Individual members of that entity do not meet objection eligibility requirements solely on the basis of membership in an entity. A member or an individual must submit written comments independently in order to be eligible to file an objection in an individual capacity.

(c) When an objection lists multiple individuals or entities, each individual or entity must meet the requirements of paragraph (a) of this section. If the objection does not identify a lead objector as required at § 218.8(d)(3), the reviewing officer will delegate the first eligible objector on the list as the lead objector. Individuals or entities listed on an objection that do not meet eligibility requirements must not be considered objectors. Objections from individuals or entities that do not meet the requirements of paragraph (a) must not be accepted and must be documented in the objection record.

(d) Federal agencies may not file objections.

(e) Federal employees who otherwise meet the requirements of this subpart for filing objections in a non-official capacity must comply with Federal conflict of interest statutes at 18 U.S.C. 202-209 and with employee ethics requirements at 5 CFR part 2635. Specifically, employees must not be on official duty nor use Government property or

equipment in the preparation or filing of an objection. Further, employees must not incorporate information unavailable to the public, such as Federal agency documents that are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552 (b)).

§218.6 Computation of time periods.

(a) *Computation.* All time periods are computed using calendar days, including Saturdays, Sundays, and Federal holidays. However, when the time period expires on a Saturday, Sunday, or Federal holiday, the time is extended to the end of the next Federal working day as stated in the legal notice (11:59 p.m. in the time zone of the receiving office for objections filed by electronic means such as e-mail or facsimile).

(b) *Objection-filing period.* The day after publication of the legal notice for the EA or final EIS in the newspaper of record or **Federal Register** (see § 218.7(c)) is the first day of the objection-filing period.

(c) *Publication date.* The publication date of the legal notice of the EA or final EIS in the newspaper of record or, when the Chief is the responsible official, the **Federal Register**, is the exclusive means for calculating the time to file an objection. Objectors may not rely on dates or timeframe information provided by any other source.

(d) *Extensions.* Time extensions are not permitted except as provided at paragraph (a) of this section, and § 218.26(b).

§218.7 Giving notice of objection process for proposed projects and activities subject to objection.

(a) In addition to the notification required in paragraph (c) of this section, the responsible official must disclose during scoping and in the EA or EIS that the proposed project or activity is:

(1) A hazardous fuel reduction project as defined by the HFRA, section 101(2), that is subject to subparts A and C of this part, or

(2) A project or activity implementing a land management plan and not authorized under the HFRA, that is subject to subparts A and B of this part.

(b) The responsible official must promptly make available the final EIS or the EA, and a draft Record of Decision (ROD) or Decision Notice (DN), to those who have requested the documents or are eligible to file an objection in accordance with § 218.5(a).

(c) Upon completion and notification of the availability of the final EIS or EA, and draft ROD or DN, legal notice of the opportunity to object to a proposed project or activity must be published in the applicable newspaper of record identified as defined in § 218.2 for each National Forest System unit. When the Chief is the responsible official, notice must be published in the **Federal Register**. The legal notice or **Federal Register** notice must

(1) Include the name of the proposed project or activity, a concise description of the draft decision and any proposed land management plan amendments, name and title of the responsible official, name of the forest and/or district on which the proposed project or activity will occur, instructions for obtaining a copy of the final EIS or EA and draft ROD or DN as defined in § 218.2, and instructions on how to obtain additional information on the proposed project or activity.

(2) State that the proposed project or activity is subject to the objection process pursuant to 36 CFR part 218 and include the following:

(i) Name and address of the reviewing officer with whom an objection is to be filed. The notice must specify a street, postal, fax, and e-mail address, the acceptable

format(s) for objections filed electronically, and the reviewing officer's office business hours for those filing hand-delivered objections.

(ii) A statement that objections will be accepted only from those who have previously submitted specific written comments regarding the proposed project during scoping or other opportunity for public comment in accordance with § 218.5(a). The statement must also specify that issues raised in objections must be based on previously submitted specific written comments regarding the proposed project unless the issue is based on new information arising after the opportunities for comment.

(iii) A statement that the publication date of the legal notice in the newspaper of record or **Federal Register** notice is the exclusive means for calculating the time to file an objection (see §§ 218.26(a) and 218.32(a)), and that those wishing to object should not rely upon dates or timeframe information provided by any other source. A specific date must not be included in the notice.

(iv) A statement of whether the proposal is a hazardous fuel reduction project authorized under the HFRA and subject to the predecisional objection procedures specific to such projects in subpart C of this part or is a project implementing a land management plan, not authorized under the HFRA, and therefore subject to the objection procedures specific to these projects in subpart B of this part.

(v) A statement that an objection, including attachments, must be filed (regular mail, fax, e-mail, hand-delivery, express delivery, or messenger service) with the appropriate reviewing officer (see § 218.8) within 30 days of the date of publication of the legal notice for the objection process if the proposal is an authorized hazardous fuel reduction project, or within 45 days if the proposal is otherwise a project or activity

implementing a land management plan. It should also be stated that incorporation of documents by reference is permitted only as provided for at § 218.8(b).

(vi) A statement describing the minimum content requirements of an objection (see § 218.8(d)).

(d) Through notice published annually in the **Federal Register**, each regional forester must advise the public of the newspaper(s) of record utilized for publishing legal notice required by this part.

§218.8 Filing an objection.

(a) Objections must be filed with the reviewing officer in writing. All objections are available for public inspection during and after the objection process.

(b) Incorporation of documents by reference is not allowed, except for the following list of items which may be provided by including date, page, and section of the cited document. All other documents must be included with the objection.

(1) All or any part of a Federal law or regulation.

(2) Forest Service directives and land management plans.

(3) Documents referenced by the Forest Service in the proposed project EA or EIS that is subject to objection.

(4) Comments previously provided to the Forest Service by the objector during proposed project or activity comment periods.

(c) Issues raised in objections must be based on previously submitted specific written comments regarding the proposed project or activity and attributed to the objector, unless the issue is based on new information that arose after the opportunities

for comment. The burden is on the objector to demonstrate compliance with this requirement for objection issues (see § 218.8(d)(6)).

(d) At a minimum, an objection must include the following:

(1) Objector's name and address as defined in § 218.2, with a telephone number, if available;

(2) Signature or other verification of authorship upon request (a scanned signature for electronic mail may be filed with the objection);

(3) When multiple names are listed on an objection, identification of the lead objector as defined in § 218.2. Verification of the identity of the lead objector must be provided upon request;

(4) The name of the proposed project, the name and title of the responsible official, and the name(s) of the national forest(s) and/or ranger district(s) on which the proposed project will be implemented;

(5) Sufficient narrative description of those aspects of the proposed project addressed by the objection, specific issues related to the proposed project; if applicable, how the objector believes the environmental analysis or draft decision specifically violates law, regulation, or policy; and suggested remedies that would resolve the objection; and

(6) A statement that demonstrates the link between prior written comments on the particular proposed project or activity and the content of the objection, unless the objection concerns an issue that arose after the designated opportunity(ies) for comment (see § 218.8(c)).

§218.9 Evidence of timely filing.

It is the objector's responsibility to ensure timely filing of an objection.

Timeliness must be determined by the following indicators:

(a) The date of the U.S. Postal Service postmark for an objection received before the close of the fifth business day after the objection filing date;

(b) The electronically generated posted date and time for e-mail and facsimiles;

(c) The shipping date for delivery by private carrier for an objection received before the close of the fifth business day after the objection filing date; or

(d) The official agency date stamp showing receipt of hand delivery.

§218.10 Objections set aside from review.

(a) The reviewing officer must set aside and not review an objection when one or more of the following applies:

(1) Objections are not filed in a timely manner (see §§ 218.7(c)(2)(v), 218.9).

(2) The proposed project is not subject to the objection procedures in §§ 218.1, 218.4, 218.20, and 218.31 of this part.

(3) The individual or entity did not submit timely and specific written comments regarding the proposed project or activity during scoping or another designated opportunity for public comment (see § 218.5(a)).

(4) None of the issues included in the objection are based on previously submitted written comments unless one or more of those issues arose after the opportunities for comment.

(5) The objection does not provide sufficient information as required by § 218.8(d)(5) and (6) for the reviewing officer to review.

(6) The objector withdraws the objection.

(7) An objector's identity is not provided or cannot be determined from the signature (written or electronically scanned) and a reasonable means of contact is not provided (see § 218.8(d)(1) and (2)).

(8) The objection is illegible for any reason, including submissions in an electronic format different from that specified in the legal notice.

(b) The reviewing officer must give written notice to the objector and the responsible official when an objection is set aside from review and must state the reasons for not reviewing the objection. If the objection is set aside from review for reasons of illegibility or lack of a means of contact, the reasons must be documented and a copy placed in the objection record.

§218.11 Resolution of objections.

(a) *Meetings.* Prior to the issuance of the reviewing officer's written response, either the reviewing officer or the objector may request to meet to discuss issues raised in the objection and potential resolution. The reviewing officer has the discretion to determine whether or not adequate time remains in the review period to make a meeting with the objector practical. The responsible official should be a participant along with the reviewing officer in objection resolution meetings. All meetings are open to the public.

(b) *Reviewing officer's response to objections.* (1) A written response must set forth the reasons for the response, but need not be a point-by-point response and may contain instructions to the responsible official, if necessary. In cases involving more than one objection to a proposed project or activity, the reviewing officer may consolidate objections and issue one or more responses.

(2) No further review from any other Forest Service or USDA official of the reviewing officer's written response to an objection is available.

§218.12 Timing of project decision.

(a) The responsible official may not sign a ROD or DN concerning a proposed project or activity subject to the provisions of this part until the reviewing officer has responded to all pending objections.

(b) The ROD or DN signed by the responsible official must be consistent with the reviewing officer's response to objections.

(c) When no objection is filed within the allotted filing period (see §§ 218.26 and 218.32):

(1) The reviewing officer must notify the responsible official.

(2) Approval of the proposed project or activity documented in a ROD in accordance with 40 CFR 1506.10, or in a DN may occur on, but not before, the fifth business day following the end of the objection-filing period.

§218.13 Secretary's authority.

(a) Nothing in this section shall restrict the Secretary of Agriculture from exercising any statutory authority regarding the protection, management, or administration of National Forest System land.

(b) Decisions concerning projects and activities issued by the Secretary of Agriculture or the Under Secretary, Natural Resources and Environment, are not subject to the procedures set forth in this part. Approval of projects and activities by the Secretary or Under Secretary constitutes the final administrative determination of the U.S. Department of Agriculture.

§218.14 Judicial proceedings.

The objection process set forth in this subpart fully implements Congress' design for a predecisional administrative review process. These procedures present a full and fair opportunity for concerns to be raised and considered on a project-by-project basis. Individuals and groups must structure their participation so as to alert the local agency officials making particular land management decisions of their positions and contentions. Further, any filing for Federal judicial review of a decisions covered by these regulations is premature and inappropriate unless the plaintiff has exhausted the administrative review process set out in this part.

§218.15 Information collection requirements.

The rules of this part specify the information that objectors must provide in an objection to a proposed project (see § 218.8). As such, these rules contain information collection requirements as defined in 5 CFR part 1320. These information requirements are assigned OMB Control Number 0596-0172.

§218.16 Effective dates.

(a) *Effective dates for HFRA-authorized projects.* (1) Provisions of this part that are applicable to hazardous fuel reduction projects authorized under the HFRA are in effect as of [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] for projects where scoping begins on or after this date.

(2) Hazardous fuel reduction project proposals under the HFRA for which public scoping began prior to [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] may use the predecisional objection procedures posted at <http://www.fs.fed.us/objections>.

(3) Hazardous fuel reduction project proposals that are re-scoped with the public or re-issued for notice and comment after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] are subject to this part.

(b) *Effective dates for non-HFRA-authorized projects.* (1) Project proposals with public scoping completed, but that have not had legal notice published. The applicable provisions of this part are in effect as of [Date of publication of the final rule in the **FEDERAL REGISTER**] where public scoping was previously initiated for project proposals, but legal notice of the opportunity to comment has not yet been published; unless scoping or other public notification of the project (e.g. Schedule of Proposed Actions) has clearly indicated the project to be under the former 36 CFR part 215 appeal process.

(2) Project proposals which have legal notice published, but a Decision Notice or Record of Decision has not been signed. If a Decision Notice or Record of Decision is signed within 6 months of [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], it will be subject to the 36 CFR part 215 appeal process. If the Decision Notice or Record of Decision is to be signed more than 6 months beyond [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the project proposal will be subject to the requirements of this part. In this case, the responsible official will notify all interested and affected parties who participated during scoping or provided specific written comment regarding the proposed project or activity during the comment period initiated with a legal notice that the project proposal will be subject to the predecisional objection regulations at 36 CFR part 218. All interested and

affected parties who provided written comment as defined in § 218.2 during scoping or the comment period will be eligible to participate in the objection process.

(3) Project proposals are subject to the requirements of this part when initial public scoping, re-scoping with the public, or re-issuance of notice and comment begins on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

Subpart B—Provisions Specific to Project-level Proposals Not Authorized Under Healthy Forests Restoration Act

§218.20 Applicability and scope.

This subpart includes provisions that are specific to proposed projects and activities implementing land and resource management plans and documented with a Record of Decision or Decision Notice, except those authorized under the Healthy Forests Restoration Act (HFRA). The sections of this subpart must be considered in combination with the general provisions of subpart A for the full complement of regulatory direction pertaining to predecisional administrative review of the applicable projects and activities.

§218.21 Emergency situations.

(a) *Authority.* The Chief and the Associate Chief of the Forest Service are authorized to make the determination that an emergency situation as defined in § 218.2 exists.

(b) *Determination.* The determination that an emergency situation exists shall be based on an examination of the relevant information. During the consideration by the Chief or Associate Chief, additional information may be requested from the responsible

official. The determination that an emergency situation does or does not exist is not subject to administrative review under this part.

(c) *Implementation.* When it is determined that an emergency situation exists with respect to all or part of the decision, implementation may proceed as follows:

(1) Immediately after notification (see 36 CFR 220.7(d)) of a decision documented in a decision notice (DN).

(2) Immediately when the decision is documented in a record of decision (ROD), after complying with the timeframes and publication requirements described in 40 CFR 1506.10(b)(2).

(d) *Notification.* The responsible official shall identify any emergency situation determination made for a project or activity in the notification of the decision (see 36 CFR 220.5(g) and 220.7(d)).

§218.22 Proposed projects and activities subject to legal notice and opportunity to comment.

The legal notice and opportunity to comment procedures of this subpart apply only to:

(a) Proposed projects and activities implementing land management plans for which an environmental assessment (EA) is prepared;

(b) Proposed projects and activities implementing land management plans and described in a draft or supplemental environmental impact statement (EIS), for which notice and comment procedures are governed by 40 CFR parts 1500 through 1508 also;

(c) Proposed amendments to a land management plan that are included as part of a proposed project or activity for which an EA or EIS is prepared and which are applicable only to a proposed project or activity covered in paragraph (a) of this section;

(d) A proposed project or activity decision resulting from a supplement or revision of an EA or EIS based on consideration of new information or changed circumstances; and

(e) Proposed research activities to be conducted on National Forest System land.

§218.23 Proposed projects and activities not subject to legal notice and opportunity to comment.

The legal notice and opportunity to comment procedures of this subpart do not apply to:

(a) [Reserved];

(b) Proposed land management plans, plan revisions, and plan amendments that are made separately from any proposed projects;

(c) Proposed projects and activities not subject to the provisions of the National Environmental Policy Act and the implementing regulations at 40 CFR parts 1500 through 1508 and 36 CFR part 220;

(d) Determinations by the responsible official, after consideration of new information or changed circumstances, that a correction, supplement, or revision of the EA or EIS is not required; and

(e) Rules promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 et seq.) or policies and procedures issued in the Forest Service Manual and Handbooks (36 CFR part 216).

(f) Proposed hazardous fuel reduction projects authorized under the Healthy Forests Restoration Act.

§218.24 Notification of opportunity to comment on proposed projects and activities.

(a) *Responsible official.* The responsible official shall:

(1) Provide legal notice of the opportunity to comment on a proposed project or activity implementing the land management plan.

(2) Determine the most effective timing and then publish the legal notice of the opportunity to comment on a proposed project or activity as provided for in paragraph (c)(2) of this section.

(3) Promptly provide notice about the proposed project or activity to any individual or organization who has requested it and to those who have participated in planning for that project.

(4) Accept all written comments on the proposed project or activity as provided for in § 218.25(a)(4).

(5) Identify all specific written comments regarding the proposed project.

(b) *Content of legal notice.* All legal notices shall include the following:

(1) The title and brief description of the proposed project or activity.

(2) A general description of the proposed project or activity's location with sufficient information to allow the interested public to identify the location.

(3) When applicable, a statement that the responsible official is requesting an emergency situation determination or it has been determined that an emergency situation exists for the proposed project or activity as provided for in § 218.21.

(4) For a proposed project or activity to be analyzed and documented in an environmental assessment (EA), a statement that the opportunity to comment ends 30 days following the date of publication of the legal notice in the newspaper of record (see § 218.25(a)(2)); legal notices shall not contain the specific date since newspaper publication dates may vary.

(5) For a proposed project or activity that is analyzed and documented in a draft environmental impact statement (EIS), a statement that the opportunity to comment ends 45 days following the date of publication of the notice of availability (NOA) in the **Federal Register** (see § 218.25(a)(2)). The legal notice must be published after the NOA and contain the NOA publication date.

(6) A statement that only those who submit timely and specific written comments regarding the proposed project or activity during a designated opportunity for public comment will be accepted as objectors.

(7) The responsible official's name, title, telephone number, and addresses (street, postal, facsimile, and e-mail) to whom comments are to be submitted and the responsible official's office business hours for those submitting hand-delivered comments (see § 218.25(a)(4)(ii)).

(8) A statement indicating that for objection eligibility each individual or representative from each organization submitting specific written comments regarding the proposed project or activity must either sign the comments or verify identity upon request.

(9) The acceptable format(s) for electronic comments.

(10) Instructions on how to obtain additional information on the proposed project or activity.

(c) *Publication.* (1) Through notice published annually in the **Federal Register**, each Regional Forester shall advise the public of the newspaper(s) of record utilized for publishing legal notices required by this part.

(2) Legal notice of the opportunity to comment on a proposed project or activity shall be published in the applicable newspaper of record identified in paragraph (c)(1) of this section for each National Forest System unit. When the Chief is the responsible official, notice shall also be published in the **Federal Register**. The publication date of the legal notice in the newspaper of record is the exclusive means for calculating the time to submit written comments on a proposed project or activity to be analyzed and documented in an EA. The publication date of the NOA in the **Federal Register** is the exclusive means for calculating the time to submit written comments on a proposed project or activity that is analyzed and documented in a draft EIS.

§218.25 Comments on proposed projects and activities.

(a) *Opportunity to comment.* (1) *Time period for submission of comments—*

(i) *Environmental assessment.* Comments on the proposed project or activity shall be accepted for 30 days following the date of publication of the legal notice.

(ii) *Draft environmental impact statement.* Comments on the proposed project or activity shall be accepted for a minimum of 45 days following the date of publication in the **Federal Register** pursuant to 40 CFR parts 1500 through 1508.

(iii) *Comments*. It is the responsibility of all individuals and organizations to ensure that their comments are received in a timely manner as provided for in paragraph (a)(4) of this section.

(iv) *Extension*. The time period for the opportunity to comment on environmental assessments shall not be extended.

(2) *Computation of the comment period*. The time period is computed using calendar days, including Saturdays, Sundays, and Federal holidays. However, when the time period expires on a Saturday, Sunday, or Federal holiday, comments shall be accepted until the end of the next Federal working day (11:59 p.m.).

(i) *Environmental assessment (EA)*. The 30-day comment period for proposed projects or activities to be analyzed and documented in an EA begins on the first day after publication of the legal notice.

(ii) *Draft environmental impact statement (EIS)*. The 45-day comment period for proposed projects or activities that are analyzed and documented in a draft EIS begins on the first day after publication of the NOA in the **Federal Register**.

(3) *Requirements*. Individuals and entities wishing to be eligible to object must provide the following during the comment period:

(i) Name and address.

(ii) Title of the proposed project or activity.

(iii) Specific written comments as defined in § 218.2 regarding the proposed project or activity, along with supporting reasons that the responsible official should consider in reaching a decision.

(iv) Signature or other verification of identity upon request; identification of the individual or entity who authored the comment(s) is necessary for objection eligibility.

(A) For objections listing multiple entities or multiple individuals, a signature or other means of verification must be provided for the individual authorized to represent each entity and for each individual in the case of multiple names, to meet objection eligibility requirements.

(B) Those using electronic means may submit a scanned signature. Otherwise another means of verifying the identity of the individual or entity representative may be necessary for electronically submitted comments.

(v) Individual members of an entity must submit their own comments to meet the requirements of objection eligibility; comments received on behalf of an organization are considered as those of the organization only.

(4) Evidence of timely submission. When there is a question about timely submission of comments, timeliness shall be determined as follows:

(i) Written comments must be postmarked by the Postal Service, emailed, faxed, or otherwise submitted (for example, express delivery service) by 11:59 p.m. on the 30th calendar day following publication of the legal notice for proposed projects or activities to be analyzed and documented in an EA or the 45th calendar day following publication of the NOA in the **Federal Register** for a draft EIS.

(ii) Hand-delivered comments must be time and date imprinted at the correct responsible official's office by the close of business on the 30th calendar day following publication of the legal notice for proposed projects or activities to be analyzed and

documented in an EA or the 45th calendar day following publication of the NOA in the **Federal Register** for a draft EIS.

(iii) For emailed comments, the sender should normally receive an automated electronic acknowledgment from the agency as confirmation of receipt. If the sender does not receive an automated acknowledgment of the receipt of the comments, it is the sender's responsibility to ensure timely receipt by other means.

(b) *Consideration of comments.* (1) The responsible official shall consider all written comments submitted in compliance with paragraph (a) of this section.

(2) All written comments received by the responsible official shall be placed in the project file and shall become a matter of public record.

§218.26 Objection time periods.

(a) *Time to file an objection.* Written objections, including any attachments, must be filed with the reviewing officer within 45 days following the publication date of the legal notice of the EA or final EIS in the newspaper of record or the publication date of the notice in the **Federal Register** when the Chief is the responsible official (see § 218.7(c)). It is the responsibility of objectors to ensure that their objection is received in a timely manner.

(b) *Time for responding to an objection.* The reviewing officer must issue a written response to the objector(s) concerning their objection(s) within 45 days following the end of the objection-filing period. The reviewing officer has the discretion to extend the time for up to 10 days when he or she determines that additional time is necessary to provide adequate response to objections or to participate in resolution discussions with the objector(s).

Subpart C—Provisions Specific to Proposed Projects Authorized Under the Healthy Forests Restoration Act

§218.30 Applicability and scope.

This subpart includes provisions that are specific to proposed hazardous fuel reduction projects documented with a Record of Decision or Decision Notice, and authorized under the Healthy Forests Restoration Act (HFRA). The sections of this subpart must be considered in combination with the general provisions of subpart A for the full complement of regulatory direction pertaining to predecisional administrative review of the applicable projects and activities.

§218.31 Authorized hazardous fuel reduction projects subject to objection.

(a) Only authorized hazardous fuel reduction projects as defined by the HFRA, section 101(2), occurring on National Forest System land that have been analyzed in an EA or EIS are subject to this subpart. Authorized hazardous fuel reduction projects processed under the provisions of the HFRA are not subject to the requirements in subpart B of this part.

(b) When authorized hazardous fuel reduction projects are approved contemporaneously with a plan amendment that applies only to that project, the objection process of this part applies to both the plan amendment and the project.

§218.32 Objection time periods.

(a) *Time to file an objection.* Written objections, including any attachments, must be filed with the reviewing officer within 30 days following the publication date of the legal notice of the EA or final EIS in the newspaper of record or the publication date of the notice in the **Federal Register** when the Chief is the responsible official (see §

218.6(c)). It is the responsibility of objectors to ensure that their objection is received in a timely manner.

(b) *Time for responding to an objection.* The reviewing officer must issue a written response to the objector(s) concerning their objection(s) within 30 days following the end of the objection-filing period.

Thomas L. Tidwell
Chief, Forest Service

July 19, 2012
(Dated)

[FR Doc. 2012-19302 Filed 08/07/2012 at 8:45 am; Publication Date: 08/08/2012]