



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 216

Forest Service Directives

RIN 0596-AC65

AGENCY: Forest Service, USDA.

ACTION: Final rule with request for comments

SUMMARY: This final rule updates the current regulations that establish procedures for public participation in the formulation of standards, criteria, and guidelines applicable to Forest Service programs as required by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (FRRRPA). These revisions will provide greater opportunity for public participation in the formulation of such standards, criteria, and guidelines by expanding and better defining the scope of policies subject to such review and utilizing technologies for public engagement that were not available at the time of the last amendment to these regulations in 1984.

DATES: This rule is effective [INSERT DATE 30 days from date of publication in the FEDERAL REGISTER.] The Forest Service is publishing this rule as a final rule with comment. The Forest Service will accept written comments on this final rule until close of business [INSERT DATE 60 days from date of publication in the FEDERAL REGISTER]. See SUPPLEMENTARY INFORMATION for a description of how the Forest Service will respond to comments.

ADDRESSES: Please submit comments via one of the following methods:

1. *Public participation portal (preferred)*: <https://cara.ecosystem-management.org/Public/CommentInput?project=ORMS-1893>.

2. *Mail*: Office of Regulatory and Management Services, c/o Michael Migliori; USDA Forest Service, Mailstop 1150, 1400 Independence Avenue SW, Washington, DC 20250.

3. *Email*: directive_comments@fs.fed.us.

4. *Fax*: 202-649-1161.

All 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 online via an online public reading room at <https://cara.ecosystem-management.org/Public/ReadingRoom?project=ORMS-1893>, or at U.S. Forest Service, Office of Management and Regulatory Services, 201 14th St. SW, 2 Central, Washington, DC 20024. Visitors are encouraged to call ahead to (202) 205-1475 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Michael Migliori, Program Analyst, Directives and Regulations, Office of Regulatory and Management Services, mmigliori@fs.fed.us, (202) 205-2496. Individuals who use telecommunication devices for the deaf may call the Federal Information Relay Service at (800) 877-8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background and Explanation of the Final Rule

The Forest Service will consider revising this rule based on public comments received. If the Forest Service determines that no changes to the rule are warranted, the Forest Service will publish a notice affirming this final rule by [INSERT DATE 180 days from date of publication].

If the Forest Service seeks to incorporate changes based on the public comments, the final rule will be revised as appropriate.

This final rule is promulgated pursuant to section 14(a) of the FRRRPA (16 U.S.C. 1612(a)), which provides that the Secretary, in exercising his authority [under the Act] and other laws applicable to the Forest Service, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

This provision of law has been implemented through 36 CFR part 216, published on April 23, 1984. The purpose of that provision is to ensure that Federal, State, and local governments and the public have adequate notice and opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

Currently, 36 CFR part 216 only applies to directives published in the Forest Service Manual, which are policies and guidance for Forest Service staff. Part 216 reflects an Agency assumption that the Forest Service Handbook- which contains detailed instructions on how to implement the Forest Service Manual- is administrative or technical in nature, and does not include standards, criteria or guidelines. Over the past three decades, however, the complexity of management of the National Forest System (NFS) has increased, and the Agency has realized that the Forest Service Handbook may contain directives subject to the notice and comment requirements of section 14(a) of FRRRPA.

This final rule revises part 216 to require public notice and comment on the formulation of standards, criteria or guidelines applicable to Forest Service programs, regardless of whether they are published in the Forest Service Manual or Handbook. The part 216 requirements would

not apply to Forest Service directives pertaining to law enforcement and investigations; personnel matters; procurement; administrative support activities such as budget and finance; business operations; and activities undertaken by the Forest Service on behalf of other Federal agencies.

The revision of part 216 will also require the Forest Service to establish an internet-based notice and comment system, as notice of proposed changes to directives will be posted on a Forest Service-administered schedule on the agency's national website. While interim and final directives are available to the public on the internet, revision of part 216 will allow the public to have notice of, and ready access to, proposed, directives issued by the Forest Service. By utilizing modern technology, the public will be presented with several options for submitting comments, including at least one electronic means of submittal such as email or through a web form, as well as the traditional means of submitting comments by post-mailed letters. The process for submitting comments will be specified on the schedule. Several supplemental notification methods may also be employed in order to communicate about such notice to a broader segment of the public, including publishing notices of proposed, interim, and final directives in the Federal Register, issuing press releases, or holding public meetings. Other similar processes could also be utilized when appropriate.

These revisions are issued as a final rule as provided for in 5 U.S.C. 553(a)(2) and 553(b)(3)(A) and (B) and (d)(1). The final rule does not impose additional burdens on any governmental entity or the public but significantly expands the opportunity for all parties to comment more readily on Forest Service policies set forth in Forest Service directives. These revisions maintain the public's right to participate in the formulation of internal standards, criteria, and guidelines and expands the options available to the Forest Service as it manages this

procedural process. These revisions are intended to expand the public's awareness and ability to comment upon these directives.

Since certain situations require implementation of standards, criteria, and guidelines applicable to Forest Service programs prior to completion of the public notice and comment process, this final rule continues to allow the use of interim directives that are effective upon publication. The same public participation process for proposed directives applies to interim directives.

Use of the Forest Service website for providing notice and comment opportunities results in both expanded capacity and actual savings (estimated at \$72,000-\$110,000 over 10 years). The revision has many non-economic and non-quantifiable benefits. It will allow the Forest Service to reach a broader cross-section of the interested public when publishing notice of proposed directives, fostering robust public participation.

The Forest Service solicited input from the public to inform the content of this final rule. These outreach efforts included direct engagements with State natural resource agencies, Federally-recognized Indian Tribes and Alaska Native Corporations, agencies within the Department of Agriculture (USDA), and other Federal land management agencies. In addition, the Forest Service published a Request for Information in the Federal Register, inviting interested members of the public to attend an informational webinar and to submit questions, comments, and suggestions to a dedicated agency email address (80 FR 74740 (Nov. 30, 2015)).

Collectively, the feedback provided in these conversations indicated broad support for the use of web-based technology, in addition to maintaining traditional, postal-based commenting, to improve public participation in the formulation of Forest Service directives. No outright opposition to this approach was expressed. Several stakeholder groups reiterated the importance

of ensuring that the web platform used to facilitate the notice and comment process for Forest Service directives be accessible, reliable, and user-friendly.

Several specific provisions were also suggested for inclusion in this final rule. For example, representatives from certain State agencies requested that the comment period for any directives involving an issue of overlapping State and Federal jurisdiction be at least 60 days to provide States sufficient opportunity to explore the questions and formulate meaningful input. To support engagement of representatives of public agencies, as well as other communities of interest, the revised Part 216 notes that the Forest Service will maintain generally on a quarterly basis a schedule of pending and proposed directives in a centralized repository on the Forest Service website.

In addition, several stakeholders asked that criteria be established to guide the Forest Service's determination as to whether point-by-point responses must be issued to individual comments or whether issuance of a single summary response to all timely and relevant comments is sufficient for a given directive. The Forest Service intends to provide a framework, consistent with the Office of Management and Budget's Good Guidance Practice Bulletin, for responding to comments through revision of the directives that will include more detailed guidance on managing public notice and comment.

For example, Agency response should reflect the nature of public comment provided; a high volume of very similar comments may need to be handled differently than a small number of very detailed comments. There may be situations where no comments are within the scope of the proposed policy so no Agency response is needed. The directives will ensure that the Agency's approach to responding to comments is consistent with FRRRPA requirements and supports transparency, public participation and collaboration. While the directives will provide a

flexible approach to responding to comments, it should be noted that it is the Agency's intent that all comments received will be viewable through the Forest Service website.

Regulatory Certifications

Environmental Impact

This final rule updates the process the Forest Service will use in implementing section 14(a) of the FRRRPA. Forest Service regulations at 36 CFR 220.6(d)(2) exclude “rules, regulations, or policies to establish service-wide administrative procedures, program processes, or instructions” from documentation in an environmental assessment or environmental impact statement. The Department's assessment is that this final rule falls within this category of actions, and that no extraordinary circumstances exist that would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

This final rule has been reviewed under applicable USDA procedures, as well as Executive Order (E.O.) 12866 on regulatory planning and review. The Office of Management and Budget (OMB) has designated this rule to be significant based on its applicability to a wide segment of the public.

This final rule is not subject to the requirements of EO 13771 (82 FR 9339, February 3, 2017) because this final rule is related to agency organization, management or personnel. This final rule will have no costs to the public, and result in fiscal savings in the long-run. Cost savings will result from expected reductions in utilizing the Federal Register for publication; moreover, the final rule allows the Forest Service to expand its ability to provide notice and opportunity for public comment on directives by posting them on the Agency website, even as it reduces publication costs. The Agency estimates it spent nearly \$39,000 over the last three years

on the publication of directives in the Federal Register, whereas setting up an email subscription service will incur a one-time cost of \$24,766. The new regulations will result in an annualized cost savings of between \$7,431 to \$13,371 per year at 3%, and between \$6,807 to \$13,157 at 7% using the low and high ends of the three years of data on Federal Register costs and the annualized cost of CARA over 10 years of \$2,904 at 3% and \$3,528 at 7%.

The Agency expects to recoup the costs associated with setting up the internal software that allows publications of such notices, and commenting functionality within 3-4 years and achieve significant long term savings, thereafter. Additional cost savings would be realized through improved staff efficiency in the time and effort required to review and issue directives. Details on the estimated cost savings of this final rule can be found in the rule's economic analysis.

Regulatory Flexibility Act

This final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601-612). The final rule updates the process used by the Forest Service in implementing section 14(a) of the FRRPRA with regard to the issuance of Forest Service Directives. This final rule will not have a significant economic impact on a substantial number of small entities as defined by the Act, because the Rule will not impose recordkeeping requirements on them. Neither will it affect small entities' competitive position in relation to large entities, nor would it not affect their cash flow, liquidity, or ability to remain in the market.

No Takings Implications

This final rule has been analyzed in accordance with the principles and criteria contained in E.O. 12630. It has been determined that the rule would not pose a risk of a taking of private property.

Civil Justice Reform

This final rule has been reviewed under E.O. 12988 on civil justice reform. Upon publication of the final rule, (1) all State and local laws and regulations that conflict with this Rule or impede its full implementation are preempted; (2) no retroactive effect is given to this Rule; and (3) no exhaustion of administrative proceedings before parties may file suit in court challenging its provisions is required.

Federalism and Consultation and Coordination with Indian Tribal Governments

The Forest Service has considered this final rule under the requirements of E.O. 13132 on federalism, and has determined that the rule: conforms with the principles of federalism set out in the E.O.; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Agency, has determined that no further assessment of federalism implications is necessary. This final rule has been considered under the requirements of E.O. 13175, Consultation and Coordination with Indian Tribal Governments. The Forest Service's Office of Tribal Relations has conducted the 120 day consultation period, which ended on May 31, 2016.

Only one Tribe commented on this rule. The comment expressed support for expanding the public notification procedures through a centralized, internet-based schedule, and reiterated the desire of Tribes to receive early and meaningful consultation opportunities on applicable policy changes that are separate and distinct from the general public participation requirements. It recommended that Tribal consultation occur before notice and comment procedures are initiated to ensure the general public is commenting on policies that are not in conflict with Tribal interests.

In response to these comments, the Forest Service reiterates its commitment to ensuring that consultation procedures are maintained according to existing authorities. This regulatory revision makes no change to any Tribal consultation policy. This revision seeks to update and expand outreach, engagement, and notice of changes to the Directives System; as such, the Forest Service is developing electronic engagement platforms, and it intends to link to the online Forest Service Tribal Relations Consultation Schedule whenever appropriate and practicable.

Energy Effects

This final rule has been reviewed under E.O. 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this rule does not constitute a significant energy action as defined in E.O. 13211.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Agency has assessed the effects of this final rule on State, local, and Tribal governments and the private sector. This rule will not compel the expenditure of \$100 million or more by any State, local, or Tribal government, or any entity in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public

This final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or are not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 - 3521), and its implementing regulations at 5 CFR part 1320, do not apply.

List of Subjects in 36 CFR Part 216

Administrative practice and procedure, National Forests.

Therefore, for the reasons set out in the preamble, the Forest Service revises part 216 of title 36 of the Code of Federal Regulations to read as follows:

PART 216 – PUBLIC NOTICE AND COMMENT FOR STANDARDS, CRITERIA, AND GUIDANCE APPLICABLE TO FOREST SERVICE PROGRAMS

Sec.

216.1 Purpose and scope.

216.2 Definition.

216.3 Notice and opportunity for public comment.

216.4 Interim directives.

Authority: 16 U.S.C. 1612(a).

216.1 Purpose and scope.

(a) This part sets forth the process that the Forest Service will use to ensure adequate notice and an opportunity for comment from the public, Tribal, State and local governments, and other Federal agencies with respect to the formulation in Forest Service directives of standards, criteria, and guidelines applicable to Forest Service programs. Nothing in this Part restricts the Forest Service from providing additional public participation opportunities, including public hearings, where appropriate.

(b) This part applies to the formulation in Forest Service directives of standards, criteria, and guidelines applicable to Forest Service programs. This part does not apply to Forest Service directives pertaining to law enforcement and investigations; personnel matters; procurement; administrative support activities such as budget and finance; business operations; and activities undertaken by the Forest Service on behalf of other Federal agencies. To the extent that any other part in this chapter of the Code of Federal Regulations requires greater opportunities for the

public to participate with respect to policymaking or the issuance of directives than are required by this part, the other Part shall be controlling.

216.2 Definition.

Directive means the contents of the Forest Service Manual and Forest Service Handbooks issued by the Office of the Chief, as described at 36 CFR 200.4(c).

216.3 Notice and an opportunity for public comment.

(a) Prior to issuing a final directive subject to this part, the Forest Service shall:

(1) Provide notice to the public of a proposed directive or interim directive and provide an opportunity to submit comments during a comment period of not less than 30 days in accordance with the requirements this section; and,

(2) Review, consider and respond to timely comments received.

(b) Notices and comments required by paragraph (a) of this section shall:

(1) Be published on a schedule for proposed directives and interim directives maintained by the Forest Service in a centralized repository on the Forest Service website.

(2) Provide a physical mailing address and an internet address or similar online resource for submitting comments.

(c) Notices of final directives shall be published on a schedule on the Forest Service website.

§216.4 Interim directives.

Upon a finding of good cause that an exigency exists, an interim directive may be effective in advance of providing notice and an opportunity for public comment. As described in § 216.3, opportunity will be given for public comment before the interim directive is made final. The basis for the determination that good cause exists for the issuance of an interim directive shall be published at the time the directive is issued.

Daniel James Jiron

Acting Deputy Under Secretary,
Natural Resources and Environment, USDA

Date: March 22, 2018

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