



[3411-15-P]

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**36 CFR Parts 214, 228, and 261**

**RIN 0596-AD33**

**Oil and Gas Resources**

**AGENCY:** Forest Service, Agriculture (USDA).

**ACTION:** Proposed rule.

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**SUMMARY:** The U.S. Department of Agriculture (USDA), Forest Service (Agency) is proposing revisions to its regulations governing Federal oil and gas resources on National Forest System lands. The Agency proposes these revisions to update and modernize its existing regulations. In addition, conforming technical amendments to other parts of the Code of Federal Regulations (CFR) affected by this rule are proposed. The proposed regulations would revise the procedures the Forest Service will follow in the future to make lands available for leasing. The proposed regulations would also clarify requirements for conducting operations and revise procedures that the Agency will follow to monitor operator compliance on leases. These requirements would apply to operations on both existing and future leases. Public input has informed the development of the rules, including through an advance notice of proposed rulemaking (ANPR). The Agency is now requesting public comments on the proposed revisions to the rule. The Agency will carefully consider public comments in preparing the final rule. The Agency is also

requesting comments on the information collection associated with the Subpart E revision and the Environmental Assessment (EA).

**DATES:** Comments concerning this proposed rule, the associated information collection, and/or the EA must be received by [**Insert date 60 days from date of publication in the Federal Register**].

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

1. Electronically: Via the Federal eRulemaking Portal:

*http://www.regulations.gov*. In the Search box, enter 0596-AD33, which is the RIN for this proposed rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule link to locate this document.

You may submit a comment by clicking on “Comment Now!”

2. Mail: Send written comments to USDA-Forest Service. Attn: Director-MGM Staff, 1617 Cole Boulevard, Building 17, Lakewood, CO 80401.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us, as it is part of the public record.

**FOR FURTHER INFORMATION CONTACT:** Sherri Thompson at 303-275-5147 or by mail at 1617 Cole Boulevard, Building 17, Lakewood, CO 80401. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 10 a.m. and 7 p.m., Eastern Daylight Time, Monday through Thursday.

**SUPPLEMENTARY INFORMATION:**

**Background of 36 CFR Part 228, Subpart E**

The USDA, Forest Service is proposing revisions to its Oil and Gas Resources (36 CFR part 228, subpart E) regulations. Acting under established legal authorities, the Forest Service manages the surface-disturbing aspects of oil and gas leasing and operations on national forests and grasslands. Revisions to existing USDA regulations governing Federal oil and gas resource management are being pursued at this time for several reasons. The existing regulations were first promulgated in 1990 with a minor modification in 2007 to reflect revisions to the Forest Service and U.S. Department of Interior, Bureau of Land Management (Bureau of Land Management) joint rule, the Onshore Oil and Gas Order No. 1 (see 43 CFR 3164.1). Updating the regulations will afford an opportunity to address statutory and other requirements enacted since 1990 and modernize existing procedures to streamline processes and promote efficiency.

This rulemaking only affects Federal oil and gas resources on National Forest System lands, it does not affect nonfederal (i.e. reserved and outstanding private) oil and gas resources. Some lands that the Forest Service acquires are subject to previously reserved or outstanding rights (See Forest Service Manual Chapters 5470, 2830 and 2710). Reserved rights are legal rights in property that the seller retains at the time the property is conveyed to the United States. Reserved rights may be made subject in the deed of conveyance to the Secretary of Agriculture's rules and regulations. When reserved rights are made subject to the Secretary's rules and regulations, the exercise of reserved rights generally requires a special use authorization, a plan of operation, or some other appropriate legal authorization. Outstanding rights, sometimes called valid existing rights (VERs), are legal rights in property owned by third parties other than the United States' grantor. Outstanding rights are those rights which have been severed and

purchased by third parties before the United States' acquisition. The United States has limited control over outstanding rights except to prevent undue degradation or nuisance to adjacent surrounding National Forest System land.

The proposed rule would contribute to increasing efficiencies in managing Federal oil and gas activities and would help the Agency achieve its strategic goal to deliver benefits to the public. The Agency is proposing the revision of its existing regulations to clarify internal processes related to oil and gas leasing and approving operations, clarify oil and gas operators' responsibility to protect natural resources and the environment, clarify the Agency's procedures regarding inspections and compliance, and update material noncompliance procedures to reflect existing agency practices and better reflect requirements of law. The changes to 36 CFR part 228 require minor conforming changes to regulations at 36 CFR parts 214 and 261.

The proposed changes would not materially alter the basic responsibility of either the Agency or of oil and gas operators on NFS lands. The proposed changes aim to clarify procedures, reduce redundancy and promote consistency with other existing rules such as Onshore Order 1. For example, one notable proposed change aims to simplify the administrative process the Agency follows to determine which lands are open to leasing, reducing the amount of time it takes the Agency to make these decisions while at the same time maintaining all environmental and human health and safety protections of the current rule. Another proposed change would simplify the compliance process in Agency inspections, which is projected to result in better management and protection of surface resources.

The intent of these proposed changes is to streamline and reduce redundancies to improve agency efficiency and better align Forest Service regulations with those used by the Bureau of Land Management. The Bureau of Land Management is the federal agency primarily responsible for managing federally-owned minerals, including those underlying National Forest System lands. The Forest Service and the Bureau of Land Management jointly manage leasing and operations when oil and gas activities involve National Forest System lands, and oftentimes project proponents operate on lands managed by each agency. Subject to specific provisions as further noted herein, the Secretary of the Interior has the final decision whether to issue oil and gas leases on Federal lands, including National Forest System lands. Better alignment is most practically achieved by the Forest Service aligning its single subpart regulation with the multiple components of the Bureau of Land Management's more extensive oil and gas regulations in 43 CFR, subchapter C, parts 3000 through 3190.

Congress has long recognized the importance of the mineral resources located on lands within the National Forest System and has repeatedly made special provisions for the administration and development of these minerals. The Forest Service manages the surface-disturbing aspects of oil and gas leasing and operations on national forests and grasslands. The Agency seeks to ensure that development of subsurface resources is carried out in a manner that will minimize the impact on these surface resources.

Congress passed the Mineral Leasing Act of 1920 (30 U.S.C. 181, et seq.) directing that disposal of Federal oil and gas resources would be subject to a leasing system. Initially, under the Mineral Leasing Act, the Department of the Interior did not have to obtain the consent of the Forest Service to offer oil and gas leases on National

Forest System lands. That was changed with the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (Pub. L. 100-203, the Reform Act), which amended the Mineral Leasing Act of 1920, and established that the Department of the Interior may not issue any lease on National Forest System Lands reserved from the public domain ‘over the objection of’ the USDA, Forest Service. The Reform Act also revised leasing procedures, and gave the Department of Agriculture specific authority to approve surface uses related to oil and gas exploration and development on National Forest System lands.

In 1947, Congress enacted legislation governing leasing on acquired National Forest System lands (Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. 351-359). This Act applies to acquired National Forest System lands (e.g. those lands added to the National Forest System by the Weeks Act of 1911 or the Bankhead Jones Farm Tenant Act of 1937). The Mineral Leasing Act for Acquired Lands authorized the Secretary of the Interior to lease oil and gas deposits on acquired National Forest System lands “under the same conditions as contained in the leasing provisions of the mineral leasing laws” upon obtaining the consent of the Secretary of Agriculture, 30 U.S.C. 352. The Act also required the Secretary of the Interior to include in such leases any conditions prescribed by the Secretary of Agriculture to “insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered . . .”.

In 2005, Congress directed Federal agencies to streamline and reduce timeframes for processing proposals to lease and conduct oil and gas operations on Federal lands. *See* Energy Policy Act of 2005 (Pub. L. 109-58), Subtitle F, sections 361, 362, and 390.

It is in the national interest to promote clean and safe development of our Nation's vast energy resources while preserving the surface resources of national forests and grasslands. To that end, the Forest Service seeks to facilitate orderly development of Federal oil and gas resources in an environmentally sound manner. The proposed regulatory revisions are consistent with those goals.

The Mineral Leasing Act directs that no permit to drill may be granted without the analysis and approval by the Secretary of Agriculture of a Surface Use Plan of Operations (SUPO) covering proposed surface-disturbing activities within a lease area on National Forest System lands. In 2007, the Forest Service and the Bureau of Land Management jointly established coordination procedures for review and analysis of permits to drill, including the SUPO portion, in Onshore Order 1.

The Mineral Leasing Act also specifies requirements for inspections and compliance, and consequences of noncompliance, for approvals to operate on National Forest System lands. The proposed rule would streamline these requirements and would clarify consequences for an operator found to be noncompliant on National Forest System lands.

The proposed rule would also clarify the procedures that the Forest Service follows to require an operator to take corrective actions if operations are found to be out of compliance with approved SUPOs, including establishing a formal option to refer instances of continued noncompliance to the Bureau of Land Management. The proposed rule would retain operator requirements for emergency abatement when the Agency acts to remedy emergency situations such as fires or spills to which the operator cannot or will not respond. The proposed rule would also revise the Agency's material noncompliance

proceedings by streamlining the process and reflecting consequences defined in the Mineral Leasing Act.

Executive Order 13783 on March 28, 2017, Promoting Energy Independence and Economic Growth (E.O. 13783), declared that it is in the national interest to promote clean and safe development of the Nation's energy resources while avoiding regulatory burdens that unnecessarily encumber energy production. E.O. 13783 indicates that development of these energy resources is essential to ensuring the Nation's geopolitical security. Section 2 of E.O. 13783 directs agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law. As directed, agencies submitted reports to the Office of Management and Budget recommending specific actions that, to the extent permitted by law, could alleviate or eliminate aspects of agency policy that burden domestic energy production. In its report, the USDA identified revisions to the 36 CFR part 228, subpart E, regulation as appropriate to meet the intent of the E.O.

There are currently 5,490 Federal oil and gas leases covering about 4.2 million acres (about 2%) of National Forest System lands. Approximately 2,700 of these leases, covering 1.6 million acres across 39 national forests and grasslands, have producing Federal oil or gas operations, and the footprint of actual operations comprises a small percentage (less than 10% percent) of that. There are 3,165 wells producing oil or natural gas operating on these leases. In 2018, production from these wells was over 25 million barrels of oil and gas products (0.6% of the nation's total), and over 117 million cubic



feet of natural gas (0.3% of the nation's total). The production was valued at over \$1.7 billion and returned approximately \$207 million in royalties to the U.S. Treasury.

The Agency also anticipates that new and updated interpretive guidance for implementing the proposed regulations will be developed and set out in the Agency's directive system in 2021. For example, the Agency intends to update guidance related to proposed revisions for the Agency's leasing consent decision. Guidance may also include clarification of terms not explicitly defined but nonetheless important to execution of these regulations. The Agency also expects that public comment on this proposed rulemaking could help inform necessary updates and additions to the manual or handbook directive system.

#### **Advance Notice of Proposed Rulemaking**

The Agency published an advance notice of proposed rulemaking in the *Federal Register* on September 13, 2018 (83 FR 46458), inviting public input on key issues regarding implementation of existing regulations and other areas of concern. The public comment period occurred from September 13 to October 15, 2018, and served as the scoping period for the environmental analysis. The Forest Service received 91 responses.

Fifty-seven public comments included statements of general opposition, and twenty-three included statements of general support for the proposed rule. The remainder expressed neither opposition nor support.

Stated reasons for general opposition include the destruction of national forests and natural resources for financial or political interests; inadequate protection of human and environmental health; adverse impacts to recreation opportunities and tourism; and unsustainable reliance on fossil fuels.

Stated reasons for general support include the generation of revenue; large existing demands for oil and gas; decreases in regulatory burden on the oil and gas industry; promotion of domestic energy production; and creation of a simplified process leading to quicker leasing decisions and elimination of duplication with the Bureau of Land Management.

Comments expressed both support and opposition to streamlining and process reform. Supporters noted a need to address a Forest Service backlog in leasing decisions and provide an efficient National Environmental Policy Act (NEPA) process, while opponents believe that the existing process provides efficient analysis and decision-making. Some commenters stated that the Forest Service should retain authority of leasing decisions and abide by stewardship responsibilities when managing oil and gas resources.

Commenters noted and gave opinions on other areas where they believed that the Forest Service could make improvements. Their comments included the following: the Forest Service should not rely upon old documents (such as the 1989 Bureau of Land Management Uniform Format for Oil and Gas Lease Stipulations, and Onshore Order 1) to review oil and gas leasing activities; the Forest Service should seek to reduce timelines for Endangered Species Act Section 7 consultation; and the Forest Service should complete leasing analyses in conjunction with land management planning.

Some respondents noted streamlining the process for coordination between the Bureau of Land Management and Forest Service, or consolidating decisions under one agency, would improve efficiency. Commenters continued to express concerns surrounding Forest Service organizational capacity to implement efficient decisions,

including apparent disconnects between Forest Service staff titles and day-to-day responsibilities. This leads to proponents being confused about whom to contact for a particular issue. Respondents also expressed concern that the Forest Service staff lacks understanding of processes and requirements related to the oil and gas regulations; that there are insufficient staff to efficiently complete tasks, leading to outdated leasing analyses; and that there is a need for the Forest Service to create strategies to solve staffing challenges prior to updating regulations. Respondents recommended that the Agency expand use of third-party consultants to prepare NEPA documents.

Regarding the intent to update the process for considering requests for waivers, exceptions, or modifications to lease stipulations, some commenters expressed opposition to waivers, exceptions, and modifications to permits, or stated that any revisions must continue to ensure environmental protection, monitoring, reporting, inspections, and compliance. Other commenters questioned whether the process duplicates work and decisions of the Bureau of Land Management.

On the topic of clarifying procedures for review and approval of SUPOs, some commenters expressed support for clarification of procedures to ensure a consistent format for review and approval. However, some commenters stated that existing regulations already provide a simple, clear process for review and approval of SUPOs, and that new revisions could result in insufficient review and increase potential for environmental impact.

Respondents noted that the Forest Service should clarify what is required of the Forest Service and the Bureau of Land Management in conducting "analysis and approval" of a surface-use plan. Other respondents recommended clarifying procedures to

include maintaining public participation and objection opportunities; implementing deadlines and expiration dates for the approval process; improving coordination between the Forest Service and the Bureau of Land Management on SUPO processing and encouraging applicant support during processing; continuing to implement the surface use requirements in §228.108 and NEPA review requirements in §228.107; and using categorical exclusions for oil and natural gas activities.

With respect to the Forest Service's intent to update regulations addressing the operator's responsibility to protect natural resources and the environment, several comments expressed concern that changes to existing regulations would reduce operator obligations to protect the environment. Respondents suggested that specific requirements and best practices in 36 CFR 228.108 should remain in place, or be strengthened, to protect surface resources. Commenters suggested that the Forest Service describe environmental responsibilities of the Forest Service, the Bureau of Land Management and the operator; that the Forest Service add language regarding operator responsibility to comply with Secretary of the Interior standards for cultural resource protection; and, that the Forest Service not place restrictions on development to protect migratory birds or their habitat. One commenter expressed the view that the regulation changes must not impact drilling activities.

Public comments received in response to the ANPR can be found on the <http://www.regulations.gov>. Search on Docket ID: FS-2018-0053.

**SECTION-BY-SECTION EXPLANATION OF THE 36 CFR PART 228,  
SUBPART E, PROPOSED RULE**

This rule proposes updates to the existing Forest Service regulations governing Federal oil and gas resource management to reflect requirements of legislation and Executive orders enacted since 1990. This rule proposes revisions based on Agency experience implementing existing regulations, and seeks to better align these regulations with established joint Forest Service and the Bureau of Land Management Onshore Order 1 (see 43 CFR 3164.1), and the Bureau of Land Management's independent regulations (43 CFR part 3100), where it may be appropriate and applicable.

The proposed rule would clarify and streamline the processes for identifying National Forest System lands open for leasing, while emphasizing an operator's responsibilities for compliance, and would clarify management steps that the Forest Service may take when operators do not comply with Forest Service regulations. The proposed rule would also aim to unify Forest Service regulations with those of the Bureau of Land Management regarding sundry notices and instances of bonding. The proposed rule would clarify the applicability of the existing procedures in Onshore Order 1 by which the Bureau of Land Management and the Forest Service jointly respond to operating proposals.

The proposed rule would incorporate the content of §228.110, Indemnification, in the existing regulations into §228.105, Responsibilities of Operators, of the proposed rule, thereby reducing the number of sections by one. The proposed rule would also, reorder, renumber and re-title various sections that would result in the following organization of the regulations:

Section 228.100 Scope and Applicability

Section 228.101 Definitions

Section 228.102 Issuance of Onshore Orders and Notices to Lessees and Operators

Section 228.103 Leasing Analysis and Consent Decision

Section 228.104 Consideration of Requests to Waive, Except, or Modify Lease Stipulations

Section 228.105 Responsibilities of Operators

Section 228.106 Operator's Submission of Surface Use Plan of Operations

Section 228.107 Review and Approval of Surface Use Plan of Operations

Section 228.108 Sundry Notices

Section 228.109 Bonds

Section 228.110 Temporary Cessation of Operations

Section 228.111 Compliance and Inspection

Section 228.112 Notice of Noncompliance

Section 228.113 Material Noncompliance

Section 228.114 Posting Requirements

Section 228.115 Information Collection Requirements

The paragraphs below provide a section-by-section description of the proposed changes.

*Section 228.100 Scope and Applicability*

The proposed rule would not change the scope and applicability from the existing rule. The changes or additions to the section are proposed to improve readability, clarity, and provide specific reference to the applicability of the Bureau of Land Management regulations at 43 CFR parts 3160 and 3170 and onshore orders to Federal oil and gas leasing and subsequent lease operations. The proposed rule would include references to

the applicable legal framework and the role of the Secretary of Agriculture in implementing those statutes and would revise the language in paragraph (a) for readability and include specific language regarding lessees and operators. The proposed rule would revise paragraph (b) to describe that the rule applies to National Forest System lands concerning Federal oil and gas leases, and to operations conducted thereon, and to explicitly inform the public that the rule would not apply to oil and gas activity conducted as part of a non-Federal mineral right. The proposed rule would revise paragraph (c) to incorporate the applicability of the joint Forest Service and Bureau of Land Management rule, Onshore Order 1. The proposed rule would reference applicability of other Bureau of Land Management requirements such as its regulations at 43 CFR part 3100, Onshore Oil and Gas orders other than No. 1, and the Bureau of Land Management-issued Notices to Lessees and Operators. The proposed rule would replace the term ‘leasehold’ with ‘lease’ or ‘agreement’ as appropriate to better reflect the Bureau of Land Management terminology regarding oil and gas leasing.

#### *Section 228.101 Definitions*

The proposed rule would add, remove, and revise some terms in the existing regulations to provide greater clarity. The proposed changes would benefit the regulated community, the Forest Service, and the Bureau of Land Management with a more harmonious set of definitions between the agencies’ regulations.

The proposed rule would retain as is or with minor wording changes to improve clarity the following definitions: acquired lands; authorized Forest Service officer; consent; infrastructure or facilities; lease; lessee; material noncompliance; National

Forest System lands; Notices to Lessees and Operators; Onshore Oil and Gas Order; Operations; Operator; substantial modification; and Surface Use Plan of Operations.

The proposed rule would add the following terms and their definitions to provide functionality to proposed regulation text and improve consistency with the Bureau of Land Management terms: agreement; Conditions of Approval; Final Abandonment Notice; lease notice; Master Development Plan; Master Surface Use Plan of Operations; Reasonably Foreseeable Development Scenario; stipulation; Sundry Notice; and Waiver, Exception or Modification.

The proposed rule would remove the definitions of the following terms, because they are redundant, lack applicability to the rule, or do not merit a stand-alone definition due to limited use or no special meaning beyond the plain English usage within the regulation: leasehold; operating right; operating rights owner; person; transfer; and transferee.

#### *Section 228.102 Issuance of Onshore Orders and Notices to Lessees and Operators*

The proposed rule would move the content of the existing §228.102 regarding leasing analysis and decisions to §228.103. The proposed rule would move the requirements for Issuance of Onshore Orders and Notices to Lessees and Operators from § 228.105 in the existing regulations to this section. The proposed rule would then combine procedures for the Chief of the Forest Service to issue onshore oil and gas orders into paragraph (a) and those for issuing Notices to Lessees and Operators into paragraph (b). The proposed rule would make editorial changes to the text for clarity and readability.

#### *Section 228.103 Leasing Analysis and Consent Decision*



The Leasing Analysis and Consent Decision section addresses development of a nationwide schedule for leasing analyses in coordination with the Bureau of Land Management, the components of a leasing analysis, the components of a leasing decision, the ability of the Forest Service to withdraw its consent prior to the Bureau of Land Management conducting a lease sale, and notification of how stakeholders may appeal a leasing consent decision.

The proposed rule would remove reference to the former post-decisional appeal process (36 CFR part 217) because it has been rendered obsolete by subsequent regulations. The proposed change remedies the outdated reference and provides direction to 36 CFR part 219, subpart B, which is the codified sole process by which the public may file objections seeking predecisional administrative review for proposed projects and activities implementing land management plans and documented with a Record of Decision (ROD) or Decision Notice (DN). (78 FR 18481)

The proposed rule would streamline the approach that the Agency follows to identify lands open to leasing and stipulations to protect surface resources on lands open to leasing by establishing that the Forest Service has one decision point. That being consent to leasing made at the completion of the leasing analysis. This approach better aligns the Forest Service leasing availability analysis methods with those followed by the Bureau of Land Management. The proposed rule would also clearly state that the Forest Service may withdraw its consent to lease prior to the Bureau of Land Management conducting a lease sale.

The proposed rule would remove references to other laws and regulatory requirements, particularly with respect to complying with NEPA and the Endangered

Species Act and their implementing regulations, in favor of letting those laws and regulations speak for themselves and to reduce likelihood that direction could be confused in the future if other regulations change. While several citations to specific laws and regulations have been removed, the Forest Service and lessees must still comply with all applicable laws and regulations.

Paragraph (a) of § 228.103 would modernize language regarding scheduling leasing analyses. The existing regulation references scheduling analyses within 6 months of April 20, 1990 and calls for an annual update of the schedule. The proposed rule would remove reference to a specific date, emphasize coordination between National Forests and Grasslands and the Bureau of Land Management for scheduling, inform the public that the agencies would consider public interest in leasing, and would require an annual update to the schedule. The changes would help align the efforts of Forest Service and the Bureau of Land Management with each other and interested parties in conducting leasing analyses.

Paragraph (b) of § 228.103 would define the required components of a leasing consent analysis. The proposed rule maintains the same components of analysis but provides additional direction on cooperation with the Bureau of Land Management, development of alternatives, and use of stipulations. These requirements would include clarifying how stipulations must be designed to carry out provisions of the Energy Policy Act of 2005 (42 U.S.C. 15922) to ensure that lease stipulations are applied consistently, coordinated between agencies, and only as restrictive as necessary to protect the resource for which the stipulations are applied. This section would incorporate parts of the existing § 228.102(b) and (c). The leasing consent analysis process proposed in the rule would

direct that the Forest Service will make a single decision identifying lands on which the Agency would consent to the Bureau of Land Management's offering oil and gas leases for the affected National Forest System lands. The existing regulation directs an administrative review by the Forest Service at the time that specific lands, which have already been subject to an area or forest-wide leasing analysis, are being scheduled for leasing by the Bureau of Land Management. This is not a second, more detailed analysis, but a validation review verifying that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document and is consistent with the applicable land management plan. The proposed rule would remove this largely duplicative administrative procedure. The existing regulation's flexible approach to the sequence or timing of Forest Service consent determinations has sometimes caused confusion among government personnel and the public. The proposed regulation settles on a specific point in the process in which Forest Service consent will be determined allowing uniformity of practice that should eliminate such confusion. The proposed rule includes a provision that would allow the Forest Service to withdraw its consent at any time prior to a Bureau of Land Management lease sale.

Paragraph (c) of § 228.103 would carry forward the components of a leasing consent decision from the existing regulations but is renamed "Leasing Consent Decision." The paragraph would clarify that the Forest Service has one decision point in the process and would clearly define the required components of the Forest Service decision: which lands are open to leasing and under what conditions (standard lease terms and conditions or added stipulations); and which lands are closed through exercise of management direction, statute, regulation, or withdrawal.

Paragraph (d) clarifies the notification to the Bureau of Land Management of a consent decision.

The proposed rule would eliminate content in § 228.102(e) of the existing regulation that discusses leasing decisions for specific lands as authorizing specific lands for lease. This existing language has been subject to litigation. For example, the Forest Service's interpretation of the existing leasing analysis and consent process set out in § 228.102(c), (d), and (e) has been disputed in litigation, such as the trilogy of *Wyoming Outdoor Council* rulings (*Wyoming Outdoor Council v. U.S. Forest Service*, 981 F.Supp. 17 (D.D.C. 1997), *aff'd*, 165 F.3d 43 (D.C. Cir 1999); *Wyoming Outdoor Council v. Dombeck*, 148 F.Supp.2d 1 (D.D.C. 2001); *Wyoming Outdoor Council v. Bosworth*, 284 F.Supp.2d 81 (D.D.C. 2003)). A more recent and ongoing case, *Center for Biological Diversity v. USFS*, No. 2:17-cv-372, 2020 WL 1429569 (S.D. Ohio Mar. 13, 2020), addresses the Agency's analysis and consent process, including whether Forest Service consent can be withdrawn. The proposed rule seeks to simplify the overall process by settling on a specific point in the process in which Forest Service consent will be determined, allowing uniformity of practice. The Agency anticipates that new interpretive guidance for implementing the leasing consent decision will be developed and set out in the Agency's manual or handbook directive system in 2021.

Finally, paragraph (e) of the proposed rule would codify the existing practice that the Forest Service could withdraw its consent decision prior to a Bureau of Land Management lease sale.

*Section 228.104 Consideration of Request to Waive, Except or Modify Lease Stipulations*

The proposed rule would add direct reference regarding the applicability of procedures in Onshore Order 1 for requesting waivers or exceptions from or modifications to a lease stipulation (see proposed regulation text in §228.104). The proposed rule would direct the Forest Service to provide notice to the Bureau of Land Management on its determination as to whether to grant or deny a request for a waiver, exception, or modification. The existing regulation directs notification to both the Bureau of Land Management and operator. As the administrator of Federal leases, the appropriate notification to the operator is from the Bureau of Land Management. The proposed rule would remove obsolete references to administrative appeal regulations that are no longer in use, in deference to the Agency's existing administrative appeal regulations at 36 CFR part 214 and the Agency's objection procedures at 36 CFR part 219.

The existing regulation requires the Forest Service to consult with other agencies when considering a waiver, exception or modification to a lease stipulation included at the other agency's request. Examples of instances when this might occur would be if the Forest Service include a stipulation that restricted occupancy in the vicinity of an electrical transmission line operated by a Federal power authority, or a stipulation to protect a special status wildlife species required by the U.S. Fish and Wildlife Service.

#### *Section 228.105 Responsibilities of Operators*

The proposed rule would move the content of the existing §228.105 to §228.102. The proposed rule would move the content of the existing §228.108 to §228.105 and re-title it *Responsibilities of Operators*. To improve efficient implementation of the regulations, the proposed rule would generally revise the content to not duplicate

requirements in Onshore Order 1; readers will be referred to Onshore Order 1 as applicable.

The proposed rule would retain requirements from the existing regulations in paragraphs (g), (i), and (j)(2), place them in paragraph (a), and reorder them for readability. Paragraph (a) of the proposed rule would reinforce existing practices for operators to maximize use of existing roads and utility corridors in planning and constructing new infrastructure and report to the Forest Service any spills, blowouts, fires, or personal injuries that are reported to the Bureau of Land Management under its requirements.

Paragraph (b) of the proposed rule would require the operator to comply with all other applicable state and Federal statutes and regulations. Paragraph (c) of the proposed rule would require the operator to allow the Forest Service access to its operations for compliance inspection purposes. Paragraph (d) of the proposed rule would inform the operator of existing requirements that it would be responsible for obtaining Forest Service permits for uses of National Forest System lands and resources not otherwise included in a Surface Use Plan of Operation, most notably for uses outside an operator's lease area. Paragraph (e) of the proposed rule would maintain the requirement that the operator shall conduct its activities in a manner that avoids the cause or minimizes the spread of fire.

The proposed rule would move §228.110 in the existing regulation to paragraph (f) of this section and retitle it *Liability*. The proposed rule would maintain the same conditions of liability to the United States for injury, loss, or damage, including fire

suppression costs incurred by the government resulting from the operator and all lessees' activities.

*Section 228.106 Operator's Submission of Surface Use Plan of Operations*

The proposed rule would revise language clarifying the applicability of the requirements in Onshore Order 1 when an operator submits a Surface Use Plan of Operation and would address use of Master Development Plans and Master Surface Use Plans of Operation. The Bureau of Land Management is principally responsible to track applications for operations on Federal oil and gas leases and does so through a database called the Automated Fluid Minerals Support System (AFMSS). The Forest Service has access to AFMSS to track Surface Use Plans of Operation and Master Surface Use Plans of Operation. The proposed rule revises paragraph (c) to emphasize the need for operators to include in their applications a description of infrastructure or facilities to the extent known that would be used to support their operations such as pipelines or roads, and whether it would be within the boundaries of a lease or agreement, or outside lease or agreement boundaries. The proposed rule would remove paragraph (d), which uses terminology that is inconsistent with the Bureau of Land Management regulations and would instead clarify Sundry Notices in §228.108.

*Section 228.107 Review and Approval of Surface Use Plan of Operations*

The proposed rule would rename and reduce the number of paragraphs in this section. The proposed rule would improve references to Onshore Order 1, including the timeframes established in the Order for agency response. The proposed rule would remove obsolete references to Agency administrative appeal procedures since they are no longer in use, in deference to the Agency's existing administrative appeal regulations at

36 CFR part 214 and the Agency's objection procedures at 36 CFR part 219. The proposed rule would remove §228.107(e), which uses terminology that is inconsistent with the Bureau of Land Management's regulations and would instead clarify Sundry Notices in §228.108.

*Section 228.108 Sundry Notices*

The proposed rule would move the content of the existing §228.108 to §228.105, Responsibility of Operator. The proposed rule would rename this section Sundry Notices replacing references to supplemental plans in §§228.106 and 228.107 of the existing regulations. This would remove language inconsistent with the Bureau of Land Management regulations and align the proposed rule with the Bureau of Land Management procedures. New content regarding sundry notices would include that the operator must follow the Bureau of Land Management procedures for submitting a sundry notice and that Forest Service approval of a sundry notice would be required if the notice proposed surface-disturbing activities. The proposed rule would clarify that surface-disturbing activities may be subject to environmental analysis. The new content is informative of compliance with existing requirements.

*Section 228.109 Bonds*

The proposed rule maintains the same bond requirement as the existing rule but provides additional instruction to Forest Service managers and operators with regard to clarity and consistency with Onshore Order 1. The proposed rule would make general clarifications and editorial corrections for readability. The proposed rule clarifies how the Forest Service would coordinate with the Bureau of Land Management if an operator chooses to increase its Bureau of Land Management bond to cover additional bonding



required by the Forest Service for surface reclamation purposes. The Forest Service's experience in managing Federal oil and gas resources since the existing regulations were promulgated in 1990 indicates that in many cases the Bureau of Land Management lease bonds are insufficient to support surface reclamation needs if a lessee or operator defaults. The proposed rule retains language for the Forest Service to exercise its authority under the Mineral Leasing Act to ensure adequate financial assurance is in place to reclaim surface disturbance. The proposed rule would add language that describes what factors authorized Forest Service officers would consider when determining if Bureau of Land Management lease bonds are adequate. The proposed rule would retain language to the effect that the operator may increase the Bureau of Land Management performance bond or post a separate surface reclamation bond with Forest Service when the Forest Service determines additional bonding is necessary. The proposed rule would add paragraph (d) to clarify methods for posting bonds, and paragraph (e) to clarify methods for releasing a Forest Service-held surface reclamation bond.

#### *Section 228.110 Temporary Cessation of Operations*

The proposed rule would move the content of the existing § 228.110 to paragraph (f) of §228.105, *Responsibilities of Operator*, and rename it *Liability*. The proposed rule would place the content from the existing §228.111 in this section. The proposed rule would make editorial clarifications.

#### *Section 228.111 Compliance and Inspection*

The proposed rule would move the content of the existing § 228.111, except paragraph (c), to §228.110. The proposed rule would move the content of the existing

paragraph (c) to §228.105(b), *Responsibility of Operator*, and simplify it to reference *Compliance with Other Statutes*. The proposed rule would place the content of the existing §228.112 in this section. The proposed rule would reorder and rename the paragraphs in this section and make editorial corrections to clarify the Agency's responsibility to inspect operations for compliance with terms of applicable approvals and the regulations in this subpart.

#### *Section 228.112 Notice of Noncompliance*

The proposed rule would move the content of the existing section to §228.111. The proposed rule would also move the content of the existing §228.113 to this section. The proposed rule would reorder, rename, and revise the paragraphs in this section. The proposed rule would streamline the procedures that the Agency would use to notify an operator of issues concerning noncompliance with the terms of approvals or the regulations in this subpart. The proposed rule would streamline these procedures by moving from a two-step process to a one-step process. The proposed rule would clarify when the Agency would either engage the Bureau of Land Management to take action under 43 CFR part 3163, refer a noncompliance action to law enforcement, or refer a noncompliance issue to the Agency's material noncompliance proceedings. The proposed rule would clarify an operator's opportunity to correct issues of noncompliance and would clarify an operator's appeal opportunities. The proposed rule would update the methods for notifying operators of noncompliance issues by including electronic means of notification.

#### *Section 228.113 Material Noncompliance*

The proposed rule would move the content of the existing section to §228.112, and move the content of §228.114 to this section. The proposed rule would revise, reorder, and rename the paragraphs in this section. The proposed rule would streamline the procedures that the Agency would follow when determining if an operator would be in material noncompliance with reclamation or other requirements or standards and would better reflect the requirements and consequences established in the Mineral Leasing Act. The 1990 procedures for oil and gas material noncompliance proceedings were designed to be consistent with other debarment procedures that are now defunct, thus prompting the need to revise these procedures.

*Section 228.114 Posting Requirements*

The proposed rule would move the content of the existing section to §228.113; move the content of §228.115 to this section; retitle this section; and revise it to make the timeframes consistent with the timeframes in the Bureau of Land Management's direction and Onshore Order 1. The proposed rule would remove internal direction regarding posting decisions, which is addressed in the Agency's NEPA regulations.

*Section 228.115 Information Collection Requirements*

The proposed rule would move the content of the existing section to §228.114, and retitle it *Information Collection Requirements*. The proposed rule would include statements regarding Office of Management and Budget requirements from the existing §228.115.

**Conforming Technical Amendments**

The proposed rule identifies minor, non-substantive changes to two other regulations for purposes of conforming with the modifications that would be made to 36 CFR part 228, subpart E.

In 36 CFR 214.4(b)(3), which specifies the decisions that are appealable under part 214, the phrase “request to supplement a surface use plan of operation” would be changed to “request for surface use portion of sundry notice” to track language in the proposed rule. The proposed rule would add two additional appealable decisions: 1) requests for a waiver or exemption from, or modification to an oil and gas lease stipulation, and 2) requests for an extension of the time period for taking action in response to a notice of noncompliance.

In 36 CFR 261.2, which includes definitions applicable to the Agency’s law enforcement regulations, the definition of “operating plan” would be changed by replacing the phrase “supplemental surface use plan of operation” with “surface use portion of a sundry notice.”

## **REGULATORY CERTIFICATIONS**

### *E.O. 12866 Regulatory Planning and Impact Analysis (Analysis of Costs and Benefits)*

E.O. 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant regulatory actions. The Office of Information and Regulatory Affairs has determined that this proposed rule is significant pursuant to section 3(f) of E.O. 12866. Therefore, a Regulatory Impact Analysis (RIA) analyzing the costs and benefits of the proposed regulation is needed to comply with E.O. 12866. The potential benefits and costs, as well

as distributional impacts, associated with the proposed rule were analyzed to fulfill the RIA requirements, consistent with E.O.12866 and OMB Circular A-4.

The RIA considers costs and benefits associated with updates, modifications, or clarifications to different sections of 36 CFR part 228, subpart E, as they relate to key procedural steps for oil and gas leasing and permitting on National Forest System lands. Changes in costs and benefits are discussed in a primarily qualitative manner due to the challenges with quantifying costs and benefits at a programmatic level. Quantitative proxies are used when feasible to help describe the potential frequency or magnitude of activities and corresponding costs affected by the proposed rule.

The direct benefits of the proposed rule are reduced costs and time spent on identifying available lease areas, approving operations, and addressing compliance actions, including costs and time incurred by the Agency as well as by proponents engaged in or pursuing oil and gas operations on National Forest System lands. Indirect benefits can result from expedited access to leasable oil and gas resources on National Forest System lands, including time-valued oil and gas revenue or returns to operators as well as time-valued bids, lease rentals, and royalties paid by operators to the Federal Government and public.

The proposed rule is not expected to have a significant or measurable impact on rates of oil and gas production on National Forest System lands; oil and gas prices and other market factors are likely to drive future changes in growth of development and production. Because of minimal impacts to production, the proposed rule is equally unlikely to have significant distributional impacts on job or income contributions from oil and gas activities on National Forest System lands.

The total or aggregate net benefits associated with the proposed rule cannot be quantified but are likely to be small or slightly more than the estimated agency cost savings of \$100,000 to \$200,000 per year. The Regulatory Impact Analysis is available with the supporting documents at <http://www.regulations.gov>.

#### *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804(2). Findings in the Regulatory Impact Analysis for the proposed rule indicate that it is unlikely to have significant impacts on job or income contributions from oil and gas activities on National Forest System lands. Therefore, the revised regulation is not classified as major.

#### *Energy Effects.*

The proposed rule was reviewed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The proposed rule is not expected to have a measurable effect (positive or negative) on oil and/or gas supply or distribution. The Agency regulation does not make decisions about which lands are open or closed to leasing and subsequent development, but instead manages the process. The proposed rule should streamline the oil and gas leasing process and should clarify processing procedures for the Surface Use Plan of Operation portion of an Application for Permit to Drill on National Forest System lands. The streamlining should reduce time and costs of permitting or leasing.

The proposed rule is not expected to have a significant adverse effect on the supply, distribution, or use of energy; on competition or prices; or on other agency

actions related to energy. The proposed rule is not expected to raise novel issues regarding adverse effects on energy. The proposed rule is therefore not expected to be a significant energy action or to require a statement of energy effects, consistent with OMB guidance for implementing E.O. 13211.

*Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)*

The Agency has reviewed this proposed rule under U.S. Department of Agriculture procedures and Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, issued January 30, 2017. The Office of Management and Budget has reviewed this proposed rule and designated it as significant per E.O. 12866. E.O. 13771 requires that agencies account for the incurred costs that a significant regulatory action may have on the public and offset such costs with the removal of two other significant regulatory actions.

The total or aggregate net benefits associated with the proposed rule cannot be quantified; however, they are expected to be small or slightly more than the estimated agency cost savings of \$100,000 to \$200,000 per year for leasing analysis and processing expressions of interest. Thus, the proposed rule is considered a deregulatory action per E.O.13771.

*National Environmental Policy Act*

The Agency prepared a programmatic environmental assessment (PEA) to determine whether this proposed rule would have a significant impact on the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) The PEA describes and analyzes two alternatives: the Proposed Rule (Proposed Action) and continuing with the existing regulations (No Action). The

PEA is available for review with the supporting documents for this proposed regulation at <http://www.regulations.gov>. If the final PEA supports a Finding of No Significant Impact for the rule, the preparation of an environmental impact statement pursuant to the NEPA would not be required.

*Consultation and Coordination with Indian Tribal Governments (E.O. 13175)*

This rule has been reviewed in accordance with the requirements of Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*. Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications (including regulations, legislative comments or proposed legislation, and other policy statements or actions) that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. To ensure tribal perspectives are heard and fully considered during rulemaking, the Agency contacted all federally recognized Indian tribes and Alaska Native Corporations in accordance with E.O. 13175, (Consultation and Coordination with Indian Tribal Governments); USDA Departmental Regulation 1350-02 (Tribal Consultation, Coordination and Collaboration); and Forest Service Handbook 1509.13, Chapter 10 (Consultation with Indian tribes and Alaska Native Corporations). The Agency initiated formal consultation on the rulemaking by contacting the Indian tribes and Alaska Native Corporations by mail.

The consultation period began in September 2018 and will continue until the close of the comment period on the proposed rule. Consultation materials included the advance notice of proposed rulemaking, briefing documents that outline possible revisions of the



existing regulations and the reasons why these changes are being proposed, and a list of frequently asked questions. As consultation continues, the Agency will also provide Indian tribes and Alaska Native Corporations with the proposed rule.

So far, the consultation process has included two in-person regional tribal consultation meetings in the Forest Service's Southwest Region: one was held on October 29, 2018, in Albuquerque, New Mexico, and the other on October 31, 2018 in Flagstaff, Arizona. During the October 31, 2018 consultation meeting, the Hopi Tribe requested additional face-to-face consultation with the Regional Forester. The Agency also received written comments from the Hopi Tribe and the Rincon Band of Luiseno Indians by letter and from the Federated Indians of Graton Rancheria by email. Most comments stated that the tribes will be provided additional review and comment once the Agency releases the proposed rule, as part of the consultation process. The Agency will continue to conduct government-to-government consultation on the rule until the close of the public comment period on the proposed rule.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian tribes and has determined that this rule has tribal implications that require continued communication efforts to determine if further tribal consultation under E. O. 13175 is required. To date, as part of their regulatory review process noted above, the Forest Service has engaged in various outreach efforts to American Indian and Alaska Native tribes, villages, and Corporations regarding the development of this proposed rule and the ongoing tribal cooperation in this process. If further consultation is required or otherwise appropriate, the Forest Service will work with the USDA's Office of Tribal Relations to ensure that meaningful consultation is provided.

### *Regulatory Flexibility Act and Small Business Analysis*

The Agency considered the impacts of the proposed rule on small entities, consistent with requirements of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Flexibility Enforcement Fairness Act of 1996 (SBREFA), and Executive Orders 13272 and 13563 (Proper Consideration of Small Entities in Agency Rulemaking). Under the RFA, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities potentially impacted by the proposed rule include small businesses (firms) involved in oil and gas extraction operations (North American Industry Classification System (NAICS) 211111), drilling oil and gas wells (NAICS 213111), and support activities for oil and gas operations (NAICS 213112). The proposed rule does not affect the terms, conditions, and stipulation of existing leases. The proposed rule can impact businesses that express interest in or decide to bid on new leases, or otherwise decide to engage in oil and gas development and operations on National Forest System lands currently under lease or that may come under lease in the future. The proposed rule provides both direct and indirect benefits to small businesses depending on whether the business holds leases or provides drilling and other support services.

There were 328 different firms operating oil and gas producing wells on National Forest System lands as of September 2018, of which 316 (96 percent) are estimated to be

small businesses based on the Small Business Administration (SBA) small business criterion of 1,250 employees for NAICS 211111. The proposed rule will primarily impact a subset of operators that express interest in leasing National Forest System land or apply for permits to drill new wells on National Forest System lands in the future. As an estimate for the subset of affected small businesses, the Forest Service used the average of 35 Surface Plans of Operation for new wells that were approved annually, from 2013 – 2017, and assumed each new Surface Use Plan of Operations is submitted by a different firm (which is unlikely and provides a high side estimate). Other aspects of the proposed rule will likely go unnoticed by operators. For example, compliant operators will likely experience no affects from proposed procedures that the Agency will follow to monitor for compliance. For comparison to the effect on 35 small businesses annually, the estimated number of small firms associated with the oil and gas extraction sector (NAICS 211111) for the nation is approximately 5,600. The percent of small businesses affected by the proposed rule on an annual basis is projected to be small (35 of 5,600 is less than 1 percent).

The aggregate impact of the proposed rule, compared to baseline regulatory conditions, is expected to be positive for a majority of the entities involved in oil and gas leasing, development and operations on National Forest System lands, as noted in the Regulatory Impact Analysis. Provisions of the proposed rule are expected to reduce the times for reviewing and approving leases and permits, thereby saving operator costs and expediting opportunities for production and revenue. Exceptions might include cases where some operators may be faced with increases in reclamation bond amounts or have to apply for special use authorizations; however, these situations arise only when

operators are not in full compliance with existing regulations. Based on the evidence summarized above, the proposed rule is expected to increase opportunities for net benefits to small entities on average. The number of small entities that would be impacted is not likely to be substantial. We therefore certify that this rule will not have a significant economic impact on a substantial number of small entities indicating that an initial regulatory flexibility analysis is not required

More information on the RFA and SBREFA determination is available with the supporting documents for this proposed regulation at <http://www.regulations.gov>. The Agency acknowledges that the analysis took place prior to the COVID-19 pandemic-induced recession and its impact on oil and gas markets. Because the expected impacts on small businesses are expected to be very small, difficult to quantify, and beneficial, we do not expect updated data on oil and gas markets or Forest Service production and development activity to change the overall conclusion and certification. However, the Agency intends to use the most current data available in its analyses prior to finalizing the rule. The Agency is seeking public comment specific to this analysis, and public comment on what effect the COVID-19 pandemic may have on the proposed revisions to the regulation.

### *Federalism*

The Agency considered this proposed rule under the requirements of Executive Order 13132, Federalism. The Agency has concluded that the rule conforms to the federalism principles set out in this Executive order. It will not impose any compliance costs on the States and will not have substantial direct effects on the States or the relationship between the National Government and the States, or on 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.

*Taking of Private Property (E.O. 12630)*

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that the rule does not pose the risk of a taking of protected private property. This rule affects management of Federal oil and gas resources and does not apply to privately held oil and gas rights.

*Civil Justice Reform (E.O. 12988)*

This rule complies with the requirements of Executive Order 12988. More specifically, this rule meets the criteria of section 3(a), which requires agencies to review all regulations to eliminate errors and ambiguity and to write all regulations to minimize litigation. This rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

*Environmental Justice*

The Department considered impacts of the proposed rule on civil rights and environmental justice (pursuant to Executive Order 12898, February 16, 1994). The Civil Rights Impact Analysis prepared according to USDA DR 4300-4 and 5600-002 may be viewed with this proposed regulation's supporting documents at <http://www.regulations.gov>. No adverse or disproportionate impacts on civil rights or environmental justice to underrepresented populations, or to other U.S. populations or communities, are expected from the proposed rule.

### *Unfunded Mandates Reform Act*

Pursuant to Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1531–1538), the Agency has assessed the effects of the proposed rule on State, local, and Tribal governments, and on the private sector. This proposed rule would not compel the expenditure of \$100 million or more by State, local, or Tribal governments, in the aggregate, or by the private sector. Therefore, this proposed rule is not subject to the requirements of section 202 and 205 of the UMRA.

### *Paperwork Reduction Act*

This proposed rule contains a collection of information for which the Agency is seeking Office of Management and Budget (OMB) approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.). To accomplish the information collection approval, the Agency is currently seeking reinstatement of OMB Control No. 0596-0101, which has previously been approved for collection of information associated with the existing 36 CFR part 228, subpart E. The proposed rule does not establish any new information collection requirements not previously approved under OMB Control No. 0596-0101.

It is important to note that the information collection requirements of this subpart are supplemental to the Bureau of Land Management's various OMB information collection approvals for issuing and managing operations on Federal oil and gas leases. The following sections of proposed subpart E contain information requirements as defined in 5 CFR part 1320:

*Section 228.104 – Consideration of Requests to Waive, Except, or Modify Lease Stipulations.* Under the Bureau of Land Management regulations at 43 CFR 3101.1-4, the

Bureau of Land Management may waive, except, or modify a lease stipulation. For leases on National Forest System lands, the Bureau of Land Management must obtain approval from the Forest Service before granting such a request. Section 228(c) provides criteria for approval that the Authorized Forest Service officer must determine are in place to grant approval. The additional information collection burden estimate is for the extra time an operator would take to organize and focus its request to assist the Forest Service in its review and consideration for approval.

*Section 228.106(a), (c), and (d) – Operator’s Submission of Surface Use Plan of Operations.* Where a well is located on National Forest System lands, the Forest Service must approve the Surface Use Plan of Operations included as part of an operator’s Application for Permit to Drill (reference BLM Form 3160-3, OMB Control No. 1004-0136). The Agency estimates that there are no additional burden hours for an operator’s submission of a Surface Use Plan of Operations on National Forest System lands versus lands managed by the Bureau of Land Management.

*Section 228.109(e) Bond Release.* This section would provide an operator the ability to seek an incremental reduction in the performance bond based on partial completion of the reclamation requirements of the approved Surface Use Plan of Operations. This is an information collection specific to subpart E regulations.

*Section 228.110(a) Notice of Temporary Cessation of Operations.* This section would require an operator to provide verbal notification followed by a written statement to the Forest Service if operations will be temporarily paused for a period of 45 days or more. This is an information collection specific to subpart E regulations.

*Section 228.112(c) Extension of Deadline in Notice of Noncompliance.* Under this section, when issued a notice of noncompliance an operator may request an extension of the deadline contained within the notice. In its request, an operator would provide the rationale for the needed delay for it to come into compliance. This is an information collection specific to subpart E regulations.

*Section 228.113(b)(2) – Response to a Referral of Material Noncompliance.* When the Agency determines that an operator has failed to remedy a state of noncompliance and is being referred to the Compliance Officer for a determination of material noncompliance, this section would inform an operator that it may submit a written response to the referral or request an oral presentation to the Compliance Officer. This is an information collection specific to subpart E regulations.

*OMB Control Number: 0596-0101*

*Title: Oil and Gas Resources, 36 CFR, Part 228, Subpart E*

*Type of Review: Reinstatement without Change*

*Respondents/Affected Public: Individuals and private sector businesses who wish to engage in activities on National Forest System lands pursuant to a Federal oil and gas lease.*

*Total Estimated Number of Annual Respondents: Approximately 50*

*Total Estimated Number of Annual Responses: Approximately 70*

*Estimated Completion Time per Response: Varies from 5 minutes to 2 hours, depending on activity, with weighted average of 0.2 hours per response*

*Total Estimated Number of Annual Burden Hours: 14 hours*



In accordance with the Paperwork Reduction Act of 1995, we provide the public and other agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed information collection request. We are especially interested in public comment addressing the following issues: (1) is the collection necessary to the proper functions of the Agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Agency minimize the burden of this collection on the respondents, including through the use of information technology.

#### REQUEST FOR PUBLIC COMMENT

Public input has informed the development of the rules, including through an advance notice of proposed rulemaking (ANPR). The Agency reiterates its request for public comments on any aspects of the proposed revisions to the rule. The Agency will carefully consider public comments in preparing the final rule.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to the Office of Management and Budget to approve this information collection request. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying

information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Please see the **ADDRESSES** section for directions on where to submit comments for this information collection request.

### **List of Subjects**

#### **36 CFR Part 214**

Administrative practice and procedure, National forests.

#### **36 CFR Part 228**

Environmental protection, Mines, National forests, Oil and gas exploration, Public lands-mineral resources, Public lands-rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

#### **36 CFR Part 261**

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, the Forest Service is proposing to amend parts 214, 228, and 261 of title 36 of the Code of Federal Regulations as follows:

### **PART 214 – POSTDECISIONAL ADMINISTRATIVE REVIEW PROCESS FOR OCCUPANCY OR USE OF NATIONAL FOREST SYSTEM LANDS AND RESOURCES**

1. The authority citation for part 214 continues to read as follows:

Authority: 7 U.S.C. 1011(f); 16 U.S.C. 472, 551.

2. Amend § 214.4 by revising paragraph (b)(3) to read as follows:

**§ 214.4 Decisions that are appealable.**

\*\*\*\*\*

(b) \*\*\*

(3) Approval or denial of a surface use plan of operations, request for a surface use portion of a sundry notice, request for a waiver or exception from or modification to an oil and gas lease stipulation, suspension of oil and gas operations, issuance of a notice of noncompliance, or denial of a request for noncompliance notice deadline extension pursuant to 36 CFR part 228, subpart E;

\*\*\*\*\*

**PART 228 – MINERALS**

3. The authority citation for part 228 continues to read as follows:

Authority: 16 U.S.C. 478, 551; 30 U.S.C. 226, 352, 601, 611; 94 Stat. 2400.

4. Revise subpart E to read as follows:

**Subpart E – Oil and Gas Resources**

Sec.

228.100 Scope and applicability.

228.101 Definitions.

228.102 Issuance of onshore orders and notices to lessees and operators.

228.103 Leasing analysis and consent decision.

228.104 Consideration of request to waive, except, or modify lease stipulations.

228.105 Responsibilities of operator.

228.106 Operator's submission of Surface Use Plan of Operations.

228.107 Review and approval of Surface Use Plan of Operations.

228.108 Sundry notices.

228.109 Bonds.

228.110 Temporary cessation of operations.

228.111 Compliance and inspection.

228.112 Notice of noncompliance.

228.113 Material noncompliance.

228.114 Posting requirements.

228.115 Information collection requirements.

#### **Subpart E – Oil and Gas Resources**

Authority: 16 U.S.C. 478, 551; 30 USC 226, 352, 601, 611.

#### **§ 228.100 Scope and applicability.**

(a) *Scope.* This subpart sets forth the rules and procedures by which the Forest Service of the United States Department of Agriculture will carry out its statutory responsibilities for the conservation of surface resources associated with oil and natural gas leasing on National Forest System lands, for approving surface use requirements related to exploration and development of oil and gas on National Forest System lands subject to a Federal oil and gas lease, for inspecting surface-disturbing operations on such leases, for enforcing surface use and reclamation requirements, and for the general management of subsequent oil and gas operations on National Forest System lands. This subpart also establishes minimum requirements for lessees and/or operators for use and protection of National Forest System lands and resources.

(b) *Applicability.* The rules of this subpart apply to National Forest System lands subject to Federal oil and gas leases, and to operations that are conducted within such leases. The regulations in this subpart do not apply to the development of non-Federal oil and gas interests pursuant to reserved and outstanding rights.

(c) *Applicability of other rules.* Other rules that apply are:

(1) Application requirements for proposing oil or gas wells, along with the procedures the Federal agencies follow for approving oil and gas wells, certain subsequent well operations, and abandonment, are established in the Forest Service and Bureau of Land Management joint rule, Onshore Oil and Gas Order Number 1 (see 43 CFR 3164.1), referred to as Onshore Order 1 in this subpart.

(2) The Bureau of Land Management regulations at 43 CFR parts 3160 and 3170, Onshore Oil and Gas Orders 2 and 7, and Bureau of Land Management-issued Notices to Lessees and Operators also apply to oil and gas leasing and operations on National Forest System lands, where applicable.

(3) Surface uses associated with oil and gas activities that are conducted on National Forest System lands outside a lease or agreement are subject to Forest Service authorization under regulations set forth elsewhere in 36 CFR chapter II, including but not limited to the regulations set forth in 36 CFR part 251, subpart B, and 36 CFR part 261.

**§ 228.101 Definitions.**

For the purposes of this subpart, the terms listed in this section have the following meaning:

*Acquired lands.* Lands which the United States obtained by deed through purchase or gift, or through condemnation proceedings, including lands previously disposed of under the public land laws including the mining laws.

*Agreement.* A Bureau of Land Management-approved Oil and Gas Unit Agreement or Communitization Agreement (see 43 CFR 3180.0-5).

*Authorized Forest Service officer.* The Forest Service employee delegated the authority to perform a duty described in this subpart and who is generally a Regional Forester, Forest, Grassland or Prairie Supervisor, or District Ranger, depending on the scope and level of the duty to be performed.

*Compliance Officer.* The Deputy Chief, or the Associate Deputy Chief, National Forest System or the line officer designated to act in the absence of the Deputy Chief.

*Conditions of Approval.* Site-specific requirements that may be included with the approval of a Surface Use Plan of Operations that may limit or modify the specific activities covered in the plan. Conditions of Approval may minimize, mitigate, or prevent impacts to National Forest System lands or resources.

*Consent.* For the purposes of this subpart means to authorize the Bureau of Land Management to offer oil and gas leases on National Forest System lands, and refers to either the Forest Service's not objecting to such leasing on lands reserved from the public domain or the Forest Service's consenting to such leasing on acquired National Forest System lands.

*Final Abandonment Notice (FAN).* An operator submits a FAN to notify the Bureau of Land Management and the surface management agency that final reclamation has been completed, that the surface has been reclaimed in accordance with previous

approval(s), and that the well site or other facility is ready for inspection and consideration for release from liability under the bond.

*Infrastructure or facilities.* The basic physical components (e.g., buildings, roads, power supply, equipment, pipelines, storage tanks) necessary for the development and production of oil and gas.

*Lease.* Any contract, profit-share arrangement, joint venture, or other agreement issued or approved by the United States under a mineral leasing law that authorizes exploration for, extraction of, or removal of oil or gas on Federal lands, including National Forest System lands.

*Lease Notice.* A notice attached to an oil and gas lease that provides more detailed information concerning limitations that already exist in law, lease terms, regulations, or operational orders. A Lease Notice also addresses special terms the lessee should consider when planning operations but does not impose new or additional restrictions. Lease Notices attached to leases should not be confused with NTLs – Notices to Lessees (43 CFR 3160.0-5).

*Lessee.* A person or entity holding record title in a lease issued by the United States. A lessee also may be an operating rights owner if the operating rights in a lease or portion thereof have not been severed from record title (43 CFR 3100.0-5).

*Master Development Plan.* A plan submitted by an operator(s) to the Bureau of Land Management that contains information common to multiple planned wells, including drilling plans, Surface Use Plans of Operations, and plans for future production.

*Master Surface Use Plan of Operations.* A plan for surface use, disturbance, and reclamation for two or more wells.

*Material noncompliance.* A Forest Service determination that an operator or lessee has materially failed or refused to take necessary corrective actions, complete reclamation, maintain required bonds, or reimburse the Agency for the costs of abating an emergency, as further described in § 228.113, in a timely manner.

*National Forest System lands.* All lands, waters, or interests therein administered by the USDA Forest Service as provided in 16 U.S.C. 1609.

*Notices to Lessees and Operators.* A written notice issued by the authorized Forest Service officer or the Bureau of Land Management. Notices to Lessees and Operators serve as requirements related to specific item(s) of importance within a State, Forest Service Region, National Forest, Grassland or Prairie, or Ranger District, or other area.

*Onshore Oil and Gas Order.* An order issued by the Chief of the Forest Service that implements and supplements the regulations in this subpart. Onshore Oil and Gas Orders may also be issued by the Bureau of Land Management and co-signed by the Chief, as with Onshore Oil and Gas Order 1 (see 43 CFR 3164.1), referred to as Onshore Order 1 in this subpart. The Bureau of Land Management may also issue Onshore Oil and Gas Orders governing other oil and gas activities under their jurisdiction that apply to National Forest System lands.

*Operations.* Activities conducted on a lease or agreement area on National Forest System lands pursuant to an approved Surface Use Plan of Operations, including but not



limited to exploratory drilling, development, and production of oil or gas resources and reclamation of surface resources.

*Operator.* Any person or entity, including, but not limited to, the lessee or operating rights owner, who has stated in writing to the authorized officer of the Bureau of Land Management that the person or entity is responsible under the terms and conditions of the lease for the operations conducted on the leased lands or a portion thereof.

*Reasonably Foreseeable Development Scenario (RFDS).* A projection of oil and gas exploration, development, production, and reclamation activity. The RFDS estimates the oil and gas activity in a defined area for a specified period of time. The RFDS projects a baseline scenario of activity assuming all potentially productive areas are open to lease under standard lease terms, except those areas designated as closed to leasing by statute or regulation or areas withdrawn by the Secretary of the Interior.

*Stipulation.* A provision that modifies standard lease terms and is attached to, and made a part of, the lease by the Bureau of Land Management. The Forest Service may include stipulations as part of its consent to lease determination to conserve surface resources and to minimize, mitigate, or prevent impacts to lands and resources. Stipulations constrain where, when, or how the surface lands may be used for exploration and development activities.

*Sundry Notice.* An operator's request submitted to the Bureau of Land Management to perform work or conduct lease operations not covered by another type of permit or authorization, or to change operations in a previously approved permit; or a subsequent report of completed activities; or a final abandonment notice.

*Surface Use Plan of Operations.* A plan for surface use, disturbance, and reclamation, and is a component of an Application for Permit to Drill or Sundry Notice. The requirements for the Surface Use Plan of Operations are described in detail in Onshore Order 1.

*Waiver, exception, or modification.* Refers to a change to a lease stipulation including:

(1) *Waiver.* Permanent exemption from a lease stipulation. The stipulation no longer applies anywhere within the lease.

(2) *Exception.* Case-by-case exemption from a lease stipulation. The stipulation continues to apply to all other sites within the lease to which the restrictive criteria, as described in the lease stipulation, apply.

(3) *Modification.* Fundamental change to the provisions of a lease stipulation, either temporarily or for the term of the lease. A modification may, therefore, include an exemption from or alteration to a stipulated requirement. Depending on the specific modification, the stipulation may or may not apply to all other sites on the lease to which the restrictive criteria, as described in the lease stipulation, apply.

**§ 228.102 Issuance of onshore orders and notices to lessees and operators.**

(a) *Onshore Oil and Gas Orders.* The Chief of the Forest Service may issue, or cosign with the Director, Bureau of Land Management, Onshore Oil and Gas Orders necessary to implement and supplement the regulations of this subpart. Additional Onshore Oil and Gas Orders shall be published in the *Federal Register* for public comment.

(b) *Notices to Lessees and Operators.* The authorized Forest Service officer may issue, or cosign with the authorized officer of the Bureau of Land Management, Notices to Lessees and Operators necessary to implement the regulations of this subpart. Notices to Lessees and Operators apply to all operations conducted by Federal lessees on the National Forest System lands or portion thereof supervised by the authorized Forest Service officer who issued or cosigned such notice.

**§ 228.103 Leasing analysis and consent decision.**

(a) *Scheduling leasing consent analysis.* The Forest Service Washington Office shall develop, in cooperation with the Bureau of Land Management, Forest Service Regional Offices, and Forest and Grassland units, a schedule for analyzing all National Forest System lands with oil and gas resource potential for leasing in consideration of the following:

(1) The schedule shall identify whether each analysis will be part of a land management plan or will be a separate leasing analysis.

(2) Scheduling shall consider the level of leasing interest expressed by the public.

(3) The Forest Service shall review, revise, or make additions to the schedule at least annually.

(b) *Leasing consent analysis.* The authorized Forest Service officer shall conduct a forest-wide or area-specific leasing analysis in either a land management plan or a separate leasing analysis. The Bureau of Land Management shall be invited to participate as a cooperating agency in the consent analysis. In determining lands open or closed for leasing, the authorized Forest Service officer shall:

(1) Identify and exclude from further review the lands which are ineligible for

leasing by statute, regulation, or withdrawal by the Secretary of the Interior.

(2) Consider a Reasonably Foreseeable Development Scenario that projects the type/amount of post-leasing activity that is reasonably foreseeable on eligible lands within the analysis area.

(3) Develop reasonable alternatives, including a no-leasing alternative. The alternatives should include lease stipulations that may be applied.

(4) Project the level of post-leasing activity that would occur for each alternative.

(5) Analyze the impacts of post-leasing activity projected under paragraph (b)(4) of this section.

(6) Develop lease stipulations that are consistently applied and coordinated between agencies and are only as restrictive as necessary to protect the resource or resources for which the stipulations are applied.

(7) Include, in the analysis, maps showing lands open to leasing, lands closed to leasing, and applicable stipulations for each alternative.

(c) *Leasing consent decision.* (1) Upon completion of the leasing consent analysis, the authorized Forest Service officer shall issue a leasing consent decision to the authorized officer of the Bureau of Land Management that identifies all National Forest System lands covered by the leasing consent analysis as:

(i) Open to leasing, subject to the terms and conditions of the standard oil and gas lease form (including an explanation of the typical standards and objectives to be enforced under the standard lease terms);

(ii) Open to leasing, subject to constraints that will require the use of lease stipulations; or

(iii) Closed to leasing, distinguishing between those areas that are being closed through exercise of management direction and those areas that are closed by virtue of a statute, regulation, or withdrawal.

(2) Leasing consent decisions made pursuant to this subpart shall be subject to a pre-decisional objection process conducted in accordance with the procedures set forth in 36 CFR part 219, subpart B, whether the leasing consent decision is made as part of a land management plan or separately.

(d) *Effect of leasing consent decision.* An authorized Forest Service officer's identification of lands as open to leasing does not commit the Bureau of Land Management to future leasing actions, nor does it constitute an irretrievable or irreversible commitment of resources.

(e) *Withdrawing leasing consent.* The authorized Forest Service officer may withdraw consent to lease prior to a Bureau of Land Management lease sale.

**§ 228.104 Consideration of requests to waive, except, or modify lease stipulations.**

(a) *General.* (1) The Bureau of Land Management's oil and gas leasing regulations at 43 CFR 3101.1-4 and Onshore Order 1 outline requirements for operators to request waivers, exceptions, or modifications to lease stipulations.

(2) Where the request involves stipulations included on the lease as prescribed by the Forest Service, the Bureau of Land Management must obtain approval from the Forest Service before granting a request for a waiver, exception, or modification.

(b) *Requesting a waiver, exception, or modification.* Requests to waive, except, or modify a lease stipulation are subject to procedures in Onshore Order 1. In addition to information required in Onshore Order 1, the operator should submit any information that

might assist the authorized Forest Service officer in assessing whether or not to approve a waiver, exception, or modification.

(c) *Criteria for approval.* A request for a waiver, exception, or modification to a lease stipulation may be approved by the authorized Forest Service officer if the officer determines the following, after reviewing the present condition of the surface resources involved and the nature, location, timing, and design of the proposed operations:

(1) The action would be consistent with applicable Federal laws.

(2) The action would be consistent with the current land management plan.

(3) The management objectives which led the Forest Service to require the inclusion of the stipulation in the lease can be met if the waiver, exception, or modification is granted.

(4) The action is acceptable to the authorized Forest Service officer based upon a review of the environmental consequences.

(d) *Coordination with other agencies.* If a lease stipulation was included in a lease by the Forest Service at the request of another agency, or if another agency has specific jurisdiction over the specific resource, the authorized Forest Service officer shall coordinate with that agency prior to approving a waiver, exception, or modification. This paragraph (d) does not require the consent of such an agency to the waiver, exception, or modification unless such consent is independently required by statute or regulation.

(e) *Notice of determination.* The authorized Forest Service officer shall notify the Bureau of Land Management in writing whether or not the request should be granted and shall provide all information used to make the determination.

**§ 228.105 Responsibilities of operator.**

(a) *General.* The lessee or operator shall conduct operations on National Forest System lands in a manner that minimizes effects on surface resources and prevents unnecessary or unreasonable surface resource disturbance.

(1) At a minimum, the operator must:

(i) Control soil erosion and mitigate land instability caused by their operations;

(ii) Control water runoff from their operations;

(iii) Remove, or control, solid wastes, toxic substances, and hazardous substances attributable to their operations;

(iv) Reshape and revegetate areas disturbed by their operations;

(v) Remove structures, improvements, facilities, and equipment no longer needed in the conduct of operations, unless otherwise authorized;

(vi) Take measures to preclude introduction of nonnative invasive species that could otherwise result from their operations;

(vii) Take measures to reclaim surface areas disturbed by their operations, as required by the authorized Forest Service officer;

(viii) Unless otherwise approved by the authorized Forest Service officer, initiate interim reclamation activity within 1 year of completion of operations on the affected area. Interim reclamation shall be conducted concurrently with other operations; and

(ix) Promptly clean up and remove from National Forest System lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system (16 U.S.C. 1609) any released oil, produced water, toxic substances, or other contaminating substances

attributable to their operations in accordance with all applicable Federal, State and local laws and regulations.

(2) Operators shall use existing roads and utility corridors wherever possible.

(3) All spills or leakages of oil, gas, produced water, toxic liquids, or waste materials; blowouts; fires; personal injuries; and fatalities that are reported to the Bureau of Land Management according to applicable orders, notices to lessee, and/or approved Surface Use Plan of Operations shall also be reported to the authorized Forest Service officer.

(b) *Compliance with other statutes and regulations.* The operator is responsible for complying with applicable Federal and State laws and regulations. The operator must also comply with onshore oil and gas orders and notices to lessees issued pursuant to this subpart.

(c) *Access for inspections.* Operators must allow Forest Service employees access, for inspection purposes, to drilling and production sites and to any other locations on National Forest System lands where operations pursuant to a lease are being conducted.

(d) *Other Forest Service authorizations.* To the extent required by applicable statutes and regulations, the operator shall obtain other Forest Service authorizations such as timber contracts, road use permits, or special use authorizations for other uses of National Forest System lands.

(e) *Safety measures.* (1) The operator must maintain structures, facilities, improvements, and equipment located on the area of operation in a safe and well-maintained manner and in accordance with the applicable approval(s).



(2) The operator must take appropriate measures in accordance with applicable Federal and State laws and regulations to protect the public from hazardous sites or conditions resulting from the operations. Such measures may include, but are not limited to, posting signs, building fences, or otherwise identifying a hazardous site or condition.

(3) The operator shall conduct its activities in a manner that avoids the cause or minimizes the spread of fire.

(f) *Liability.* The operator and lessee are jointly and severally liable in accordance with Federal and State laws to the United States for:

(1) Injury, loss, or damage, including fire suppression costs, incurred by the United States as a result of the operations; and

(2) Payments made by the United States in satisfaction of claims, demands, or judgments for an injury, loss, or damage, including fire suppression costs, incurred as a result of the operations.

**§ 228.106 Operator's submission of Surface Use Plan of Operations.**

(a) *General.* (1) The provisions of this section apply to both Surface Use Plans of Operations and Master Surface Use Plans of Operations. Operators shall submit Applications for Permit to Drill or Master Development Plans in accordance with Onshore Order 1 to the Bureau of Land Management. The Application for Permit to Drill or Master Development Plan shall include the Surface Use Plan of Operations or Master Surface Use Plan of Operations.

(2) A Master Surface Use Plan of Operations can be submitted with a Master Development Plan or with an individual Application for Permit to Drill. If a Master Surface Use Plan of Operations has been submitted, then subsequent Applications for

Permit to Drill can reference the Master Surface Use Plan of Operations if they are consistent with the Master Surface Use Plan of Operations.

(b) *Preparation of the Surface Use Plan of Operations.* In preparing a Surface Use Plan of Operations, the operator must ensure that it contains the mandatory components of Onshore Order 1 and provisions of §228.105. The operator is also encouraged to contact the local Forest Service office to make use of such information as is available from the Forest Service concerning surface resources and uses, standard conditions of approval, environmental considerations, and local reclamation procedures. The Surface Use Plan of Operations must be consistent with lease terms and stipulations.

(c) *Content of Surface Use Plan of Operations.* The type, size, and intensity of the proposed operations and the sensitivity of the affected surface resources by the proposed operations determine the level of detail and the amount of information which the operator includes in a proposed Surface Use Plan of Operations. The Surface Use Plan of Operations shall also include planned infrastructure or facilities, to the extent known, to be used to execute the Surface Use Plan of Operations. This submission should specify what facilities or infrastructure are located within lease or agreement boundaries, and those that are located outside lease or agreement boundaries.

#### **§ 228.107 Review and approval of Surface Use Plan of Operations.**

(a) *General.* The provisions of this section apply to both Surface Use Plans of Operations and Master Surface Use Plans of Operations. An operator must obtain an approved Application for Permit to Drill from the Bureau of Land Management before conducting operations. No permit to drill on National Forest System lands may be granted without a Forest Service-approved Surface Use Plan of Operations covering

proposed surface-disturbing activities. Approval or denial of a Surface Use Plan of Operations proposed to be documented in a Decision Notice or Record of Decision is subject to the pre-decisional objection process set forth in 36 CFR part 218 and post-decisional appeal process as provided in 36 CFR 214.4(b)(3).

(b) *Review.* The authorized Forest Service officer shall review the Surface Use Plan of Operations following the procedures in Onshore Order 1 to ensure that:

(1) The Surface Use Plan of Operations contains the mandatory components of Onshore Order 1 and § 228.105;

(2) The Surface Use Plan of Operations is consistent with the lease, including the lease stipulations, and applicable Federal laws; and

(3) To the extent consistent with the rights conveyed by the lease, the Surface Use Plan of Operations is consistent with, or can be modified to be consistent with, the applicable land management plan.

(c) *Analysis and decision.* When the review of the Surface Use Plan of Operations is completed, the authorized Forest Service officer shall:

(1) Approve the Surface Use Plan of Operations as submitted; or

(2) Approve the Surface Use Plan of Operations subject to specified Conditions of Approval; or,

(3) Deny the Surface Use Plan of Operations for the reasons stated.

(d) *Timing of decision.* If a decision on a Surface Use Plan of Operation cannot be made within 30 days of a complete application, the authorized Forest Service officer shall advise the appropriate Bureau of Land Management office as soon as it becomes apparent that additional time will be needed to process the plan. The authorized Forest Service

officer shall follow procedures described in Onshore Order 1 to explain why additional time is needed and project the date by which a decision on the Surface Use Plan of Operation will likely be made. The authorized Forest Service officer shall also notify the applicant of any action the applicant could take that would enable the Forest Service officer to issue a final decision on the Surface Use Plan of Operations.

(e) *Notifying the Bureau of Land Management.* The authorized Forest Service officer shall promptly notify the Bureau of Land Management if a Surface Use Plan of Operations is approved, including Conditions of Approval, if any, or whether it has been denied. This transmittal shall include the estimated additional surface use bond amount to be required (§ 228.109), if any.

**§ 228.108 Sundry notices.**

(a) *General.* For activities that require a Sundry Notice under Bureau of Land Management regulations (43 CFR 3162.3-2), the operator must obtain approval from the Bureau of Land Management. If the activity would cause effects on surface resources, a Surface Use Plan of Operations that is subject to Forest Service approval is required. The sundry notice need only address those operations that differ from those authorized by the current approved Surface Use Plan of Operations. If the activity would cause effects on surface resources not authorized by the currently approved Surface Use Plan of Operations, the sundry notice is subject to the same requirements of §§ 228.106 and 228.107.

(b) *Review and approval.* If Forest Service approval is required, the authorized Forest Service officer shall determine whether the activity would be subject to additional environmental review or analysis. Following review or analysis, the authorized Forest

Service officer shall notify the Bureau of Land Management whether the Forest Service approves the activity.

**§ 228.109 Bonds.**

(a) *General.* (1) As part of the review of a proposed Surface Use Plan of Operations, the authorized Forest Service officer shall review existing bond amount(s) to determine if they are sufficient to ensure complete and timely reclamation of surface disturbances and restoration of any lands or surface waters adversely affected by lease operations. The review shall include a determination of whether the performance bond held by the Bureau of Land Management is adequate to meet the requirements of this paragraph (a)(1).

(2) If at any time prior to, or during the conduct of operations, the authorized Forest Service officer determines that the performance bond amount held by the Bureau of Land Management is not adequate to ensure complete and timely reclamation and restoration of National Forest System lands, the authorized Forest Service officer may review and require a bond amount specifically for reclaiming surface disturbance.

(b) *Considerations for reviewing bond adequacy.* In assessing whether a bond is sufficient, the authorized Forest Service officer:

(1) Shall consider the scope and full extent of the operator's proposed operations, associated surface disturbance, and infrastructure, and performance history and risk posed by the operator.

(2) Shall consider the costs to the Forest Service to undertake reclamation or restoration actions in case of operator default.

(c) *Determining level of bond amount.* If additional bonding is determined necessary, the authorized Forest Service officer may specify a bond amount to any level, provided that the amount does not exceed the total estimated cost of reclamation based on surface disturbance.

(d) *Posting bonds.* If the authorized Forest Service officer determines that additional bonding is necessary, the officer shall give the operator the option of either increasing the bond held by the Bureau of Land Management or filing a separate reclamation bond with the Forest Service in the amount deemed adequate. The Forest Service must notify the Bureau of Land Management if the operator chooses to increase its Bureau of Land Management bond. If an additional surface use bond is determined to be necessary, the bond must be posted prior to commencing any surface disturbing-activities.

(e) *Bond release.* When the Forest Service holds a bond, the operator may request that the Forest Service authorize an incremental reduction in bond amount at any time during operations as restoration or reclamation activities are completed. When the Bureau of Land Management holds the bond, an operator may request the authorized Forest Service officer to notify the Bureau of Land Management to reduce the bond amount. The authorized Forest Service officer shall, if appropriate, notify the Bureau of Land Management of the amount by which the bond may be reduced.

**§ 228.110 Temporary cessation of operations.**

(a) *General.* As soon as it becomes apparent that there will be a temporary cessation of operations for a period of 45 days or more, the operator must verbally notify and subsequently file a written statement with the authorized Forest Service officer

verifying the operator's intent to maintain structures, facilities, improvements, and equipment that will remain on the area of operation during the cessation of operations, and specifying the expected date by which operations will be resumed.

(b) *Interim measures.* The authorized Forest Service officer may require the operator to take reasonable interim reclamation or erosion control measures to protect surface resources during temporary cessation of operations, including during cessation of operations resulting from adverse weather conditions.

(c) *Notice of operations.* The operator shall notify the authorized Forest Service officer at least 48 hours prior to resuming operations following a temporary cessation of 45 days or more.

#### **§ 228.111 Compliance and inspection.**

(a) *General.* Operations must be conducted in accordance with this subpart, the applicable lease (including stipulations made part of the lease at the direction of the Forest Service), an approved Surface Use Plan of Operations, applicable Onshore Oil and Gas Orders (§ 228.102(a)), and applicable Notices to Lessees and Operators (§ 228.102(b)).

(b) *Inspection of operations.* The Forest Service shall periodically inspect the area of operations to determine and document whether operations are being conducted in compliance with the requirements in paragraph (a) of this section.

(c) *Inspection of reclamation.* The Forest Service shall inspect sites for reclamation compliance when a Final Abandonment Notice is submitted. The Forest Service shall ensure that reclamation meets the requirements of the approved Surface Use

Plan of Operations and § 228.105. The Forest Service shall promptly notify the Bureau of Land Management in writing when reclamation is satisfactory.

(d) *Penalties.* If surface-disturbing operations are being conducted that are not authorized by an approved Surface Use Plan of Operations, or that violate a term or operating condition of an approved Surface Use Plan of Operations, the entity conducting those operations is subject to the applicable prohibitions and penalties under 36 CFR part 261. See also § 228.112.

**§ 228.112 Notice of noncompliance.**

(a) *General.* When an authorized Forest Service officer finds that operations are not being conducted in accordance with regulations of this subpart, the lease (including stipulations made part of the lease at the direction of the Forest Service), an approved Surface Use Plan of Operations, applicable Onshore Oil and Gas Orders, and applicable Notices to Lessees and Operators, the operator shall be notified and given opportunity to come into compliance according to paragraph (b) of this section. The Forest Service shall provide courtesy copies to the local Bureau of Land Management office when a written notice of noncompliance is sent to an operator.

(b) *Notice of noncompliance.* Upon finding that an operator is in noncompliance, the authorized Forest Service officer shall send the operator written notification by certified mail that:

- (1) Describes the requirement(s) with which the operator is in noncompliance;
- (2) Describes the measure(s) that are required to correct the noncompliance;
- (3) Specifies a reasonable period of time within which the noncompliance(s) must be corrected;



(4) Describes the possible consequences of continued noncompliance as described in paragraph (e) of this section; and

(5) Provides notification that the authorized Forest Service officer is willing to work cooperatively with the operator to resolve the noncompliance.

(c) *Extension of deadlines.* The operator may request an extension of a deadline specified in a notice of noncompliance if the operator is unable to come into compliance by the deadline. The operator must provide written rationale for delaying compliance. The authorized Forest Service officer has sole discretion to extend compliance deadlines, subject to provisions for appeal as noted in paragraph (d) of this section.

(d) *Appeal.* An operator may appeal a Notice of Noncompliance issued under paragraph (b) of this section or a denial of a request for extension under paragraph (c) of this section, as provided for in 36 CFR part 214.

(e) *Continued noncompliance.* If an operator fails or refuses to comply with a Notice of Noncompliance, the authorized Forest Service officer may take action in one or more of the following ways:

(1) Refer the issue to the local Bureau of Land Management office for action under 43 CFR part 3163.

(2) Refer the issue to a Forest Service law enforcement officer if the noncompliance also constitutes a violation of the prohibitions in 36 CFR part 261.

(3) Refer the issue to the Compliance Officer for a determination of material noncompliance per § 228.113.

(f) *Suspension of operations.* When the noncompliance is likely to result in danger to public health or safety or in irreparable resource damage, the authorized Forest Service

officer shall, in coordination with the Bureau of Land Management, suspend the operations, in whole or in part.

(1) Suspension of operations shall remain in effect until the authorized Forest Service officer determines that the operations are in compliance with the applicable requirement(s) identified in the notice of noncompliance, or that it is no longer likely that any remaining noncompliance is likely to result in danger to public health or safety or in irreparable resource damage.

(2) The authorized Forest Service officer shall serve decisions suspending operations upon the operator in person, by certified mail, electronic mail or by telephone. If notice is initially provided in person, by electronic mail, or by telephone, the authorized Forest Service officer shall send the operator written confirmation of the decision by certified mail.

(g) *Abatement of emergencies.* When the noncompliance is resulting in an emergency, the authorized Forest Service officer may take action as necessary to abate the emergency. The total cost to the Forest Service of taking actions to abate an emergency becomes an obligation of the operator.

(1) Emergency situations include, but are not limited to, imminent dangers to public health or safety or irreparable resource damage.

(2) The authorized Forest Service officer shall promptly serve a bill for such costs upon the operator by certified mail.

**§ 228.113 Material noncompliance.**

(a) *General.* The authorized Forest Service officer shall refer actions to the Compliance Officer for a determination of material noncompliance when the operator or lessee has failed or refused to:

(1) Comply with necessary corrective actions directed according to the procedures in § 228.112 in cases where the noncompliance resulted in danger to public health or safety; caused irreparable resource damage; or resulted in an emergency;

(2) Complete reclamation;

(3) Maintain an additional bond in the amount required by the authorized Forest Service officer during the period of operation; and

(4) Reimburse the Forest Service in a timely manner for the cost of abating an emergency.

(b) *Compliance Officer determination of material noncompliance.* When determining whether an operator or lessee has failed or refused to comply in a material respect with reclamation requirements or other requirements or standards identified in paragraph (a) of this section, the Compliance Officer shall:

(1) Inform the operator or lessee by certified mail of the authorized Forest Service officer's material noncompliance referral and the Compliance Officer's intent to proceed with a material noncompliance review.

(2) Inform the operator or lessee of the opportunity to submit a written response to the referral and/or to request an oral presentation with the Compliance Officer within 30 calendar days of receipt of the certified letter.

(3) Ensure that:

(i) Opportunities for corrective action according to § 228.112(b) have been pursued;

(ii) Consideration is given to the status of any noncompliance referrals sent to the Bureau of Land Management for action per § 228.112(e); and

(iii) Consideration is given to the seriousness of the effects caused by the operator's failure or refusal to comply.

(4) Consider any pending judicial or administrative appeals involving the operator, including those within the purview of the Bureau of Land Management.

(5) Notify the operator or lessee by certified mail of the outcome of the material noncompliance referral review. If material noncompliance was determined, the notice shall state that the Bureau of Land Management will be advised to not issue a lease or approve the assignment of any lease to the entity. The notification shall also state that the decision is the final administrative determination of the Department of Agriculture.

*(c) Notifying the Bureau of Land Management.* Upon completion of a material noncompliance review, the Compliance Officer shall notify the Bureau of Land Management in writing of the outcome of the review. When an entity has been found to be in material noncompliance, the Forest Service shall advise the Bureau of Land Management not to issue or approve the assignment of any lease to the entity determined to be in material noncompliance.

*(d) Notification that material compliance has occurred.* If an entity found to be in material noncompliance subsequently comes into material compliance with reclamation requirements or other requirements or standards identified in paragraph (a) of this

section, the Compliance Officer shall advise the Bureau of Land Management that the entity has come into material compliance.

**§ 228.114 Posting requirements.**

The affected National Forest or Grassland ranger district office shall promptly post notices provided by the Bureau of Land Management of:

(a) Competitive lease sales which the Bureau of Land Management plans to conduct that include National Forest System lands. These must be posted for a minimum of 45 days prior to the sale;

(b) Substantial modifications in the terms which the Bureau of Land Management proposes to make for leases on National Forest System lands (43 CFR 3101.1-4). These must be posted for a minimum of 30 days prior to the sale; and,

(c) Applications for Permits to Drill which the Bureau has received involving leases or agreements located on National Forest System lands according to provisions of Onshore Order 1. These must be posted for a minimum of 30 days.

**§ 228.115 Information collection requirements.**

The Office of Management and Budget reviewed and approved the information collection requirements contained in this subpart and assigned OMB Control No. 0596-0101. The collection of information allows the Forest Service to approve or take other appropriate actions on surface use plans of operations; requests to waive, except, or modify lease stipulations; requests for reduction in reclamation liability; noncompliance issues; and notices of cessation of operations. The information collection requirements of this subpart are supplemental to the Bureau of Land Management's various OMB information collection approvals for issuing and managing Federal oil and gas leases, but

primarily to the following: OMB Control No. 1004-0134 for 43 CFR 3162.3; and OMB Control No. 1004-0136 for Form 3160-3, Application for Permit to Drill.

## **PART 261 – PROHIBITIONS**

5. The authority citation for part 261 continues to read as follows:

Authority: 7 U.S.C. 1011(f); 16 U.S.C. 4601-6d, 472, 551, 620(f), 1133(c)-(d)(1), 1246(i).

6. Amend §261.2 by revising the definition for “Operating plan” to read as follows:

### **§ 261.2 Definitions.**

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*Operating plan* means the following documents, providing that the document has been issued or approved by the Forest Service: A plan of operations as provided for in 36 CFR part 228, subparts A and D, and 36 CFR part 292, subparts C and G; a supplemental plan of operations as provided for in 36 CFR part 228, subpart A, and 36 CFR part 292, subpart G; an operating plan as provided for in 36 CFR part 228, subpart C, and 36 CFR part 292, subpart G; an amended operating plan and a reclamation plan as provided for in 36 CFR part 292, subpart G; a surface use plan of operations as provided for in 36 CFR part 228, subpart E; a surface use portion of a sundry notice as provided for in 36 CFR part 228, subpart E; a permit as provided for in 36 CFR 251.15; and an operating plan and a letter of authorization as provided for in 36 CFR part 292, subpart D.

\*\*\*\*\*

James E. Hubbard,  
Under Secretary,  
Natural Resources and Environment.

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