

Authority: 33 U.S.C. 513; 49 CFR 1.46(c)(3).

Dated: December 13, 1996.

T.W. Josiah,

Rear Admiral, U.S. Coast Guard Commander,  
Eighth Coast Guard District.

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## DEPARTMENT OF AGRICULTURE

### Forest Service

#### 36 CFR Part 223

#### Disposal of National Forest Timber; Cancellation of Timber Sale Contracts

RIN 0596-AB21

AGENCY: Forest Service, USDA.

ACTION: Proposed rule.

**SUMMARY:** This proposed rule would revise the existing rules on cancellation of timber sale contracts, permits, and other such instruments authorizing the sale or harvest of timber or other forest products to clarify when, why, and by whom contracts may be cancelled, to remove redundant provisions, and to provide a new formula for compensation when the government must cancel timber sale contracts. This proposed rule also would limit financial liability of the United States on certain contracts, remove cancellation limits applicable to the length of the contract term, and define the contractual terms "purchaser", "modification", "partial cancellation", and "cancellation". The proposed rule would also require that all sales are to be laid out in identifiable units. These changes are necessary because the Forest Service is unable to continue bearing most of the financial risk and burden of contract cancellation arising from compliance with increasingly complex and rigorously enforced environmental laws and regulations. This proposed rule would reasonably reallocate risk between the Government and private parties, thereby protecting the U.S. taxpayer from unreasonable and excessive financial damages arising from cancellation of timber sale contracts and other such instruments.

**DATES:** Comments must be received in writing by February 13, 1997.

**ADDRESSES:** Send written comments to Director, Timber Management Staff (2400), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.

The public may inspect comments received on this proposed rule in the Office of the Director, Wing 3NW, Auditors Building, 201 14th Street, SW, Washington, DC 20250. Parties wishing

to view comments are encouraged to call ahead (202-205-0893) to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Rex Baumbach, Timber Management Staff, (202) 205-0855.

**SUPPLEMENTARY INFORMATION:** The rules at Title 36, Code of Federal Regulations (CFR), part 223 govern the sale of National Forest System timber. Section 223.30 provides that each timber sale contract will be consistent with plans, environmental standards, and other management requirements. Section 223.30 sets forth specific management requirements for timber sales contracts in addition to general compliance with environmental standards and resource management plans, for example, fire protection and suppression, minimizing increases in erosion, regeneration of timber, and so forth. Sections 223.40 and 223.116 set out the current bases for cancellation of timber sale contracts by either the Government or the purchaser and prescribe the amount of damages, if any, in the event of cancellation.

Section 223.40 requires that timber sale contracts, permits, and other such instruments with terms longer than 2 years provide for cancellation when necessary to prevent serious environmental damage or when they are significantly inconsistent with land management plans adopted or revised in accordance with section 6 of the Forest and Rangeland Renewable Resources Act of 1974, as amended (16 U.S.C. 1601, *et seq.*) and 36 CFR part 219—Planning.

Section 223.116 provides that timber sale contracts and permits may be cancelled based on specifically listed conditions. This section also authorizes the Chief of the Forest Service to cancel contracts and places limitations on the re-delegation of cancellation authority to Regional Foresters.

#### Background

Under existing regulations, purchasers may request cancellation of contracts if, as a result of catastrophic damage caused by forces beyond the control of the purchaser, the value of the remaining timber is materially diminished. The Government may cancel contracts under any of the following conditions: (1) By mutual agreement with the purchaser when such action is to the advantage of the United States or not prejudicial to its interests; (2) for purchaser's violation of contract terms; (3) for purchaser's conviction of violation of criminal statutes or for violation of civil standards, orders, permits, or other regulations, issued by a Federal agency,

State agency, or political subdivision thereof, for the protection of environmental quality, on National Forest System land, unless compliance with such laws or regulations would preclude performance of other contractual requirements; and (4) upon determination by the Chief of the Forest Service that operations under the contract would result in serious environmental degradation or resource damage.

Unlike government-wide rules governing procurement contracts, the existing cancellation regulation places an inappropriate amount of the financial liability on the Forest Service when the agency must, for reasons of public policy or statutory direction, cancel a timber sale contract or permit. In an effort to address this issue, the agency published a proposed rule to revise its rules on cancellation of timber sale contracts, permits, and other such instruments in the Federal Register on August 31, 1990, at 55 FR 35683-35686. No public comment was received as a result of this publication. After subsequent review of the cancellation regulation, the agency identified additional changes that are needed but that were not included in the proposed rule. Therefore, the agency is publishing a new proposed rule and inviting public comments.

The need for the revised contract cancellation procedures and expanded use of identifiable units for all forest product sales arises from the changing circumstances over the last two decades surrounding forest product sales and the increasing likelihood that a forest product sales may have to be changed in order to comply with the law. Consequently, the Federal manager must have contractual flexibility in order to maintain compliance with the law within reasonable economic limits.

Under the existing regulation when a sale is cancelled, the Forest Service pays a purchaser's out-of-pocket costs for a purchaser's operations up to the date of cancellation. The Forest Service also compensates the purchaser for the presumptive increased cost of acquiring comparable timber to replace the timber lost through cancellation, without regard to whether the purchaser actually purchases replacement timber. By holding inventory in a rising market, a purchaser generally earns a profit under the existing rules. In a falling market, the current rule shields the purchaser from loss that otherwise would be incurred if the contract had not been cancelled by the Forest Service.

Given the inability of the Forest Service to predict or control the need to adjust management practices to respond

to environmental statutes or other requirements, it is no longer appropriate for the Forest Service to guarantee purchasers a replacement supply of timber or to assure them a margin of profit in the event of cancellation. Moreover, this policy is very costly to the taxpayer. For example, in addition to paying out-of-pocket expenses, the Forest Service has already had to pay approximately \$9 million to cover purchaser's replacement timber costs that resulted primarily from contract cancellations or partial contract cancellations in Arizona and New Mexico to protect the Mexican spotted owl and northern goshawk. There is also \$57 million in unresolved lawsuits and contract claims related to contract cancellation. Further, this amount of potential liability does not include potential damages that may result from cancellation of the 77 timber sales involved in the *Silver v. Thomas* (CIV-94-1610-PHX-CAM) injunction in Arizona and New Mexico or the Section 318 timber sales that are the subject of the Rescissions Act and related litigation in Oregon and Washington.

By statute, the agency is required to pay from available appropriations any timber contract claim that arises from a dispute with a purchaser (41 U.S.C. 612(c)). Because cancellation costs come out of the agency's current budget, providing for lost profits adversely affects all Forest Service operations, including other timber operations and non-timber programs. If timber is to be sold, neither the Forest Service nor the taxpayer can justify assuming risks of this magnitude. The benefits and burdens must be shared by all users, purchasers and the general public alike. Furthermore, as a practical matter, the agency is not appropriated enough funds to provide for replacement compensation for all the timber sales that may need to be cancelled, in whole or in part, in order to comply with environmental laws. Accordingly, although cancellation of contracts by the Forest Service remains in the public interest, the Forest Service has concluded that it is no longer in the public interest for the agency to bear more than out-of-pocket expenses in these instances, nor is it fiscally feasible, given the increasing uncertainty surrounding National Forest System timber sales.

This uncertainty is caused by several factors. Developing case law on environmental and related statutes and regulations, such as the Endangered Species Act, the Clean Water Act, and the Clean Air Act, in conjunction with increasing amounts of new information on the environmental effects and

resource impacts of various activities on National Forest System land has led to constantly changing and more rigorous management requirements. The uncertainty surrounding timber sales is compounded by a growing competition and public concern for the National Forests' limited resources. For example, the Forest Service may be forced to cancel or substantially modify existing timber sale contracts and permits if the Fish and Wildlife Service, an agency of the Department of the Interior, lists an animal or plant species as a threatened species under the Endangered Species Act. Specifically, in response to the listing of the red-cockaded woodpecker as an endangered species under the Endangered Species Act in 1973 and subsequent discovery of new information in 1989, the Forest Service was required to reevaluate its management practices throughout the woodpecker's range on National Forests in the South. This re-evaluation resulted in modification and cancellation of several existing timber sale contracts.

In addition, the Forest Service has recently been judicially compelled to cancel or modify additional timber sale contracts in order to protect the Mexican spotted owl and marbled murrelet, which are both listed as a threatened species under the Endangered Species Act. This has also happened with the northern spotted owl. Further, there are proposals that the Fish and Wildlife Service list the goshawk, other owl species, and some species of Pacific salmon under the Endangered Species Act.

Modification or cancellation of existing legal contractual obligations is not limited, however, to efforts to comply with the Endangered Species Act. In one case, the activities of a private landowner upstream from a National Forest resulted in stream sediment loading to such a level that sale activities on adjoining National Forest land would have violated the Clean Water Act. As a result, the Forest Service had to alter its timber harvesting plans for the area adjacent to that stream. If timber sales had been under contract within the area adjacent to that stream, contract cancellation and payment of compensation to the purchaser would have been required to avoid violations of the Clean Water Act.

The Forest Service takes every precaution before authorizing a particular activity on National Forest System lands to ensure that its authorization conforms with existing laws and with existing conditions on the ground at the time of the authorization. However, when deciding to go forward with such projects, the

Forest Service must plan for potential intervening events and circumstances. Given the increasing pressures on forest resources from a variety of sources, it is essential that Forest Service officials have flexibility to adjust management activities on National Forest System lands and associated contractual arrangements without incurring enormous financial liability. Reasonable limits to the Government's exposure to financial liability and burden of risk in the event of such adjustments are imperative to protect the public's financial interests. Without reasonable limits to such exposure, spiraling costs to the Forest Service could seriously reduce future timber sale offerings.

#### Provisions of the Proposed Rule

##### *Section 223.30*

To accomplish the needed changes, the agency proposes to revise 36 CFR 223.30 to include a new paragraph (g) which would provide that all timber sale contracts, permits, and other such instruments authorizing the sale or harvest of timber or other forest products must identify subdivision(s), payment unit(s), cutting unit(s), clearcutting unit(s), understory harvest unit(s), individual tree marked area(s), or harvest unit(s) within a designated sale area boundary. Under this revision, the District Ranger or other Forest Service official responsible for sale layout would be required to consider, among others, the following factors when determining whether or not the sale area is to be divided into more than one unit: Type of forest product; type of sale; acreage; volume; topography; density of product within the area; value of the sale; and management needs. Sales that are divided into two or more harvest units are divisible.

This provision would extend the harvest unit layout concept that is now used only in timber sale contracts using FS Form 2400-6 to all other contract forms, permits, and other such instruments authorizing the sale or harvest of timber or other forest products. Under this provision, all timber sale instruments which may reasonably be divided into two or more units would be treated similarly for purposes of modification, partial cancellation, or cancellation. This revision would add uniformity to the timber administration process and also extend the application of damage limiting provisions to all forest product sale instruments.

To accommodate this new paragraph (g), existing paragraphs (g) and (h) would be designated as paragraphs (h) and (i) respectively.

### Section 223.40

Section 223.40 would be revised to require that all contracts, permits, and other such instruments authorizing the harvest of trees or other forest products provide for cancellation. The current requirement that only contracts two years in length or longer contain a provision for cancellation would be removed. No current basis supports a different standard of liability for short term contract than for contracts with terms of two (2) or more years.

This proposed revision would also eliminate potential confusion in the use of the terms "cancellation" and "termination." This proposed rule would define these terms as synonymous when used in timber sale contracts, permits, or other such instruments. The proposed rule would also revise the title of § 223.40 to read "Cancellation procedures." Further, the proposed revision would restructure § 223.40 to include the provisions currently found in § 223.116, thus incorporating all of the requirements relating to cancellation of contracts, permits, and other such instruments into one section and, thereby eliminating the redundancy and confusion of having two separate sections on cancellation. Section 223.116 would be removed in its entirety.

The proposed rule would also substantially revise the existing provisions of § 223.40 and § 223.116. First, a new paragraph (a) would define "purchaser" for purposes of this section as a holder of a National Forest System timber sale contract, permit, or other such instrument authorizing the sale and harvest of forest products. The new paragraph (a) of the proposed rule would also define the terms "partial cancellation" of a timber sale contract. This definition is included in response to a recent court decision, *Stone Forest Industries v. United States*, 973 F.2d 1548 (Fed. Cir. 1992), in which the court found that the timber sale contract was not divisible. "Partial cancellation" would be defined as the elimination of one or more, but not all, of the identifiable harvest units from a timber sale contract and is based upon the divisibility of the timber sale contract into units. Thus, this regulation would incorporate the concept of divisibility, which would be adopted in 36 CFR 223.30, and, thereby, would eliminate any ambiguity regarding the ability of the Forest Service to partially cancel a contract. Partial cancellation would afford the Forest Service flexibility in today's uncertain climate by allowing as much of a timber sale to be harvested as

is legally allowable while avoiding a breach of contract as a whole.

Additionally, the terms "modification" and "cancellation" would be defined to eliminate any confusion that might arise as to their meaning in relation to partial cancellation and use in executing timber sale contract changes. Modification would be defined as the elimination of a portion but not all of a harvest unit or units. The timber sale contract provides for rate redetermination in the event of unilateral modification. Cancellation is defined as the cancellation or termination of contract requirement(s) for removal of the remaining timber or other forest products from all of the identifiable harvest units under the timber sale contract, permit, or other timber sale instrument.

Mutual modifications and cancellations as provided in the current regulation at 36 CFR 223.112 and 36 CFR 223.116(2) would also be provided for in this proposed regulation at 223.40(c)(2). Compensation for a mutually agreed upon contract change would be provided for in the mutual agreement between the parties. Mutual agreements between the Forest Service and a purchaser can only be made if the agreement is to the advantage of the United States or not prejudicial to its interests.

Proposed paragraph (b) is a revision and expansion of provisions presently in 36 CFR 223.40 and 36 CFR 223.116 and would limit to the Chief the authority to cancel a timber sale contract, permit, or other such instrument based upon a determination by the Chief that continued operations under such contracts will result in the violation of a statute or regulation or will unreasonably conflict with management of other forest resources. Proposed paragraph (b)(1) would authorize the cancellation or partial cancellation of a timber sale by the Chief before operations result in a situation where a Federal statute or regulation would be violated, thereby giving the Forest Service the authority to pro-actively manage and avoid environmental crises. Causes for cancellation or partial cancellation under proposed paragraph (b)(1) would include, for example, the need to prevent inconsistencies with approved land and resource management plans adopted pursuant to 36 CFR part 219; damage to cultural resources; and unacceptable adverse impacts to Federally-listed threatened or endangered species. Proposed paragraph (b)(2) would provide for the cancellation or partial cancellation of a timber sale contract, permit, or other such instrument by the Chief, upon

determination by the Chief that operation of the sale may unreasonably conflict with the management of other forest resources. For example, (b)(2) would provide for cancellation or partial cancellation in order to prevent unreasonable conflict with sensitive species listed by Regional Foresters pursuant to the Forest Service Mutual Chapter 2670 or published in the Federal Register.

Paragraph (c) of proposed § 223.40 would set forth the conditions under which a contract, permit, or other such instrument for removal of National Forest System timber or other forest products may be cancelled. Existing paragraphs (a)(1)–(a)(3) of § 223.116 would become paragraphs (c)(1), (c)(2), and (c)(3) of § 223.40 and remain substantially the same. Both paragraphs (b) and (c) of revised § 223.40 would require the cancellation decisions to be based upon an administrative record.

Paragraph (c)(1) would provide for cancellation by the Government in the event of a material breach of continued violation of the terms of the contract, permit, or other such instrument. This is consistent with the principle of law that failure to perform a material element of the contract constitutes a breach and merits cancellation of the contract. It also establishes that continued, intentional violation of the contract which prevents timely performance may merit cancellation of the contract.

Paragraph (c)(2) would slightly revise text now in § 223.116(a)(2) by adding the phrases, "for reasons other than those listed in this section," and would provide that a contract may be cancelled in whole or in part by mutual agreement upon application of the purchaser or at the request of the Government with consent of the purchaser. The proposed paragraph (c)(2) would limit mutual cancellation or partial cancellation to cases in which it is determined to be in the best interests of the United States.

Paragraph (c)(3) would incorporate and revise existing § 223.116(a)(3) and provide that, upon application of the purchaser or upon notice by the Forest Service, the contract may be cancelled in whole or in part if the value of the timber remaining to be cut is diminished materially because of catastrophic damage caused by forces beyond the control of the purchaser or the Forest Service. This proposed provision would change the current rule by also authorizing the Forest Service to cancel a contract in the event of catastrophic damage. Since the very nature of damage resulting from a catastrophe can adversely affect the Government to the same extent as the

purchaser, logic and equity demand that the Government should have the ability to cancel in whole or in part the contract, permit, or other such instrument under these circumstances.

Paragraphs (c)(4) and (c)(5) would incorporate and revise existing § 223.116(a)(4). The two causes for cancellation that are presently combined in paragraph (a)(4) would be divided into separate paragraphs to clarify and distinguish between the judicial and administrative causes that may result in cancellation. Paragraph (c)(4) would clarify that contracts, permits, or other such instruments authorizing the harvesting of trees or other forest products may be cancelled upon any conviction of a purchaser for violation of a Federal or State criminal statute, when such violation is in any way connected with obtaining, attempting to obtain, selling, trading, or processing public timber, or obtaining, attempting to obtain, or performing a public contract or subcontract.

Paragraph (c)(5) would permit cancellation of timber sale contracts, permits, or other such instruments authorizing the harvesting of trees or other forest products upon the conviction of the purchaser for a violation of civil standards, orders, permits, or other regulations written for the protection of the environment.

Cancellation under paragraphs (c)(4) or (c)(5) would be an administrative action intended to ensure that the Government does business only with reasonable parties, that is, parties who possess a satisfactory record of integrity and business ethics.

A new proposed paragraph (c)(6) would provide the authority to cancel or partially cancel a contract, permit, or other such instrument authorizing the harvesting of trees or other forest products as a result of a court order or court approved settlement agreement. This proposed paragraph also would permit cancellation even though a sale contract, permit, or other such instrument is not specifically named in an order or settlement agreement if the Forest Service determines that the order or settlement agreement would be applicable to the conditions existing on the area governed by the contract, permit, or other such instrument. This paragraph is necessary for the Government to properly and efficiently respond to litigation over National Forest management and competing resource uses and would remove any ambiguity or potential misinterpretation over the agency's cancellation authority in light of court orders or court approved settlements.

Paragraph (d) of the proposed rule would provide that any timber sale contract, permit, or any other such instrument for the sale or harvest of timber or forest products containing individually identifiable harvest units may be partially cancelled without the Forest Service incurring liability for the entire contract. Paragraph (d) would also provide that when a timber sale is partially cancelled, a duty to perform the remaining portion of the contract continues with the purchaser, in most cases.

The present method for determining reasonable compensation to the purchaser is described at §§ 223.40 and 223.116(a)(5). Proposed 223.40(e) would provide the basis for determining compensation, if any, in the event a contract is cancelled for any reason. Proposed paragraph (e)(1)(i) provides that limited compensation, in the form of out-of-pocket expenses, would be provided when contracts, permits, or other such instruments are cancelled or partially cancelled pursuant to paragraphs (b)(1), (b)(2), or (c)(6), except where the Forest Service finds the purchaser contributed to the reason(s) for cancellation. These provisions allow the Government to cancel or partially cancel contracts, permits, or other such instruments in order to, among other things, comply with a court order, federal statute or regulation, or avoid adverse conflicts with other environmental resources. Out-of-pocket expenses are a fair way of allocating part of the risk associated with these cancellations or partial cancellations. Proposed paragraph (e)(1) would limit out-of-pocket expense to unrecovered costs actually paid out and arising from acquiring and performing the contract, and would expressly exclude attorney's fees, unrealized or lost profits, replacement cost of timber, or any other anticipatory losses by the purchaser.

Proposed paragraph (e)(1)(i) provides an exception to the payment of out-of-pocket expenses in situations where fairness dictates that the purchaser absorb their own expenses. Specifically, the exception excludes compensation in situations where the purchaser contributes to the cancellation reason(s) such as the violation of a statute. In most cases, such a situation would be treated as a breach or as another cancellation reason included under proposed paragraph (e)(1)(ii). Consequently, the (e)(1)(i) exception to the payment of out-of-pocket expenses is intended to apply only where no other cancellation reason is applicable. This exception would also exclude compensation in situations where either the purchaser or both the purchaser and

the Government may be responsible for the cancellation reason(s).

Proposed paragraph (e)(1)(ii) would provide that no compensation would be given for cancellations or partial cancellations pursuant to paragraphs (c)(1), (3), (4), or (5). Compensation would be inappropriate for contracts, permits, or other such instruments cancelled pursuant to paragraphs (c)(1), (4), or (5) because the cancellation would be the result of a purchaser's failure to satisfactorily perform a contract, permit, or other such instrument or the result of a purchaser's failure to comply with appropriate law, orders, rules, regulations, or standards. It would also be unreasonable for the Government to compensate such a purchaser for unrecovered costs when the cancellation results from a purchaser's own bad faith acts.

Furthermore, compensation for a cancellation or partial cancellation involving a catastrophe pursuant to proposed paragraph (c)(3) would also be inappropriate. The purchaser has the option under the terms of a timber sale contract for a contract modification and rate redetermination as well as the option to request that a contract be cancelled. If it is in the purchaser's best interest to request a cancellation, the Government should not be obligated to do more than cancel the contract, permit, or other such instrument and accept the return of damaged and/or devalued timber. Likewise, if the Government elects to cancel or partially cancel a contract as a result of a catastrophic event, equitable treatment of both parties to the contract would dictate there be no compensation given.

Cancellations or partial cancellations pursuant to proposed paragraph (c)(2) would be the result of a request for cancellation or partial cancellations originating from either the purchaser or the Government and would require the consent and agreement of the other party. The agreement reached between the parties may or may not include a financial settlement as part of the terms of the agreement. Proposed paragraph (e)(2) permits but does not require compensation for the purchaser. To require compensation for the purchaser would unfairly restrict the bargaining position of the Government when a contract, permit, or other such instrument is cancelled or partially cancelled by written mutual agreement.

#### *Section 223.116*

The procedure that has been in place for determining the value of comparable replacement timber, based on timber sold within the past 6 months on the same National Forest (§ 223.40 and

§ 223.116 (a)(5)), is often difficult and not workable. This method fails to provide the necessary flexibility to deal with different circumstances faced in individual timber sale cancellations or partial cancellations. Additionally, comparable replacement timber is becoming increasingly expensive and exposes the Forest Service and the taxpayer to excessive liability. Further, there is no assurance that there will be comparable sales sold within the 6 months prior to the cancellation or partial cancellation. Therefore, the proposal does not retain the current procedures.

Finally, paragraph (b) of § 223.116 would be replaced because it is redundant. The Secretary of Agriculture has delegated full authority to the Chief to administer the National Forest System timber sale program (7 CFR 2.42). The Chief delegates his authorities to lower level officials or reserves authority through the Forest Service Manual except as otherwise noted in the regulations at part 223.

**Environmental Impact**

This proposed rule would establish uniform criteria to be considered when a timber sale contract, permit, or other such instrument authorizing the sale or harvest of timber or other forest products must be cancelled or partially cancelled. Section 31.1b-2 of the Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." Paragraph d of Section 31.1b further excludes "proposing changes in contract terms and conditions or terms and conditions of special use authorizations." The agency's preliminary assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

**Controlling Paperwork Burdens on the Public**

This rule does not require any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and

implementing regulations at 5 CFR part 1320 do not apply.

**No Takings Implications**

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the proposed rule does not pose a risk of a taking of Constitutionally-protected private property because these proposed regulations apply to the discretionary use of Federally owned land.

**Unfunded Mandates Reform**

Pursuant to Title II of this Unfunded Mandates Reform Act of 1995, which the President signed into law on March 22, 1995, the Department has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

**Regulatory Impact**

This proposed rule was reviewed under USDA procedures and determined to be a significant rule under Executive Order 12866 on Regulatory Planning and Review because of the expected strong public interest in the proposed rule. Accordingly, this proposed rule is subject to OMB review under Executive Order 12866. However, this proposed rule will not have an annual effect of \$100 million or more on the economy, or substantially increase prices or costs for consumers, individual industries, Federal, State or local governments, or geographic regions. Furthermore, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This proposed rule will not limit the amount of National Forest System timber to be offered for sale or restrict competition for such timber. Rather, this proposed rule would remove the unreasonable degree of financial risk currently borne by the Federal Government in the event of timber sale contract cancellation and thus limit the Federal financial liability to reasonable risks.

In addition, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial

number of small entities as defined by that act.

**Civil Justice Reform Act**

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If this proposed rule were adopted, (1) all State and local laws and regulations that are in conflict with this proposed rule or which would impede its full implementation would be preempted; (2) the proposed rule may be given retroactive effect on existing contracts that contain limiting compensation provisions; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

**List of Subjects in 36 CFR Part 223**

Exports, Government contracts, National forests, Reporting requirements, and Timber sales.

Therefore, for the reasons set forth in the preamble, part 223 of chapter II of title 36 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER**

1. The authority citation for part 223 continues to read as follows:

Authority: 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213, 16 U.S.C. 618, unless otherwise noted.

**Subpart B—Timber Sale Contracts**

2. Amend § 223.30 by redesignating paragraphs (g) and (h) as paragraphs (h) and (i) respectively and adding new paragraph (g) to read as follows:

**§ 223.30 Consistency with plans, environmental standards, and other management requirements.**

\* \* \* \* \*

(g) Identification and designation of individually separable subdivision(s), payment unit(s), cutting unit(s), clearcutting unit(s), understory harvest unit(s), overstory harvest unit(s), individual tree marked area(s), or harvest unit(s) within a designated sale area boundary. Whenever reasonably feasible, the District Ranger or other Forest Service official responsible for sale layout shall divide the sale or permit area into two or more units, thereby making the contract divisible.

\* \* \* \* \*

3. Revise § 223.40 to read as follows:

**§ 223.40 Cancellation procedures.**

Timber sale contracts, permits, and other such instruments authorizing the harvesting of trees or other forest products, shall provide for cancellation

of partial cancellation for the reasons specified in paragraph (b) and (c) of this section. For the purposes of this section, the terms "cancellation" and "termination" as used in this section and in timber sale contracts, permits, and other such instruments are synonymous and may be used interchangeably.

(a) *Definitions.* The following definitions apply to the provisions of this section.

(1) *Purchaser* means, for the purpose of this section, any holder of a National Forest System timber sale contract, permit, or other such instrument authorizing the harvest of timber or other forest products.

(2) *Partial Cancellation* means the elimination of one or more, but not all, of the identifiable harvest units from a timber sale contract, permit, or other such instrument.

(3) *Modification* means the elimination of a portion of, but not all of, an identifiable harvest unit or units from a timber sale contract, permit, or other such instrument.

(4) *Cancellation* means the termination of contract requirement(s) for the removal of the remaining timber or other forest products from all of the identifiable harvest units of a timber sale contract, permit, or other such instrument.

(b) *Cancellation actions reserved to the Chief.* Based upon review of the administrative record, the Chief of the Forest Service shall cancel or partially cancel any timber sale contract, permit, and other such instrument authorizing the sale and harvest of trees or other forest products upon a determination that one or both of the following:

(1) Continued operation of the timber sale contract, permit, or other such instrument will result in the violation of a Federal statute or regulation; and/or

(2) Continued operation of the timber sale contract, permit, or other such instrument will unreasonably conflict with the management of other forest resources.

(c) *Other cancellation actions.* Based upon review of the administrative record, the Chief of the Forest Service, or other Forest Service official to whom such authority is delegated, may cancel or partially cancel, timber sale contracts, permits, or other such instruments authorizing the sale and harvest of trees or other forest products for any of the following reasons:

(1) For material breach or continued violation of their terms.

(2) Upon application or with the consent of the purchaser, for reasons other than those listed in this section, when such action is of advantage to the

United States or not prejudicial to its interests.

(3) Upon application of the purchaser or by notice of the Forest Service, when catastrophic damage caused by forces beyond the control of either the purchaser or the Forest Service materially diminishes the value of the timber remaining to be cut because of substantial damage to the timber itself or because of physical change in the sale area or access to the timber.

(4) For a conviction of a purchaser for violation of any Federal or State criminal statute, when such violation is in any way connected with obtaining, attempting to obtain, selling, trading, or processing public timber, or obtaining, attempting to obtain, or performing a public contract or subcontract.

(5) Upon final agency or judicial determination of a purchaser's violation of civil standards, orders, permits, or other regulations for the protection of environmental quality issued by a Federal agency, State agency, or political subdivision thereof, in the conduct of operations under such regulations on National Forest System land.

(6) To comply with a Federal court order or a court approved settlement agreement, regardless of whether the sale is named in such an order, upon determination by the Forest Service that the order applies to the conditions existing on the sale.

(d) *Partial Cancellation.* Any timber sale contract, permit, or other such instrument for the sale or harvest of timber or forest products that contains individually identifiable harvest units may be partially cancelled without the Forest Service incurring liability for breach of the entire contract. When a timber sale is partially cancelled, a purchaser retains the duty to perform the remaining portions of the contract, unless, based upon evidence provided by the purchaser, the Contracting Officer determines that it would be uneconomical for the purchaser to perform the remaining portion of the contract.

(e) *Compensation.* (1) In the event of cancellation or partial cancellation by the Government of a contract, permit, or other such instrument under paragraphs (b) and (c) of this section, compensation, if any, is to be determined as follows:

(i) If the cancellation or partial cancellation is made pursuant to paragraph (b)(1), (b)(2), or (c)(6) of this section, the purchaser may receive compensation for out-of-pocket expenses, except where the Forest Service finds the purchaser contributed to the reason(s) for cancellation. Out-of-pocket expenses include only

unrecovered costs arising from acquiring and performing the contract prior to cancellation. Out-of-pocket expenses do not include attorney's fees, lost profits, replacement cost of timber, or any other anticipatory losses by the purchaser. All such expense claims must be submitted, along with supporting documentation, to the Contracting Officer, pursuant to the Contract Disputes Act of 1978 (41 U.S.C. 605).

(ii) If the cancellation or partial cancellation is made pursuant to paragraphs (c)(1), (3), (4), or (5) of this section, the purchaser shall not receive any compensation.

(2) If the cancellation or partial cancellation by the government is made pursuant to paragraph (c)(2) of this section, compensation to either party will be determined subject to such terms as may be included in a written mutual agreement between the parties.

#### **§ 223.116 [Removed]**

4. Remove § 223.116 in its entirety.

Dated: May 3, 1996.

David G. Unger,  
*Associate Chief.*

Editorial Note: This document was received in the Office of the Federal Register on December 23, 1996.

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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 300**

[FRL-5671-7]

### **National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of intent to delete the Carter Industrials site from the National Priorities List; request for comments.

**SUMMARY:** The United States Environmental Protection Agency (EPA) Region 5 announces its intent to delete the Carter Industrials Site from the National Priorities List (NPL) and requests public comment on this action. The NPL is codified as Appendix B of 40 CFR Part 300. It is part of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which U.S. EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended. This action is