or the waiver is otherwise terminated by Treasury.

Dated: October 11, 2007.

Kenneth R. Papaj,

Commissioner.

[FR Doc. 07–5135 Filed 10–18–07; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

RIN 0596–AB70

Sale and Disposal of National Forest System Timber; Modification of Timber Sale Contracts in Extraordinary Conditions; Noncompetitive Sale of Timber

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises regulations at Title 36, Code of Federal Regulations, part 223, on noncompetitive disposal of timber and other forest products based on the Secretary of Agriculture's determination that extraordinary conditions exist. A notice with request for comment on an interim final rule was published in the **Federal Register** on June 16, 2006. The Forest Service made appropriate changes to the rule in response to the public comments.

DATE: This rule is effective November 19, 2007.

ADDRESSES: The public may inspect comments received at Office of the Director, Forest Management Staff, Forest Service, USDA, 201 14th Street, SW., Washington, DC 20250. Visitors are encouraged to call ahead to (202) 205–1496 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Forest Management Staff personnel, Lathrop Smith (202) 205–0858, or Richard Fitzgerald (202) 205–1753.

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

SUPPLEMENTARY INFORMATION:

Background

The National Forest Management Act (NFMA), codified in part at Title 16 U.S.C. 472a(d), requires the Secretary of Agriculture to advertise all sales of forest products unless the appraised value of the sale is less than $10,000, or the Secretary determines that extraordinary conditions exist, as defined by regulation. The requirement to advertise sales unless extraordinary conditions exist applies to the substitution of timber outside a sale contract area.

Prior to NFMA, the Government Accountability Office (formerly the General Accounting Office) held that substitution of timber outside the contract area for timber in the contract area violated the Agency's authority to sell timber.[1] Since the passage of NFMA, but in the absence of a regulation defining ''extraordinary conditions,'' the Agriculture Board of Contract Appeals has decided similarly in several cases.[2]

Before authorizing activities on National Forest System lands, the Forest Service must ensure compliance with applicable laws and regulations and with conditions on the ground at the time of the authorization. Even so, after entering into timber sale contracts, environmental changes may occur such as the listing of a new species on the endangered species list, or a catastrophic event may occur, such as a large wildfire, resulting in the need to modify the contracts. Also, court orders and decisions resulting from environmental litigation may require making changes to existing contracts even when those contracts are not specifically named in the litigation if they are similar to contracts that were named. When this occurs, it is essential for Forest Service officials to have flexibility to adjust management activities and contractual arrangements without incurring enormous financial liability associated with unilateral modifications or contract cancellations.

At the time a sale is sold, there is no way to predict what future litigation or environmental changes may occur that will result in the sale contract needing to be changed. Each occurrence is a unique situation that constitutes an extraordinary condition. The Forest Service needs the ability to provide replacement timber or forest products for contracts that must be modified to prevent environmental degradation or resource damage, or as a result of administrative appeals, litigation, court orders, or catastrophic events that occur after contract award. Thus, the Forest Service promulgated an interim final rule, published June 16, 2006 (71 FR 34823), on noncompetitive sale of timber and other forest products based on the Secretary of Agriculture's determination that extraordinary conditions exist whenever a timber or forest products contract needs to be modified or canceled to address such unexpected changes. This benefits the Government by providing contracting officers with an opportunity to avert costly claims by providing replacement timber or forest products from outside the contract area when replacement timber is not available within the contract area. Replacement timber also helps maintain the industry infrastructure, which in turn will maintain forest management options.

Response to Comments

A 60-day comment period on the interim final rule was initiated on June 16, 2006, (71 FR 34823). Only two respondents replied. One respondent is an individual and the other respondent is a timber industry association.

Comment 1: The constraints that the value of replacement material may not exceed the value of the material it is replacing by more than 10% or $10,000, whichever is less, are too restrictive and will hamper implementation and use of this valuable tool. On small amounts of replacement timber, 10% may represent a very small amount of money, and on large volumes the $10,000 may represent a small percentage of value. If one or both of these numbers has some basis in law and cannot be removed, the only fair way to deal with this situation is to have these be upper and lower limits.

Response 1: The limitations were intended to reduce potential impacts to other purchasers while making the purchaser of a sale that must be modified or terminated whole. Replacement timber from outside the sale area will most likely come from some other sale that would otherwise be offered competitively on the open market. Offering substantially more replacement timber than the amount or value being deleted by a unilateral termination goes beyond making a purchaser whole, circumvents fair and open competition and could have detrimental consequences to other purchasers, the public, and Forest Service program objectives. For the following reasons the Forest Service agrees that the 10% limit is unnecessary but disagrees that the $10,000 limit is overly restrictive.

The National Forest Management Act (NFMA) requires advertising sales greater than $10,000 in appraised value unless the Secretary determines, as

[1] Letter to Mr. Secretary, 1973 WL 7905 (Comp. Gen.), B–177602 (1973).

[2] See Appeal of Summit Contractors, 1986 WL 19566 (AGBCA), Nos. 81–252–1, No. 83–312–1 (Jan. 8, 1986), and Appeal of Jay Rucker, 1980 WL 2345 (AGBCA) Nos. 79–211A, 79–211B (June 11, 1980). See also, *Croman Corporation* v. *United States,* 31 Fed. Cl. 741, 746–47 (August 16, 1994).

defined by regulation, that extraordinary conditions exist (16 U.S.C. 472a(d)). The intent of this rule is to establish the Secretary's determination of extraordinary conditions so that replacement timber of similar quantity and value can be obtained from outside the sale area without advertisement, even when its total value is greater than $10,000. The Forest Service recognizes, however, that exact matches with the original contract value, quantity and quality are unlikely and that a defined measure of acceptable deviation is necessary. The Forest Service believes that providing replacement timber volume with an appraised value of no more than $10,000 over the original contract value is an acceptable amount of deviation. The premise for this is that the original value of the timber being replaced was established after advertisement and the opportunity for competitive bidding in accordance with the advertisement and competition requirements of NFMA and its implementing regulations. Therefore, only the value of replacement timber exceeding the value of the original timber volume being replaced was not previously subject to advertisement and competition requirements. Advertisement and competition of the excess replacement timber is not required by NFMA or the regulations so long as the excess value remains at or below $10,000.

The rules at 36 CFR 223.112 require that contract modifications must not be done in a manner that would be injurious to the United States. For the reasons stated above, the Forest Service believes that replacement timber valued at no more than $10,000 over the original contract value adequately accounts for differences in contract and replacement timber value and ensures that contracts are not modified in a manner that would be injurious to the United States. Imposing the $10,000 upper limit on the value of replacement timber establishes a reasonable and acceptable measure of deviation, prevents a purchaser from getting a potential windfall, and eliminates the need for the Forest Service to determine, on a case-by-case basis, the level of acceptable deviation that may result in a modification that is not injurious to the United States. The Forest Service does not believe this upper limit is overly restrictive and will retain it in the final rule. The Forest Service agrees, however, that the 10% limit imposed in the interim final rule is not necessary for determining an acceptable level of deviation, and for that reason, it will be eliminated from the final rule.

The respondent suggested that if there was an upper limit there should be a corresponding lower limit on the value of replacement timber. For example, if $50,000 of replacement timber is needed, applying the $10,000 limit addressed above would require the value of replacement timber to be no less than $40,000. The Forest Service disagrees as this would have the effect of guaranteeing replacement timber which is simply an alternative remedy, when it is available, to liquidated damages addressed in the contracts. Although the rule provides broad authority for authorizing replacement timber for a variety of reasons, neither the rule nor the contracts require the Forest Service to provide, or the purchaser to agree to replacement timber. No changes are made in response to this portion of the comment.

Comment 2: The Forest Service should clarify the standard used to determine what volume will be removed from a contract because of wildfire or similar catastrophic event.

Response 2: The reference to catastrophic events in the interim final rule has led to confusion with some interpreting this to mean that the Forest Service would replace catastrophically damaged timber with comparable undamaged timber. This was not the intent. Replacement timber is only a remedy for a contract termination or partial termination under subsection B/BT8.34 Contract Termination. Replacement timber is not a remedy for a contract termination or partial termination under subsection B/BT8.22 Termination for Catastrophe. However, a single sale could be terminated under both B/BT8.22 and B/BT8.34.

For example, a fire catastrophically damages 60% of a sale area including several uncut units and timber between those units. Pursuant to B/BT8.32 Modification for Catastrophe, the Forest Service and Purchaser try, but cannot reach agreement on a modification for harvesting the catastrophically affected timber, and elect termination under B/BT8.22. The remaining 40% of the sale was not damaged, includes ''green'' units that the purchaser wants to cut, and pursuant to B/BT8.32 Modification for Catastrophe the parties agree could be logged separately from the catastrophically damaged timber. But, the Forest Service determines that because of the changed conditions caused by the fire, harvesting the remaining green units will cause environmental degradation and starts the process to terminate that portion of the contract pursuant to B/BT8.34. Replacement timber from outside the sale area could be considered for the undamaged timber included under the B/BT8.34 termination but not for the damaged timber included under the B/BT8.22 termination. Although the catastrophic event caused the situation leading to a decision to terminate the undamaged portions of the sale, the actual reason to terminate is to prevent environmental degradation. Referencing catastrophic events in the rule is unnecessary and because the reference can be misinterpreted it has been eliminated in the final rule.

Contracts awarded prior to the April 2004 version of the Timber Sale Contract do not contain references to replacement timber in event of a termination but the rule potentially could be applied to those contracts as well via a contract modification. The Forest Service agrees that more clarification of how the rule could be applied to those contracts would help and will do that with an amendment to the Timber Sale Administration Handbook FSH 2409.15. But no changes to the rule are needed to address this situation.

Comment 3: Offering substitute timber outside the sale area specified in the contract is a common sense approach to meeting contractual obligations and maintaining an equitable balance of risk. Replacement timber will help maintain the industry infrastructure which will maintain forest management options.

Response 3: The Forest Service agrees. No changes are made in response to this comment.

Comment 4: The respondent opposed the determination of ''extraordinary conditions'' likening it to an environmental assault emanating from the U.S. Department of Agriculture and suggesting that the determination is based on the desires of lobbyists working for the timber industry in corrupt Washington.

Response 4: The Forest Service disagrees that the determination of extraordinary conditions is made based on the desires of timber industry lobbyists. The determination has precedent supporting it. In 1996, the Secretary promulgated an interim final rule set out at 36 CFR 223.85(b), that defined extraordinary conditions for sales released pursuant to section 2001(k) of the 1995 Rescissions Act (61 FR 14618, April 3, 1996). The 1996 rule has reduced claims by allowing timber from outside the sale area specified in the contract to be substituted, without advertisement, on specific timber sales in Washington and Oregon affected by the 1995 Rescissions Act. A similar result is anticipated with this rule. The only impact of this determination is to allow replacement timber or other forest

products without advertisement. The Forest Service may consider only such timber or forest products for replacement purposes for which the agency has completed the appropriate environmental analysis and made a decision to authorize its harvest. Additionally, any applicable comment, appeal, or objection process for the harvest must have been completed. No changes are made in response to this comment.

Comment 5: Respondent supported the concept of replacement timber in lieu of contract cancellations noting that this will benefit the public by encouraging on-the-ground resource management while minimizing taxpayer burdens associated with damage claims.

Response 5: The Forest Service agrees. No changes are made in response to this comment.

Comment 6: Replacement timber will help maintain the industry infrastructure, which will in turn maintain forest management options.

Response 6: The Forest Service agrees. No changes are made in response to this comment.

Explanation of Revisions to 36 CFR Part 223, Subpart B

The interim final rule in § 223.85(c), specified that extraordinary conditions, as provided for in 16 U.S.C. 472a(d), includes those conditions under which contracts for the sale or exchange of timber or other forest products must be suspended, modified, or terminated under the terms of such contracts to prevent environmental degradation or resource damage, or as the result of administrative appeals, litigation, court orders, or catastrophic events. The reference to catastrophic events in the interim final rule led to confusion with some interpreting this to mean that the Forest Service would replace catastrophically damaged timber with comparable undamaged timber. The intent was to address situations where harvesting the remaining green timber on a catastrophically damaged sale would result in environmental degradation or resource damage. In those situations, replacement timber would be an alternative to harvesting the remaining green timber or canceling the contract. The intent of the rule was not to replace catastrophically damaged timber with undamaged timber. The reference to catastrophically damaged timber has been removed in this final rule.

Section 223.85(c), of the interim final rule specified that the value of replacement timber or forest products may not exceed the value of the material it is replacing by more than 10% or $10,000, whichever is less as determined by standard Forest Service appraisal methods. Based on comments received on the interim final rule, and further evaluation by the Forest Service, the 10% limit has been removed in the final rule.

Section 223.85(c), of the interim final rule specified that the replacement timber or forest products must come from the same National Forest as the original contract. In some cases, several proclaimed National Forests have been combined under one Forest Supervisor for administration purposes. The term National Forest in this paragraph refers to an administrative unit headed by a single Forest Supervisor. This distinction has been added to the final rule.

Regulatory Certifications

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Agency has assessed the effects of this 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 rule has been reviewed under USDA procedures and Executive Order 12866, Regulatory Planning and Review, as amended by E.O. 13422 on January 23, 2007. The Office of Management and Budget (OMB) has determined that this is not a significant rule. This rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this rule is not subject to OMB review under Executive Order 12866.

Moreover, this rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A final regulatory flexibility assessment has been made 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 SBREFA. The rule has no adverse or special impacts on small business, small not-for-profit organizations, or small units of the Government because it imposes no additional requirements on the affected public.

Environmental Impact

Section 31.12 of 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 Servicewide administrative procedures, program processes, or instructions.'' The Agency's assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist, and therefore, the preparation of an environmental assessment or environmental impact statement for this rule is not required.

No Takings Implications

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12360, and it has been determined that the rule will not pose the risk of a taking of private property, as the rule is limited to the establishment of administrative procedures.

Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. After adoption of this rule, (1) all State and local laws and regulations that conflict with this rule or that would impede full implementation of this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) this rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Federalism

The Agency has considered this rule under the requirements of Executive Order 13132, Federalism. The Agency has made an assessment that the rule conforms with the federalism principles set out in this Executive order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Consultation and Coordination with Indian Tribal Governments

This rule does not have tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Therefore, advance consultation with Tribes is not required.

Controlling Paperwork Burdens on the Public

This rule does not require any record keeping 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.

List of Subjects in 36 CFR Part 223

Administrative practice and procedures, Forests and forest products, Exports, Government contracts, National forests, Reporting and record keeping requirements.

■ For the reasons set forth in the preamble, the Forest Service is amending part 223 of title 36 of the Code of Federal Regulations 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, 104 Stat. 714–726, 16 U.S.C. 620–620j, unless otherwise noted.

Subpart B—Timber Sale Contracts

■ 2. Revise § 223.85(c) to read as follows:

§ 223.85 Noncompetitive sale of timber.

* * * * *

(c) Extraordinary conditions, as provided for in 16 U.S.C. 472a(d), includes those conditions under which contracts for the sale or exchange of timber or other forest products must be suspended, modified, or terminated under the terms of such contracts to prevent environmental degradation or resource damage, or as the result of administrative appeals, litigation, or court orders. Notwithstanding the provisions of paragraph (a) of this section or any other regulation in this part, when such extraordinary conditions exist on sales not addressed in paragraph (b) of this section, the Secretary of Agriculture may allow forest officers to, without advertisement, modify those contracts by substituting timber or other forest products from outside the contract area specified in the contract for timber or forest products within the area specified in the contract. When such extraordinary conditions exist, the Forest Service and the purchaser shall make good faith efforts to identify replacement timber or forest products of similar volume, quality, value, access, and topography. When replacement timber or forest products agreeable to both parties is identified, the contract will be modified to reflect the changes associated with the substitution, including a rate redetermination. Concurrently, both parties will sign an agreement waiving any future claims for damages associated with the deleted timber or forest products, except those specifically provided for under the contract up to the time of the modification. If the Forest Service and the purchaser cannot reach agreement on satisfactory replacement timber or forest products, or the proper value of such material, either party may opt to end the search. Replacement timber or forest products must come from the same National Forest as the original contract. The term National Forest in this paragraph refers to an administrative unit headed by a single Forest Supervisor. Only timber or forest products for which a decision authorizing its harvest has been made and for which any applicable appeals or objection process has been completed may be considered for replacement pursuant to this paragraph. The value of replacement timber or forest products may not exceed the value of the material it is replacing by more than $10,000, as determined by standard Forest Service appraisal methods.

Dated: October 12, 2007.

Mark Rey,

Under Secretary, Natural Resources and Environment.

[FR Doc. E7–20625 Filed 10–18–07; 8:45 am]

BILLING CODE 3410–11–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 60, 72, 78, 96, and 97

[EPA–HQ–OAR–2007–0012; FRL–8483–7]

RIN 2060–A033

Revisions to Definition of Cogeneration Unit in Clean Air Interstate Rule (CAIR), CAIR Federal Implementation Plans, Clean Air Mercury Rule (CAMR); and Technical Corrections to CAIR, CAIR FIPs, CAMR, and Acid Rain Program Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Interstate Rule (CAIR), CAIR Federal Implementation Plans (FIPs), and Clean Air Mercury Rule (CAMR) each include an exemption for cogeneration units that meet certain criteria. In light of information concerning biomass-fired cogeneration units that may not qualify for the exemption due to their particular combination of fuel and technical design characteristics, EPA is changing the cogeneration unit definition in CAIR, the CAIR model cap-and-trade rules, the CAIR FIPs, CAMR, and the CAMR model cap-and-trade rule. Specifically, EPA is revising the calculation methodology for the efficiency standard in the cogeneration unit definition to exclude energy input from biomass making it more likely that units co-firing biomass will be able to meet the efficiency standard and qualify for exemption. Because this change will only affect a small number of relatively low emitting units, it will have little effect on the projected emissions reductions and the environmental benefits of these rules. If EPA finalizes the proposed CAMR Federal Plan, it intends to make the definitions in that rule conform to the CAMR model cap-and-trade rule and thus, with today's action. This action also clarifies the term ''total energy input'' used in the efficiency calculation and makes minor technical corrections to CAIR, the CAIR FIPs, CAMR, and the Acid Rain Program rules.

DATES: The final rule is effective on November 19, 2007.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2007–0012. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose