

§ 223.118

36 CFR Ch. II (7-1-07 Edition)

the notice not later than 15 days after the first publication of such notice. If a public advisory hearing is to be held, notice of it shall be published in the same newspaper or newspapers as the original notice, stating the place where it will be held and the time, which shall not be earlier than 10 days after the first publication of the said notice of hearing, and shall appear once each week, but not for more than four successive weeks in any event, until the date set for the hearing. Any such hearing shall be conducted by the Chief or by any officer designated by him as his representative, except that if the amount of the proposed sale is not in excess of that which the Regional Forester has been authorized to sell without prior approval of the Chief the hearing may be held by the Regional Forester concerned or by his representative and decision may be by the Regional Forester. At any such hearing, opportunity shall be given to those having a reasonable interest to make oral statements or to file written statements discussing the advantages and disadvantages of the proposed sale; and the officer holding the hearing may, in his discretion, permit the filing of such statements within a reasonable period after the close of the hearing to become part of the record for consideration before a decision is made.

(c) Shall keep available for public inspection,

(1) During the life of any sustained yield unit, the minutes or other record of the hearing held on the establishment thereof, and the determination of action taken following the hearing including any modification of the proposals as submitted at the hearing; and

(2) During the life of any cooperative agreement for coordinated management the similar record of the hearings and actions determined upon; and

(3) During the life of any sustained yield unit the similar record of any public hearing which may be held on a sale made without competition or with restricted competition and the action determined upon. Such records of any case may be kept in any office of the Forest Service designated by the Chief as being suitable and convenient of access for probably interested persons.

(d) Shall make provision, in any contract for the purchase of timber without competition or with restricted competition, if that contract is of more than 7 years' duration and in his discretion in any case of shorter duration, for the redetermination of rates for stumpage and for required deposits to be paid by the purchasers, such redetermination to be effective at intervals or dates stated in the contract; but the sum of such redetermined rates for stumpage and sale area betterment shall not be less than the base rates in the published notice of the proposed sale.

(e) May modify and revise existing cooperative agreements entered into under said act after taking appropriate action.

**§ 223.118 Appeal process for small business timber sale set-aside program share recomputation decisions.**

(a) *Decisions subject to appeal.* The rules of this section govern appeal of recomputation decisions related to structural, special, or market changes or the scheduled 5-year recomputations of the small business share of National Forest System timber sales. Certain decisions related to recomputation of shares, such as structural change and carryover volume, may require two decisions, one to determine that a recomputation is needed and the other to recompute the shares. Decisions made both at the earlier stage as well as the later stage are appealable.

(b) *Manner of giving notice—(1) Predecisional notice and comment.* The Responsible Official shall provide qualifying timber sale purchasers, as defined in paragraph (c)(1) of this section, 30 days for predecisional review and comment on any draft decision to reallocate shares, including the data used in making the proposed recomputation decision.

(2) *Notice of decision.* Upon close of the 30-day predecisional review period, the Responsible Official shall consider any comments received. Within 15 days of the end of the comment period, the Responsible Official shall make a decision on the small business shares and shall give prompt written notice to all parties on the national forest timber

sale bidders list for the affected area. The notice of decision must identify the name of the Appeal Deciding Officer, the address, the date by which an appeal must be filed, and a source for obtaining the appeal procedures information.

(c) *Who may appeal or file written comments as an interested party.* (1) Only timber sale purchasers, or their representatives, who are affected by recomputations of the small business share of timber sales as described in paragraph (a) of this section and who have submitted predecisional comments pursuant to paragraph (b)(1) of this section, may appeal recomputation decisions under this section or may file written comments as an interested party.

(2) Interested parties are defined as the Small Business Administration and those timber sale purchasers, or their representatives, who are affected by recomputations of the small business share of timber sales as described in paragraph (a) of this section and who have individually, or through an association to which they belong, submitted predecisional comments pursuant to paragraph (b)(1) of this section.

(i) A timber sale purchaser may submit comments on an appeal as an interested party if an association to which the purchaser belongs filed predecisional comment but later decides not to appeal or not to file comments as an interested party.

(ii) A timber sale purchaser, who is a member of an association that appeals a decision, may not file a separate appeal unless that purchaser filed separate predecisional comment under paragraph (b)(1).

(3) Interested parties who submit written comments on an appeal filed by another party may not continue an appeal if the appellant withdraws the appeal.

(d) *Level of appeal.* Only one level of review is available for appeal of decisions pertaining to recomputations under the Small Business Timber Sale Set-aside Program. The Appeal Deciding Officer is the official one level above the level of the Responsible Official who made the recomputation of shares decision. The Responsible Official is normally the Forest Supervisor;

thus, the Appeal Deciding Officer is normally the Regional Forester. However, when the Regional Forester makes recomputation decisions, the Appeal Deciding Officer is the Chief or such officer at the National headquarters level as the Chief may designate.

(e) *Filing procedures.* In order to file an appeal under this section, an appellant must file a notice of appeal, as specified in the notice of decision, with the Appeal Deciding Officer within 20 days of the date on the notice of the decision. This date must be specified in the notice of decision given pursuant to paragraph (b)(2) of this section. Written comments filed by an interested party in response to an appeal must be filed within 15 days after the close of the appeal filing period.

(f) *Content of notice of appeal.* (1) It is the responsibility of the appellant to provide sufficient narrative evidence and argument to show why a recomputation decision by the Responsible Official should be reversed or changed.

(2) An appellant must include the following information in a notice of appeal:

(i) The appellant's name, mailing address, and daytime telephone number;

(ii) The title or type of recomputation decision involved, the date of the decision, and the name of the Responsible Official;

(iii) A brief description and date of the decision being appealed;

(iv) A statement of how the appellant is adversely affected by the decision being appealed;

(v) A statement of the facts in dispute regarding the issue(s) raised by the appeal;

(vi) If relevant, any specific references to any law, regulation, or policy that the appellant believes to have been violated and the basis for such an allegation;

(vii) A statement as to whether and how the appellant has tried to resolve with the Responsible Official the issue(s) being appealed, including evidence of submission of written comments at the predecisional stage as provided by paragraph (a) of this section, the date of any discussion, and the outcome of that meeting or contact; and

(viii) A statement of the relief the appellant seeks.

(g) *Time periods and timeliness.* (1) All time periods applicable to this section will begin on the first day following a decision or action related to the appeal.

(2) Time periods applicable to this section are computed using calendar days. Saturdays, Sundays, or Federal holidays are included in computing the time allowed for filing an appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday, the filing time is automatically extended to the end of the next Federal working day.

(3) It is the responsibility of those filing an appeal to file the notice of appeal by the end of the filing period. In the event of questions, legible postmarks on a mailed appeal or the time and date imprint on a facsimile appeal will be considered evidence of timely filing. Where postmarks or facsimile imprints are illegible, the Appeal Deciding Officer shall rule on the timeliness of the notice of appeal.

(4) The time period for filing a notice of appeal is not extendable.

(h) *Dismissal without decision.* The Appeal Deciding Officer shall dismiss an appeal and close the record without a decision in any of the following circumstances:

(1) The appellant is not on the timber sale bidders list for the area affected by the recomputation decision;

(2) The appellant's notice of appeal is not filed within the required time period;

(3) The appellant's notice of appeal does not contain responses required by paragraphs (f)(2)(i) through (f)(2)(viii) of this section; or

(4) The appellant did not submit written comments on the proposed decision of the new recomputed shares as described in paragraph (c) of this section.

(i) *Appeal record.* The appeal record consists of the written decision being appealed, any predecisional comments received, any written comments submitted by interested parties, any other supporting data used to make the decision, the notice of appeal, and, if prepared, a responsive statement by the Responsible Official which addresses the issues raised in the notice of ap-

peal. The Responsible Official must forward the record to the Appeal Deciding Officer within 7 days of the date the notice of appeal is received. A copy of the appeal record must be sent to the appellant at the same time.

(j) *Appeal decision—(1) Responsive statement for appeal decision.* The Appeal Deciding Officer may request the Responsible Official to prepare a responsive statement. However, if the information in the files clearly demonstrates the rationale for the Responsible Official's decision, then a responsive statement addressing the points of the appeal is not necessary.

(2) *Appeal issue clarification.* For clarification of issues raised in the appeal, the Appeal Deciding Officer may request additional information from either the Responsible Official, the appellant, or an interested party who has submitted comments on the appeal. At the discretion of the Appeal Deciding Officer, an appellant or interested party may be invited to discuss data relevant to the appeal. Information provided to clarify issues or facts in the appeal must be based upon information previously documented in the file or appeal. Any information provided as a result of the Appeal Deciding Officer's request for more information must be made available to all parties, that is, to the Responsible Official, the appellant, and interested parties who have submitted comments on the appeal. All parties will have 5 days after the Appeal Deciding Officer receives the additional information to review and comment on the information, and the appeal decision period will be extended 5 additional days.

(3) *Issuance of final decision.* The Appeal Deciding Officer shall review the decision and appeal record and issue a written appeal decision to the parties within 30 days of the close of the appeal period except that this period must be extended to 35 days when additional information is requested by the Appeal Deciding Officer. The Appeal Officer may affirm or reverse the Responsible Official's decision, in whole or in part. There is no extension of the time period for rendering an appeal decision.

(k) *Implementation of decisions during pendency of appeal.* Recomputation of

shares arising from a scheduled 5-year recomputation are effective on April 1 following the end of the 5-year period being considered. If an appeal that may affect the shares for the next 5-year period is not resolved by the April 1 date, the share decision announced by the Responsible Official must be implemented. If an appeal decision results in a change in the shares, the revised total share of the Small Business Timber Sale Set-aside Program must be accomplished during the remaining portion of the 5-year period.

(l) *Timber sale set-aside policy changes.* Timber purchasers shall receive an opportunity, in accordance with all applicable laws and regulations, to review and comment on significant changes in the Small Business Timber Sale Set-aside Program or policy prior to adoption and implementation.

(m) *Information collection requirements.* The provisions of paragraph (f) of this section specify the information that appellants must provide when appealing decisions pertaining to recomputation of shares. As such, these rules contain information requirements as defined in 5 CFR Part 1320. These information requirements have been approved by the Office of Management and Budget and assigned control number 0596-0141.

[64 FR 411, Jan. 5, 1999]

### Subpart C—Suspension and Debarment of Timber Purchasers

SOURCE: 52 FR 43329, Nov. 12, 1987, unless otherwise noted.

#### § 223.130 Scope.

(a) This subpart prescribes policies and procedures governing the debarment and suspension of purchasers of National Forest System timber. This subpart further prescribes policies and procedures governing those persons who violate the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*).

(b) It provides for the listing of debarred and suspended purchasers.

(c) It sets forth the causes and procedures for debarment and suspension and for determining the scope, duration, and treatment to be accorded to

purchasers listed as debarred or suspended.

[52 FR 43329, Nov. 12, 1987, as amended at 60 FR 46921, Sept. 8, 1995]

#### § 223.131 Applicability.

These regulations apply to purchasers of National Forest System timber as well as to those persons who violate the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*). These regulations do not apply to Forest Service procurement contracts which are governed by regulations at 41 CFR 4-1.6.

[60 FR 46921, Sept. 8, 1995]

#### § 223.132 Policy.

(a) The Forest Service shall solicit and consider timber sale bids from and award contracts only to responsible business concerns and individuals. Debarment and suspension by the Forest Service are discretionary actions that, taken in accordance with these regulations, are appropriate means to effectuate this policy.

(b) Debarment and suspension shall be imposed only for the causes and in accordance with the procedures set forth in this subpart. The serious nature of debarment and suspension requires that these actions be imposed only in the public interest, for the Government's protection, and not for the purpose of punishment.

(c) Debarment and suspension actions taken under this subpart shall be based on the administrative record, including any submissions and argument made by the purchaser or named affiliate in accordance with this subpart, and shall be limited in scope and duration to that necessary to protect the Government's interest.

#### § 223.133 Definitions.

As used in this subpart, the following terms shall have the meanings set forth below:

*Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

*Affiliates* are business concerns or persons, whose relationship entails the following: