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**Route To:**

**Subject:** Application of 36 CRF 215 Following Ruling in Wilderness Society v. Rey

**To:** Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs  
and WO Staff

Several questions have arisen about application of the 215 regulations in light of the Wilderness Society v. Rey federal district court ruling. The enclosed document identifies questions that various field units have surfaced about this issue, and provides clarification of the subject regulations and the court's ruling in response to these questions.

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enclosure



## Questions and answers about the application of 36 CFR 215 following ruling in *Wilderness Society v. Rey*

Most of these questions are generated by the fact that the court invalidated 36 CFR 215.13(a) and replaced it with the previous regulation (1993 version) 36 CFR 215.11(a). These parts of the regulations provide criteria for determining who may appeal. Compliance with the court's order is made problematic because that same criterion and other related criteria are also used in the regulations for requirements for:

- ♦ commenting on proposed actions (§ 215.6(a)(3)(iii) and (a)(3)(v)),
- ♦ consideration of comments (§ 215.6(b)(1)),
- ♦ mailing of decision documents (§ 215.7(a)),
- ♦ content of a legal notice of the decision (§ 215.7(b)(3)),
- ♦ decisions not subject to appeal (§ 215.12(e)(1) and 12(e)(2)), and
- ♦ dismissal of appeals without review (§ 215.16(a)(6)).

None of these sections has been specifically invalidated by the court.

### **Q. The 1993 version of § 215.11, which we are now following, references § 215.6. Is that the 2003 version of § 215.6 or the 1993 version?**

A. Both versions of § 215.6 cover requirements associated with comments on proposed actions and the use of those comments by the agency. They differ from each other in several ways, but most relevant to this discussion are the references to *substantive comments* in the 2003 version.

Plaintiffs did not challenge § 215.6 and the court ruling did not sever that section or substitute the 1993 version for the 2003 version. However, because the court found that limiting appeal to those who provide substantive comments through § 215.13(a) was contrary to the more expansive right to appeal in the Appeals Reform Act, we should implement § 215.6 as though the phrase “substantive comment” reads “comment or other expression of interest”. (See Sections 215.6(a)(3)(iii), 215.6(a)(3)(v), and 215.6(b)(1)).

### **Q. Are we still to follow other parts of the 2003 version of 36 CFR 215 that refer to substantive comments, such as 215.7(a)?**

#### **§ 215.7 Legal notice of decision.**

(a) The Responsible Official shall promptly mail the Record of Decision (ROD) or the Decision Notice (DN) and Finding of No Significant Impact (FONSI) to those who requested the decision document and those who submitted substantive comments during the comment period (§ 215.6).

A. Although the provisions of the 2003 regulations, like 215.7(a) that were not specifically invalidated remain in effect, we can implement them in a way that acknowledges what the court said about our efforts to limit appeals to those who file “substantive comment” in 215.13. As in the answer above, we should implement § 215.7(a) as though the phrase “substantive comment” reads “comment or other expression of interest”.

**Q. Are we to follow the 2003 version of 215.16(a)(6)? Has it been replaced by the 1993 version of 215.15(a)(5)?**

<p><b>§ 215.16(a)(6)</b> <b>June 2003 version</b></p>	<p><b>§ 215.15(a)(5)</b> <b>November 1993 version</b></p>
<p>(a) The Appeal Deciding Officer shall dismiss an appeal without review when one or more of the following applies: ... (6) The individual or organization did not submit substantive comments during the comment period (§ 215.6).</p>	<p>(a) An Appeal Deciding Officer shall dismiss an appeal without review when: ... (5) The appellant did not express an interest in the specific proposal at any time prior to the close of the comment period specified in § 215.6;</p>

A. This specific provision of the 2003 regulations was not invalidated by the court. However, as noted in the previous answers, we should implement as though the phrase “substantive comment” reads “comment or other expression of interest”.

**Q. Can we still apply the provision at 215.12(e) that says projects for which there were only supportive comments are not appealable?**

<p><b>§ 215.12 Decisions and actions not subject to appeal.</b> The following decisions and actions are not subject to appeal under this part, except as noted: ... (e) Projects or activities for which notice of the proposed action and opportunity to comment is published (§ 215.5) and (1) No substantive comments expressing concerns or only supportive comments are received during the comment period for a proposed action analyzed and documented in an EA (§ 215.6); or (2) No substantive comments expressing concerns or only supportive comments are received during the comment period for a draft EIS (40 CFR 1502.19), and the Responsible Official’s decision does not modify the preferred alternative identified in the draft EIS.</p>
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A. Section 215.12(e) is still in effect except as it pertains to using substantive comments as a criteria for determining decisions and actions not subject to appeal. Again, implement as if the phrase “substantive comment” reads “comment or other expression of interest”.

**Q. Must the comments or expressions of interest that establish standing to appeal be provided only during the 30-day notice and comment period, or can they have been provided prior to that?**

The phrase “by the close of the comment period” in the 1993 version of § 215.11(a)(2) should be understood as meaning *during* the comment period. The sentence where this phrase occurs refers to § 215.6. Sec. 215.6(a) establishes the 30-day comment period. Sec. 215.6(b) says “persons expressing an interest or submitting comments . . . in response to a notice published or provided pursuant to § 215.5.” Sec. 215.5 is about giving public notice for comment, publication of which starts the 30-day comment period. Limiting expressions of interest/comments to the comment period (for establishing standing) is consistent with the ARA. Sec. 322(c) gives a RIGHT TO APPEAL to “a person who was involved in the public comment process under subsection (b). Sec. 322(b) establishes a COMMENT period following NOTICE, and refers to comments being accepted “within 30 days after publication of the notice.”