

(b) *Enforcement period.* This regulation is effective from 8:30 p.m. to 9:30 p.m. on November 8, 2008.

(c) *Regulations.*

(1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Sector Lake Michigan, or his on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Sector Lake Michigan or his on-scene representative.

(3) The "on-scene representative" of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Sector Lake Michigan or his on-scene representative to obtain permission to do so. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Sector Lake Michigan or his on-scene representative.

Dated: October 23, 2008.

**B.C. Jones,**

*Captain, U.S. Coast Guard, Captain of the Port Sector Lake Michigan.*

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## DEPARTMENT OF AGRICULTURE

### Forest Service

#### 36 CFR Part 223

RIN 0596-AC79

#### Sale and Disposal of National Forest Service System Timber; Timber Sale Contracts; Market-Related Contract Term Additions

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The original Market-Related Contract Term Addition (MRCTA) regulation was adopted in 1990 to provide financial relief to timber sale purchasers during cyclic downturns in forest products markets. However, the current drastic reduction in Forest

Product markets, which began in late 2004, revealed several problems with the existing MRCTA regulation.

Therefore, this final rule is needed to help ensure that the MRCTA regulation functions as originally intended.

This final rule makes four changes to the MRCTA regulation. First, the regulation now allows more than 3 years to be added to a contract's term pursuant to MRCTA when there is a drastic reduction in wood product prices that lasts for more than 10 out of 12 consecutive quarters. Second, the regulation now gives contracting officers the flexibility needed to assign the most appropriate Bureau of Labor Statistics Producer Price Index (PPI) to a timber sale contract. Third, the regulation now prevents any single 3-month MRCTA from extending a contract's term by more than 1 year. Finally, the regulation now explicitly states what types of sales are ineligible for any MRCTA relief.

**DATES:** This rule is effective December 4, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Lathrop Smith, Forest Management staff, at (202) 205-0858, or Richard Fitzgerald, Forest Management staff, at (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

In order to encourage the retention of a viable established industry capable of supplying the wood fiber needs of the public for housing and other products, the Chief of the Forest Service issued a final rule (36 CFR 223.52) on December 7, 1990, finding that the substantial overriding public interest justifies MRCTAs whenever there is a drastic reduction in wood product prices (55 FR 50643). The Chief's finding was based on the fact that MRCTAs (1) help purchasers avoid severe financial hardship; (2) ensure that the Federal government receives payments due from purchasers by reducing the likelihood of defaults; and (3) help ensure that receipts to States and counties from timber sales are not adversely affected by contract defaults. Additionally, MRCTAs help promote stability in the wood products industry, which helps promote competition, employment, investment, productivity, innovation and the industry infrastructure needed by the Forest Service to accomplish land management objectives most

economically done with timber sales. (73 FR 53817).

In accordance with the December 7, 1990, final rule, the Forest Service uses PPIs to determine when a drastic reduction in wood product prices has occurred. The Forest Service currently uses the Softwood Lumber Index (WPU0811), the Hardwood Lumber index (WPU0812) and the Wood Chips index (PCU3211133211135) to monitor different wood products. Except for sales of timber subject to rapid deterioration, each contract over 1 year in length is assigned the index that represents more than one-half of the advertised volume. When a drastic reduction in the assigned index has occurred for two consecutive quarters during the contract period, the Forest Service notifies purchasers and, upon a purchaser's written request, adds 1 year to the contract term. For each additional consecutive quarter a drastic reduction occurs, the Forest Service, upon a purchaser's written request, adds an additional 3-month period to the normal operating season of the contract.

Under the current rule, no more than twice the original contract length or 3 years, whichever is less, may be added to a contract's term by MRCTA. Pursuant to the National Forest Management Act of 1976 (16 U.S.C. 472a(c)), total contract length cannot exceed 10 years as the result of a MRCTA. Further, MRCTA may not be granted for those portions of the contracts (1) with a required completion date other than the contract termination date, (2) with timber the Forest Service determines is in need of urgent removal, or (3) where the Forest Service determines timber deterioration or resource damage may result from delay.

Since the MRCTA rule was adopted in 1990, a drastic reduction in softwood lumber prices occurred for five quarters in 1994-1995, three quarters in 1998, six quarters in 2000-2001, and for 12 quarters beginning in September 2005, through June 2008. The hardwood index has also shown a drastic reduction for three quarters in 2005-2006 and in the first two quarters of 2008. As a result, many purchasers requested and received MRCTA for qualifying timber sales.

The MRCTA regulation's intent is to avert widespread contract defaults and attendant adverse economic impacts on industry and dependent communities. Using MRCTA to add no more than 3 years to a contract's term met that objective during previous drastic reductions. However, when a drastic reduction in wood prices continues for more than 3 straight years, like the current softwood lumber market,

purchasers holding high priced sales bid when the markets were stronger face severe economic hardship without the ability to rely on additional MRCTA for relief.

To respond to the poor market conditions and associated adverse economic impacts on industry and dependent communities, Section 8401 of the Food, Conservation, and Energy Act of 2008, Public Law No. 110-246, 122 Stat. 1651 (June 18, 2008), authorized the Forest Service to use MRCTA to add up to 4 years to the original length of contracts awarded prior to January 1, 2007. While section 8401 provided immediate relief to contracts that had or were about to reach the 3-year limit, the committee notes for section 8401 state *“the Managers encourage the Forest Service to revise the existing regulations within 90 days of enactment of this Act to reflect provisions of this section for future market problems.”*

In response, on September 3, 2008, the Forest Service sought public comment on proposed amendments to the MRCTA regulation. (73 FR 51388).

**Agency Response to Major Public Comments**

The Forest Service received comments responsive to the merits of the rule from three respondents. Two of the responses were from timber industry associations who supported the intent of the proposed changes. However, one of those respondents recommended changes. The third response was from an environmental organization that raised several issues related to the rule.

Agency responses to the public comments are as follows:

*Comment:* The proposed amended rules would have an overall positive effect on the Forest Service timber sale program and are in the best interest of the people of the United States. The Forest Service should move ahead with amending the regulations to expand the maximum amount of additional contract time contracts can receive during prolonged periods of market price reductions and to modify the procedure for selecting the proper producer price index.

*Response:* While these are statements for which no response is necessary, it is noted that all three respondents specifically supported the proposed changes to establishing the appropriate producer price index.

*Comment:* We are concerned that the agency has proposed allowing additional quarters of MRCTA only after the relevant producer price index has triggered for 11 consecutive quarters. This would potentially exclude numerous contracts if there is a temporary rebound in the market with the longer term decline trend resuming quickly thereafter. *“We strongly urge the agency to modify the final rule to allow additional quarters of MRCTA when the relevant PPI triggers for 6 of the 8 previous quarters, allowing MRCTA up to 10 years. At this point, a sale may only be extended by a determination of the Chief that doing so will lead to better utilization of the forest resources.”*

*Response:* The comment addresses three issues: (1) The number of qualifying quarters needed to trigger

additional MRCTA time; (2) the proposed requirement that those triggering quarters must be consecutive; and (3) the 10-year limit on total contract length pursuant to the National Forest Management Act of 1976 (NFMA). These issues will be responded to separately as follows:

(1) Under the old rule, the maximum amount of time that could be added to a contract’s term by MRCTA was 3 years. The proposed rule was designed to only allow MRCTA to extend a contract’s term beyond 3 years when there is a drastic reduction in forest products markets that lasts over 2½ years, like the current decline and the decline in the early 1980s. The Forest Service looked at all the trigger periods for the softwood lumber and hardwood lumber PPIs from the late 1970s to the present and used the two longest declines as a basis for the proposed rule. Table 1 below shows quarters triggering MRCTA for the softwood lumber and hardwood lumber PPIs since 1978. Since the MRCTA procedures were not adopted until December 1990, and have been amended several times since then, the data shows quarters that would have qualified using the procedures in the rule being amended. Also, because the Bureau of Labor Statistics PPIs are not adjusted for inflation, the Forest Service calculates a relative index adjusted for inflation that allows comparisons to be made over time on a constant dollar basis. Qualifying quarters occur when the relative index is less than 88.5 percent of the average high of the four highest quarters in the previous eight quarters.

TABLE 1—BUREAU OF LABOR STATISTICS PPI DATA

Qtr/yr	Relative softwood index	Avg. high 4 of 8 prior qtrs	88.5% of high 4 qtrs	Qualifying quarter	Relative hardwood index	Avg. high 4 of 8 prior qtrs	88.5% of high 4 qtrs	Qualifying quarter
Sep-78	155.8	152.6	135.0		131.7	123.8	109.5	
Dec-78	155.3	154.6	136.9		130.9	126.7	112.1	
Mar-79	154.0	155.3	137.5		129.9	129.3	114.5	
Jun-79	151.5	155.4	137.5		127.8	130.4	115.4	
Sep-79	155.9	155.4	137.5		122.7	130.4	115.4	
Dec-79	134.4	155.2	137.4	Yes	118.6	130.4	115.4	
Mar-80	128.8	155.2	137.4	Yes	112.6	130.4	115.4	Yes.
Jun-80	115.2	155.2	137.4	Yes	107.6	130.4	115.4	Yes.
Sep-80	118.4	155.2	137.4	Yes	102.9	130.1	115.1	Yes.
Dec-80	117.9	154.2	136.4	Yes	101.0	127.9	113.2	Yes.
Mar-81	110.9	148.9	131.8	Yes	98.5	124.8	110.4	Yes.
Jun-81	112.7	142.7	126.3	Yes	99.0	120.4	106.6	Yes.
Sep-81	105.6	134.4	118.9	Yes	99.8	115.4	102.1	Yes.
Dec-81	101.2	124.9	110.5	Yes	99.8	110.4	97.7	
Mar-82	99.6	120.1	106.3	Yes	99.6	106.0	93.8	
Jun-82	102.0	116.1	102.7	Yes	100.1	102.8	91.0	
Sep-82	99.8	115.0	101.8	Yes	100.0	101.0	89.3	
Dec-82	99.8	111.8	98.9		100.9	100.2	88.7	
Mar-83	114.4	107.8	95.4		103.1	100.2	88.7	
Jun-83	122.5	108.7	96.2		105.4	101.0	89.4	
Sep-83	109.4	111.1	98.3		109.0	102.4	90.6	
Dec-83	109.5	112.1	99.2		114.1	104.6	92.6	

TABLE 1—BUREAU OF LABOR STATISTICS PPI DATA—Continued

Qtr/yr	Relative softwood index	Avg. high 4 of 8 prior qtrs	88.5% of high 4 qtrs	Qualifying quarter	Relative hardwood index	Avg. high 4 of 8 prior qtrs	88.5% of high 4 qtrs	Qualifying quarter
Mar-84	114.5	114.0	100.8		115.5	107.9	95.5	
Jun-84	105.4	115.2	102.0		119.5	111.0	98.2	
Sep-84	101.5	115.2	102.0	Yes	119.6	114.5	101.4	
Dec-84	102.7	115.2	102.0		115.8	117.2	103.7	
Mar-85	104.8	115.2	102.0		115.8	117.6	104.1	
Jun-85	112.6	114.0	100.9		113.4	117.7	104.2	
Sep-85	102.4	111.5	98.7		113.0	117.7	104.2	
Dec-85	98.5	110.5	97.8		110.7	117.7	104.2	
Mar-86	105.7	109.3	96.8		116.3	117.7	104.2	
Jun-86	108.4	107.1	94.8		118.2	117.8	104.3	
Sep-86	111.8	107.9	95.5		119.8	117.5	104.0	
Dec-86	108.9	109.6	97.0		121.2	117.5	104.0	
Mar-87	112.7	110.4	97.7		122.7	118.9	105.2	
Jun-87	112.5	111.5	98.7		122.8	120.5	106.6	
Sep-87	118.7	111.5	98.7		123.9	121.6	107.6	
Dec-87	112.3	113.9	100.8		126.1	122.7	108.5	
Mar-88	114.6	114.1	100.9		126.8	123.9	109.6	
Jun-88	114.1	114.6	101.5		124.3	124.9	110.5	
Sep-88	110.4	115.0	101.8		119.2	125.3	110.9	
Dec-88	107.2	115.0	101.8		116.7	125.3	110.9	
Mar-89	111.1	115.0	101.8		114.3	125.3	110.9	
Jun-89	116.5	115.0	101.8		113.9	125.3	110.9	
Sep-89	114.9	116.0	102.6		113.9	125.3	110.9	
Dec-89	108.2	115.0	101.8		114.6	124.1	109.8	
Mar-90	112.3	115.0	101.8		114.6	121.8	107.8	
Sep-90	109.9	114.4	101.3		115.0	118.7	105.1	
Dec-90	103.0	113.7	100.6	Yes	111.0	116.4	103.0	
Mar-91	97.8	113.7	100.6		109.6	115.2	102.0	
Jun-91	100.9	113.7	100.6		110.9	114.6	101.5	
Sep-91	118.7	113.4	100.4		109.6	114.5	101.4	
Dec-91	108.6	114.0	100.8		110.1	114.5	101.3	
Mar-92	111.9	112.4	99.5		112.6	113.8	100.7	
Jun-92	131.7	113.2	100.2		115.6	113.3	100.3	
Sep-92	125.6	118.1	104.5		118.2	113.5	100.5	
Dec-92	124.8	122.0	108.0		122.7	114.3	101.2	
Mar-93	135.7	125.2	110.8		128.7	117.3	103.8	
Jun-93	178.6	129.5	114.6		133.0	121.3	107.3	
Sep-93	155.5	142.9	126.5		139.2	125.7	111.2	
Dec-93	156.6	150.4	133.1		140.7	130.9	115.8	
Mar-94	176.1	156.6	138.6		140.1	135.4	119.8	
Jun-94	175.6	166.7	147.5		140.3	138.2	122.3	
Sep-94	165.8	171.7	152.0		139.9	140.0	123.9	
Dec-94	159.4	174.0	154.0		139.5	140.2	124.1	
Mar-95	154.9	174.0	154.0		138.7	140.2	124.1	
Jun-95	149.6	174.0	154.0	Yes	137.2	140.2	124.1	
Sep-95	138.6	169.2	149.8	Yes	133.4	140.2	124.1	
Dec-95	143.7	169.2	149.8	Yes	132.2	140.2	124.1	
Mar-96	134.7	169.2	149.8	Yes	130.0	139.9	123.8	
Jun-96	138.1	163.9	145.1	Yes	130.1	139.6	123.5	
Sep-96	153.8	157.4	139.3		127.7	138.8	122.9	
Dec-96	159.0	154.4	136.7		127.5	137.2	121.4	
Mar-97	156.8	154.3	136.6		128.6	135.4	119.8	
Jun-97	165.4	154.8	137.0		134.5	133.2	117.9	
Sep-97	166.3	158.7	140.5		136.6	132.5	117.3	
Dec-97	158.4	161.9	143.2		138.7	133.3	118.0	
Mar-98	153.6	162.3	143.6		140.6	135.0	119.5	
Jun-98	155.3	162.3	143.6		144.2	137.6	121.8	
Sep-98	141.9	162.3	143.6	Yes	143.7	140.0	123.9	
Dec-98	141.5	162.3	143.6	Yes	143.9	141.8	125.5	
Mar-99	142.6	161.7	143.1	Yes	143.5	143.1	126.6	
Jun-99	157.7	161.3	142.8		143.5	143.8	127.3	
Sep-99	164.5	159.4	141.1		141.1	143.8	127.3	
Dec-99	154.2	159.0	140.7		138.5	143.8	127.3	
Mar-00	150.9	157.9	139.8		142.6	143.8	127.3	
Jun-00	147.6	157.9	139.8		141.5	143.8	127.3	
Sep-00	134.2	156.8	138.8	Yes	139.4	143.6	127.1	
Dec-00	124.4	156.8	138.8	Yes	138.7	143.4	126.9	
Mar-01	121.1	156.8	138.8	Yes	137.0	142.8	126.4	
Jun-01	121.9	156.8	138.8	Yes	135.8	142.2	125.8	
Jun-01	138.2	154.3	136.5		133.4	141.1	124.9	

TABLE 1—BUREAU OF LABOR STATISTICS PPI DATA—Continued

Qtr/yr	Relative softwood index	Avg. high 4 of 8 prior qtrs	88.5% of high 4 qtrs	Qualifying quarter	Relative hardwood index	Avg. high 4 of 8 prior qtrs	88.5% of high 4 qtrs	Qualifying quarter
Sep-01	130.1	147.7	130.7	Yes	134.2	140.6	124.4	
Dec-01	125.7	142.7	126.3	Yes	138.4	140.6	124.4	
Mar-02	137.3	137.5	121.7		136.4	139.5	123.5	
Jun-02	130.0	134.9	119.4		135.3	138.4	122.5	
Sep-02	128.1	133.9	118.5		135.1	137.6	121.8	
Dec-02	124.0	133.9	118.5		136.0	136.9	121.2	
Mar-03	116.5	133.9	118.5	Yes	130.9	136.7	120.9	
Jun-03	119.5	133.9	118.5		137.7	136.5	120.8	
Sep-03	132.7	131.4	116.3		137.9	137.1	121.4	
Dec-03	128.0	132.0	116.9		138.8	137.6	121.8	
Mar-04	143.0	132.0	116.9		138.2	137.7	121.9	
Jun-04	148.5	133.5	118.1		135.7	138.1	122.3	
Sep-04	156.5	138.1	122.2		136.3	138.1	122.3	
Dec-04	130.6	145.2	128.5		132.8	138.1	122.3	
Mar-05	140.0	145.2	128.5		128.0	138.1	122.3	
Jun-05	135.8	147.0	130.1		126.7	138.1	122.3	
Sep-05	124.8	147.0	130.1	Yes	121.0	137.8	121.9	Yes.
Dec-05	119.8	147.0	130.1	Yes	120.9	137.2	121.4	Yes.
Mar-06	127.4	147.0	130.1	Yes	120.5	135.7	120.1	Yes.
Jun-06	117.1	145.2	128.5	Yes	117.8	133.2	117.9	No.
Sep-06	108.9	140.7	124.5	Yes	117.7	130.9	115.9	
Dec-06	100.1	133.4	118.1	Yes	117.9	127.1	112.5	
Mar-07	103.2	132.0	116.8	Yes	114.0	124.1	109.9	
Jun-07	100.3	127.0	112.4	Yes	111.0	122.2	108.2	
Sep-07	97.7	122.3	108.2	Yes	110.8	120.0	106.2	
Dec-07	89.0	118.3	104.7	Yes	106.8	119.3	105.5	
Mar-08	80.6	114.2	101.0	Yes	100.3	118.5	104.8	Yes.
Jun-08	83.4	107.4	95.1	Yes	92.5	116.8	103.4	Yes.

The situation described by the commenter of a brief break in triggering MRCTA followed by a continuation of a long term decline has merit. Table 1 shows the current decline with the softwood index triggering for 12 consecutive quarters beginning with the 3rd quarter 2005. Even though it was a qualifying quarter, the index showed a slight rebound in the 1st quarter of 2006. If that rebound had been high enough to prevent that single quarter from triggering, instead of having 12 consecutive qualifying quarters, only eleven of the previous 12 quarters would have been qualifying quarters and the longest consecutive string of qualifying quarters would have been nine. That minor break would not have been sufficient to change the need for additional contract time provided by the 2008 Farm Bill and the final rule. Table 1 contains another example pertinent to this issue. The softwood lumber index triggered for four consecutive quarters beginning with the 2nd quarter 2000; didn't trigger in the 2nd quarter 2001, and then triggered for two additional quarters. Using the old rule, a sale awarded prior to April 1, 2000, could have its contract term extended by 1 year for the first two qualifying quarters, plus 3 months of normal operating season time for each of the second two qualifying quarters, and 1 year for the

last two qualifying quarters following the break. Depending on the length of the normal operating season, the sale's term would have been extended by 2½ to 3 years. Using the above example, the commenter's suggestion of allowing additional MRCTA when the PPI triggers for 6 of the previous 8 quarters, could result in the sale being extended by more than 3 years. However, while the Forest Service agrees that requiring 11 consecutive qualifying quarters before triggering additional MRCTA is overly limiting, the commenter's suggestion is unacceptable because it could trigger additional MRCTA in a market decline as short as 1½ years. Accordingly the rule has been revised to allow more than 3 years to be added to a contract's term pursuant to MRCTA when there is a drastic reduction in wood product prices that lasts for more than 10 out of 12 consecutive quarters.

The Forest Service chose at least 10 of the previous 12 quarters as the trigger point because most contracts are already eligible to have their terms extended by 3 years pursuant to MRCTA. The Forest Service does not believe that there is a need to allow MRCTA to extend a contract's term by more than 3 years unless there is a drastic reduction in the market that lasts more than 2½ years (10 quarters). The rationale for allowing 3 years of MRCTA for a 2½ year market

decline is that after recovery begins purchasers need a reasonable amount of time to conclude operations where they are were working and then move back to sales that were receiving MRCTA. Up to 6 months is considered reasonable. The final rule has been revised accordingly.

(2) The commenter also recommended allowing up to 10 years of MRCTA. Following that recommendation would allow contracts to exceed 10 years in total length as the result of MRCTA. For example, 3- or 4-year contracts could become 13 or 14 year contracts. Section 472a(c) of NFMA provides, in part, as follows: "Unless there is a finding by the Secretary of Agriculture that better utilization of the various forest resources (consistent with the provisions of the Multiple-Use, Sustained-Yield Act of 1960) will result, sales contracts shall be for a period not to exceed ten years." Considering the language in NFMA, the Forest Service believes the decision to extend any timber sale or group of timber sales beyond 10 years in total length should be made on a case-by-case basis. No change will be made in the final rule relative to the 10-year limit on total contract length.

*Comment:* "We are extremely concerned and strongly opposed to the proposed change to the regulation

which would disqualify any contract for which all advertised species reach base rates from receiving additional MRCTA.”

*Response:* The commenter noted that many sales at base rates may include high associated charges for such things as brush disposal or the base rates may have been increased substantially for essential regeneration. In addition, a sale at base rates may have high operational costs for such things as helicopter logging or road construction. As a result, even though the stumpage rates for one or more species included in a sale are set at the lowest rate the Forest Service may accept for the timber, the costs of operating the sale may still be very high, especially during a depressed market period. The Forest Service agrees with the commenter and has revised the final rule accordingly.

*Comment:* One respondent believed that additional analysis and direction should be included before issuing a final rule. The respondent disagreed with the Agency’s conclusion that the rule has no direct effect upon the amount, location, or manner of timber offered for purchase. The respondent believed extensions of timber sale contracts may have a significant effect on the environment by delaying needed vegetative and habitat management work such that adverse effects to habitat, species, or people could accrue. The respondent suggested making changes in sections of the Forest Service Handbook and Manual, and agency National Environmental Policy Act (NEPA) procedures as a better way to accomplish Forest Service management objectives while responding to agency and industry concerns regarding market conditions. The respondent also noted that the citation to the categorical exclusion was out of date.

*Response:* The Forest Service agrees that contract extensions might in some instances have environmental consequences. However, this rule is not self-executing and does not by itself cause contract extensions to occur. Further, this rule is categorically excluded from documentation in an environmental assessment or an environmental impact statement.

The Forest Service disagrees that its NEPA policies and procedures should be changed to “better accomplish Forest Service management objectives while responding to agency and industry concerns regarding market conditions.” However, the Forest Service agrees that additional NEPA analysis might be necessary when a project is authorized or when a contract receives additional time under this rule. The determination of whether such analysis is necessary

will be made by the responsible official in full accordance with the law. The Forest Service’s NEPA policies and procedures currently provide for such situations and do not need to be changed. This notice’s regulatory certification section now correctly refers to 36 CFR 220.6(d)(2).

*Comment:* We cannot find any definition for “urgent removal” in 36 CFR part 223. It is unclear how the agency maintains consistency in the application of this term and how the lack of clarity would affect market related extensions.

*Response:* The commenter is correct that the term “urgent removal” is not specifically defined in 36 CFR part 223. However, § 223.53(b) and Forest Service Handbook (FSH) 2409.18, chapter 50, section 55.21, addresses sales in urgent need of harvesting, as dead and dying timber subject to rapid deterioration as the result of catastrophic events such as fire, disease or weather-related damage. Other examples of timber in need for urgent removal are addressed in the following comment/response. Ultimately, the determination of whether timber in a specific sale or project is in need of urgent removal is a decision the Forest Service makes on a case-by-case basis.

*Comment:* If fuel reduction and/or HFRA projects are considered urgent, then the regulations at 36 CFR part 223 should explicitly state so to eliminate any confusion as to whether they are eligible for an extension. The same type of specificity should apply to projects proposing to use commercial timber sales to accomplish needed endangered or threatened species habitat work under the Endangered Species Act.

*Response:* Section 223.52(c)(1) of the old rule specifies that additional contract time may not be granted for those portions of the contract which have a required completion date, or for those portions where the Forest Service determines that the timber is in need of urgent removal, or that timber deterioration or resource damage will result from delay. While this appears to address the concerns raised in the comment, § 223.52(c)(1) only pertains to portions of the sale area. Addressing the sale as a whole, § 223.52(a)(3) in the old rule specifies that a market-related contract term addition provision shall not be included in contracts where the sale has a primary objective of harvesting timber subject to rapid deterioration. The Forest Service agrees that many sales, in addition to those where the timber is subject to rapid deterioration, have timing needs that if not met may jeopardize the purpose and intended objective of the project.

Examples include treating hazardous fuels in a wildland-urban interface area, removing hazardous trees adjacent to developed sites such as roads and campgrounds, and sales where trees are designated by diameter and delay could change the treatment as the result of trees either growing into or out of the diameter range specified for treatment. But to attempt to list specific classes of sales such as HFRA projects as the respondent suggests runs the risk of being too exclusive. In order to provide resource managers with the flexibility to determine which sales should be excluded from receiving MRCTA, § 223.52(a)(3) has been amended in the final rule to state that a market-related contract term addition provision shall not be included in contracts where fulfilling the primary objective is dependent upon timely completion of harvest. The final rule also requires notifying purchasers in the prospectus when a sale is precluded from receiving a MRCTA.

## Regulatory Certifications

### Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this final rule is not a significant regulatory action and is not subject to Office of Management and Budget (OMB) review. This final rule will not have an annual effect of \$100 million or more on the economy and will not adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. This final rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Little or no effect on the national economy will result from this regulatory action, which consists of necessary, technical changes to the regulation governing market-related contract term additions. Using the replacement indices and the modified formula contained in this final rule, the Forest Service will be able to determine whether a drastic decline in wood products prices has occurred. 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 final rule is not subject to OMB review under Executive Order 12866.

Moreover, this final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 610 *et seq.*), and it is hereby certified that this action

will not have a significant economic impact on a substantial number of small entities as defined by that act. As revised in this final rule, the Forest Service will be able to grant additional market-related contract term additions to small and large purchasers when there is a prolonged drastic reduction in wood product prices. This will have the intended effect of averting massive defaults and attendant adverse economic impacts on industry and dependent communities by providing purchasers additional contract time until markets improve.

#### *Proper Consideration of Small Entities*

This final 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.*). The Forest Service has determined that this action will not have a significant economic impact on a substantial number of small entities as defined by SBREFA.

To the extent that the final rule imposes additional requirements on small entities, these requirements are the minimum necessary to protect the public interest, are not administratively burdensome or costly to meet, and are well within the capability of small entities to perform.

#### *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 Forest Service has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This final rule does not compel the expenditure of \$100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

#### *Environmental Impact*

This final rule concerns the extension of timber sale contracts when warranted by a drastic reduction in wood product prices, and, as such, has no direct effect upon the amount, location, or manner of timber offered for purchase. Code of Federal Regulations at 36 CFR 220.6(d)(2) excludes from documentation in an environmental assessment or impact statement “rules, regulations, or policies to establish Service-wide 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 which would require preparation of an environmental assessment or environmental impact statement.

#### *Controlling Paperwork Burdens on the Public*

This final rule includes information collection requirements as defined in 5 CFR part 1320. 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 apply. The Office of Management and Budget (OMB) has approved the collection of this information under OMB control number 0596–0212.

#### *Energy Effects*

This final rule has been reviewed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this final rule does not constitute a significant energy action as defined in the Executive order.

#### *Federalism*

The agency has considered this final rule under the requirements of Executive Order 13132, Federalism. The agency has made an assessment that the final 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 final rule does not have tribal implications as defined in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and, therefore, advance consultation with tribes is not required.

#### *No Takings Implications*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that the rule does not pose the risk of a taking of Constitutionally-protected private property.

#### *Civil Justice Reform*

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The agency has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full

implementation of this rule. In any event, after adoption of this final rule: (1) All State and local laws or regulations that conflict with this rule or that would impede full implementation would be preempted; (2) no retroactive effect would be given to this final rule, except as described herein; and (3) the final rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

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

Administrative practice and procedure, Exports, Forests and forest products, Government contracts, National forests, Reporting and recordkeeping requirements.

■ Therefore, for the reasons set forth in the preamble, Part 223 of Title 36 of the Code of Federal Regulations is 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, 104 Stat. 714–726, 16 U.S.C. 620–620j, unless otherwise noted.

■ 2. In § 223.52 revise paragraphs (a)(2), (a)(3), (c)(1) through (c)(4) and add a new paragraph (c)(5) to read as follows:

#### **§ 223.52 Market-related contract term additions.**

(a) \* \* \*

(2) The contract term addition provision of the contract must specify the index to be applied to each sale. The Forest Supervisor shall determine and select from paragraph (b) of this section, the index to be used for each sale based on the species and product characteristics, by volume, being harvested on the sale. The index specified shall represent more than one-half of the advertised volume. If none of the indices in paragraph (b) of this section represent more than one-half of the advertised volume, the index specified shall represent the species product combination representing the highest percentage of volume for which there is an index. When the Forest Supervisor determines that the species and potential product characteristics are such that more than one index could be used, the prospectus will state that the Contracting Officer may, upon the purchaser’s written request, select an alternative index from paragraph (b) of this section, and may modify the contract by mutual agreement, at time of contract execution, to include an alternative index that the Contracting Officer has determined represents the

highest percentage of products the purchaser intends to produce or have produced from the sale. Purchasers seeking a change of index at time of award must substantiate the need for an alternative index by providing the Contracting Officer with a written request that includes a list of products by volume the purchaser intends to produce or expects will be produced from the timber on that sale. In the event a mutual agreement to modify a contract to include an alternative index is not reached at time of contract execution, the index specified in the sample contract shall apply.

(3) A market-related contract term addition provision shall not be included in contracts where the primary management objective requires prompt removal of the timber, such as, timber is subject to rapid deterioration, timber is in a wildland-urban interface area, or hazard trees adjacent to developed sites.

\* \* \* \* \*

(c) \* \* \*

(1) Additional contract time may not be granted for those portions of the contract:

- (i) With a required completion date;
- (ii) Where the Forest Service determines that the timber is in need of urgent removal;
- (iii) Where timber deterioration or resource damage may result from delay; or
- (iv) Where included timber is designated by diameter and delay may change the treatment as a result of trees growing into or out of the specified diameter range(s).

(2) For each additional consecutive quarter in which a contract qualifies for market-related contract term addition, the Forest Service will, upon the purchaser's written request, add an additional 3 months during the normal operating season to the contract, except that no single 3-month addition shall extend the term of a contract by more than 1 year.

(3) No more than 3 years shall be added to a contract's term by market-related contract term addition unless the following conditions are met:

- (i) The sale was awarded after December 31, 2006;
- (ii) A drastic reduction in wood product prices occurred in at least ten of twelve consecutive quarters during the contract term, but not including the quarter in which the contract was awarded; and

(4) For each qualifying quarter meeting the criteria in paragraph (c)(3)(ii) of this section, the Forest Service will, upon the purchaser's written request, add an additional 3

months during the normal operating season to the contract, except no single 3-month addition shall extend the term of a contract by more than 1 year.

(5) In no event shall a revised contract term exceed 10 years as a result of market-related contract term addition.

\* \* \* \* \*

Dated: October 24, 2008.

**Mark Rey,**  
*Under Secretary, Natural Resources and Environment.*  
 [FR Doc. E8-26203 Filed 11-3-08; 8:45 am]  
**BILLING CODE 3410-11-P**

**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 17**

**RIN 2900-AM22**

**Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA): Expansion of Benefit Coverage for Prostheses and Enuretic (Bed-Wetting) Devices; Miscellaneous Provisions**

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Final rule.

**SUMMARY:** This document adopts a final rule amending the Department of Veterans Affairs (VA) medical regulations for the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) to expand benefits by covering any non-dental prostheses determined medically necessary for the treatment of certain medical conditions and by removing the exclusion from coverage of enuretic (bed-wetting) devices. In addition, this final rule makes changes in delegations of authority, technical changes, and nonsubstantive changes for purposes of clarity in VA's regulations governing CHAMPVA.

**DATES:** *Effective Date:* This final rule is effective December 4, 2008.

**FOR FURTHER INFORMATION CONTACT:** Richard M. Trabert, Policy Management Division, VA Health Administration Center, P.O. Box 65020, Denver, CO 80206-9020; (303) 331-7549. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** In a document published in the **Federal Register** on February 19, 2008 (73 FR 9068), VA proposed to amend its medical regulations at 38 CFR part 17 concerning CHAMPVA benefits. Specifically, it proposed to extend prosthetic coverage to any prostheses (other than dental prostheses) considered medically necessary because

of significant conditions resulting from trauma, congenital anomalies, or disease. Also, it proposed to remove the exclusion of enuretic (bed-wetting) devices (alarms) but would continue to exclude enuretic conditioning programs. Additionally, the document proposed to amend the delegations of authority in 38 CFR 17.275, Claim filing deadline, and 38 CFR 17.276, Appeal/review process. Finally, the document proposed to make technical and other nonsubstantive changes for purposes of clarity, including to conform with Public Law 107-135, which redesignated the statutory section authorizing the CHAMPVA program as 38 U.S.C. 1781 (formerly 38 U.S.C. 1713). VA provided a 60-day comment period that ended April 19, 2008. VA received no comments. Based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposed rule as a final rule without change, except for a technical change regarding the authority citation for 38 CFR part 17.

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

**Paperwork Reduction Act of 1995**

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

**Executive Order 12866**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a rule as a "significant regulatory action" requiring review by Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity,