GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

Subject: Whether Secretary of Agriculture Memorandum Concerning Emergency Salvage Timber Sale Program is a "Rule" under 5 U.S.C. § 801(a)(1)(A)

File: B-274505

Date: September 16, 1996

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-274505

September 16, 1996

The Honorable Larry E. Craig
Chairman, Subcommittee on Forests
and Public Lands Management
Committee on Energy and Resources
United States Senate

Dear: Mr. Chairman:

This letter is in response to your letter dated August 27, 1996, requesting our views on whether a July 2 memorandum issued by the Secretary of Agriculture concerning the Emergency Salvage Timber Sale Program is a "rule" under a recently enacted provision to be codified at 5 U.S.C. § 801 (a)(1)(A). This provision was included in the Contract with America Advancement Act of 1996.[1] The Emergency Salvage Timber Sale Program was contained in the Emergency Supplemental Appropriations and Rescissions Act of 1995.[2] As previously agreed, we did not address the question whether the memorandum is a "major rule" under 5 U.S.C. 804(2).[3]

Because of time constraints, we were unable to secure the formal views of the Departments of Agriculture and Justice, and the Office of Information and Regulatory Affairs, although we discussed the issue informally with officials of these agencies. In our view, the memorandum constitutes a "rule" as defined in 5 U.S.C. § 804(3). As a consequence, the Secretary was required by 5 U.S.C. § 801(a)(1)(A) to submit a report

---

[1] Pub. L. No. 104-121, Subtitle E, Title II, 110 Stat. 847, 868-874 (1996). Citations to provisions of this statute will be cited to those sections of the United States Code when they will appear.

[2] The Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240-247 (1995).

[3] "Major rules" are those found by the Office of Information and Regulatory Affairs in the Office of Management and Budget to meet certain criteria, such as whether the rule will have an annual effect on the economy of $100 million or more.

on the memorandum to each House of Congress and the General Accounting Office in order for the rule to become effective.

Rules Subject to Congressional Review

Subtitle E of Public Law 104-121 added a new chapter 8 to Title 5, United States Code, designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of major rules before they go into effect. The requirements of chapter 8 take precedence over any other provision of law.[4]

Section 801(a)(1) provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing---

> "(i) a copy of the rule;
>
> "(ii) a concise general statement relating to the rule, including whether it is a major rule; and
>
> "(iii) the proposed effective date of the rule."[5]

Section 804(3) provides that for purposes of chapter 8, with some exclusions, the term "rule" has the same meaning given the term in 5 U.S.C. § 551(4), which defines rules subject to the Administrative Procedure Act (APA). The APA definition of a "rule" is as follows:

> "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances,

---

[4] 5 U.S.C. § 806(a) provides that: "This chapter shall apply notwithstanding any other provision of law."

[5] On the date the report is submitted, the agency also must submit to the Comptroller General and make available to each House of Congress certain other documents, including a cost benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., and the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 601 et. seg., and the Unfunded Mandates Reform Act of 1995, 5 U.S.C. § 202, et seg., and any other relevant information or requirements under any other legislation or any relevant executive orders. 5 U.S.C. §§ 801 (a)(1)(B)(i)-(iv).

> services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing. . . . "

The exclusions from the APA definition of "rule" for purposes of chapter 8 are:

> "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;
>
> "(B) any rule relating to agency management or personnel; or
>
> "(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."

Chapter 8 provides several ways in which rules may become effective even though the required reports have not been made to the Congress and GAO. The broadest of these, section 808(2), provides that:

> "any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines."

Another provision allows "major rules," to be effective immediately if the President provides written notice of a determination by executive order that there is an "imminent threat to health or safety or other emergency" or other specified situations. 5 U.S.C. § 801 (c)(2)

The Emergency Salvage Timber Sale Program

The Emergency Salvage Timber Sale Program is intended to increase the sales of salvage timber in order to remove diseased and damaged trees and improve the health and ecosystems of federally owned forests. The legislation aims to shorten the time taken by salvage timber sales through elimination of agency–mostly the Forest Service–administrative appeals of salvage sales,[6] as well as through expedited environmental and judicial procedures.[7] The Secretary of Agriculture (Forest Service) and the Secretary of the Interior (Bureau of Land Management) are given

---

[6] Section 2001(e).

[7] Sections 2001(e) and (f).

expanded discretion in conducting these sales. Under the expedited environmental procedures, the respective Secretaries are required to prepare one document combining an environmental assessment under the National Environmental Policy Act (NEPA) and a biological evaluation under section 7(a)(2) of the Endangered Species Act.

Each Secretary also has "sole discretion" to decide whether a document containing decisions about a salvage timber sale considers the environmental effects of the sale, its effect on any threatened or endangered species, and its conformity with applicable land management plans.[8] The legislation also provides that the documentation and procedures for preparing, advertising, offering, awarding, and operating any salvage timber sale are considered to satisfy land planning and resource statutes, such as the Endangered Species Act.[9] Neither Secretary is required to issue formal rules subject to the notice and comment and publication procedures of 5 U.S.C. § 553.[10]

Responding to agency and public concerns about the implementation of the program, the Secretary of Agriculture sent a memorandum entitled "Revised Direction for Emergency Timber Salvage Sales Conducted Under Section 2001(b) of P.L. 104-19"–to the Chief of the Forest Service, containing "clarifications in policy" for the program. These consist primarily in definitions of salvage timber eligible for sale under the program. These consist primarily in definitions of salvage timber eligible for sale under the program. The memorandum represents "interim direction" until an interagency emergency salvage program review required under an August 9, 1995, Memorandum of Agreement among the Departments of Agriculture, Commerce, and Interior and the Environmental Protection Agency is completed. The memorandum applies to all salvage timber sales for which bids have not been opened.

Key provisions of the memorandum are as follows:

> "1. No salvage sales in inventoried roadless areas may go forward using authorities in section 2001(b) of P.L. 104-19, except those that qualify under 6(b) of this directive. This prohibition does not apply if salvages sales qualify under the definition of "imminently susceptible to fire" in 6(a) of this directive.

---

[8] Id.

[9] Sections 2001(i)

[10] Section 2001(h) provides that: "The Secretary concerned is not required to issue formal rules under section 553 of title 5, United States Code, to implement this section [section 2001] or carry out the authorities provided by this section."

"2. Give priority to selecting salvage sales and alternatives that minimize new road construction or reconstruction, to the maximum extent practicable.

"3. Each unit of a sale prepared under section 2001(b) should have an identifiable component of trees qualifying under at least one of the following categories: diseased, insect-infested, dead, damaged, or downed trees; or trees imminently susceptible to insect attack or fire.

"4. Any part of a sale in preparation that was identified to the public, though a scoping notice, environmental assessment, decision notice, or other manner, prior or subsequent to the enactment of P.L. 104-19, as a sale other than a salvage sale may not go forward as a section 2001(b) salvage sale, unless the complies with this directive.

"5. Any sale or part thereof in preparation prior or subsequent to enactment of P.L. 104-19 which was identified to the public through a scoping notice, environmental assessment, decision notice, or other manner, as a sale other than a salvage sale, and subsequently withdrawn, such as for environmental or other substantive reasons, may not be reclassified and may not go forward as a section 2001(b) salvage sale.

"6. Because the definition of a salvage sale in 2001(a)(3) is broad and vague, apply the following additional guidelines in the planning process and ensure that trees to be harvested are only those in excess of watershed, soil, wildlife, fisheries, or other resource needs and the proposed harvest is consistent with the MOA:

> "a. Trees 'imminently susceptible to insect attack' are trees in areas that have a high risk of incurring insect attack (as determined by a risk rating system as appropriate) and an anticipating change in stand structure or character in 3 years or less.
>
> "b. Trees 'imminently susceptible to fire' are trees located in areas with high fuel loading or where there is a high fire risk rating for the specific habitat type, and near local communities or occupied structures. Proposed sales in areas with high fuel loading or where there is a high fire risk rating for the specific habitat type but that are not near local communities or occupied structures should receive priority consideration for offering under the normal timber program authorities.

> "c. 'Associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation,' as stated in section 2001(a)(3) of the Act, are hereby referred to as 'associated trees' for the purposes of this directive. 'Associated trees' are trees that must be removed only to the extent necessary to provide access, ensure safety, or to improve the forest stand conditions in the sale area. In each salvage sale prepared under section 2001(b), the cutting of associated trees, which are primarily healthy green trees, must be subordinate to the objective of salvaging 'diseased or insect-infested trees, dead, damaged or down trees, or trees affected by fire or imminently susceptible to fire or insect attack.' The combined Environmental Assessment/Biological Evaluation must clearly document how harvesting associated trees will contribute to the project."

Analysis

There are essentially three issues presented: (1) whether the July 2 memorandum constitutes an "agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy" as provided in the APA, 5 U.S.C. § 551(4); (2) if so, whether the memorandum falls within the exclusion for a "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties" as provided in the Contract with America Advancement Act of 1996; and, finally, (3) whether any other provision of law excludes the memorandum from the requirement that it be filed with the Congress and GAO before it may become effective.

Many agency rules are not described as such.[11] They may be referred to as "a guideline," "direction," "directive," "instruction," "clarification," "manual section," "policy," etc. While how an agency describes a document may be considered in determining whether the document is a rule under the APA, the courts primarily consider the substantive effect of the document.[12] Although the Secretary's July 2 memorandum describes itself as "Revised Direction" and contains "clarifications in policy" in the form of "interim direction" and "additional guidelines," determining

---

[11] Kenneth Culp Davis & Richard J. Pierce, Jr., 1 Administrative Law Treatise §§ 6.2, 6.3 (3d ed. 1994); Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980).

[12] Mt. Diablo Hospital District v. Bowen, 860 F.2d. 951, 956 (9th Cir. 1998); Anderson v. Butz, 550 F. 2d 459, 463, (9th Cir. 1977); Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481 (3d Cir. 1972); Davis & Pierce, supra at 229.

whether or not it is a rule requires an examination of what it is intended to accomplish.

Section 2001(a)(3) of the statute establishing the Emergency Salvage Timber Program defines "salvage timber sale" as follows:

> ". . . a timber sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence."

Describing this definition as "broad and vague," the July 2 memorandum defines trees that are "imminently susceptible to insect attack" (those anticipating change in stand structure or character in 3 years or less), trees "imminently susceptible to fire" (including only those "near local communities or occupied structures"), and associated trees or trees lacking the characteristics of a healthy and viable ecosystem" (including only those trees whose removal is "necessary to provide access, ensure safety, or to improve the forest stand conditions in the sale area").

These definitions clearly are of general applicability and future effect in implementing and interpreting section 2001 of Public Law 104-19.[13] They establish criteria for the Forest Service to use in selecting areas for emergency salvage timber sales from July 2 until changed by departmental action.[14] They directly effect the size of the program and the number of sales offered for public bid.

Other provisions of the memorandum "prohibit" salvage sales in roadless areas otherwise authorized by section 2001 unless they qualify as "imminently susceptible to fire," give priority to sales that minimize new road construction, and ban certain non-salvage sales which had previously been withdrawn for substantive reasons to be reclassified and completed as emergency salvage sales. These provisions also apply generally to the emergency salvage timber sale program after July 2 and are intended for agency officials in implementing and interpreting section 2001 of Public Law 104-

---

[13] The Secretary of Agriculture is clearly authorized to implement this statutory authority to sell timber on land within the National Forest System through rules and regulations. 16 U.S.C. §§ 472, 472a(a).

[14] Interim rules–rules in effect temporarily such as this one–are within the APA definition of a "rule." Tennessee Gas Pipeline v. Federal Energy Regulatory Commission, 969 F.2d 1141, 1144-45 (D.C. Cir. 1992).

19. Thus, the July 2 memorandum meets the definition of a "rule" found in 5 U.S.C. § 551(4).

In informal discussions, Agriculture officials have argued that even though the memorandum may be a rule under the APA definition incorporated in the Contract with America Advancement Act of 1996, it is excluded from congressional reporting requirements because it is a "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. § 804(3)(C). A similar exclusion is found in the public notice and comment provision of the APA, 5 U.S.C. §553. The APA requirement for notice and comment does not apply to "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Where a rule is not clearly "substantive" or "procedural" under the APA, courts have generally considered regulatory action that substantially affects the rights and obligations of private citizens not to be procedural. E.g., JEM Broadcasting Co., Inc. v. Federal Communications Commissions, 22 F.3d 320, 326 (D.C. Cir. 1994); Pickus v. United States Board of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974); City of Alexandria v. Helms, 728 F.2d 643, 647-8 (4th Cir. 1984). During final consideration of the Contract with America Advancement Act of 1996, Representative McIntosh, a principal sponsor of the legislation, emphasized that the effect on private parties is important in applying the exclusion at issue here:

> "Pursuant to section [804(3)(C)], a rule of agency organization, procedure, or practice, is only excluded if it 'does not substantially affect the rights or obligations of nonagency parties.' The focus of the test is not on the type of rule but on its effect on the rights or obligations of nonagency parties. A statement of agency procedures or practice with a truly minor, incidental effect on nonagency parties is excluded from the definition of the rule. Any other effect, whether direct or indirect, on the rights and obligations of nonagency parties is a substantial effect within the meaning of the exception. Thus, the exception should be read narrowly and resolved in favor of nonagency parties who can demonstrate that the rule will have a nontrivial effect on their rights and obligations."[15]

In our view, the rule issued by the Secretary of Agriculture does not fall within the agency procedure or practice exclusion. While the record before us does not establish how substantially the rule affects private interests, the rule provides substantive criteria for determining what timber should be included in the Emergency Salvage Timber Sale Program, thereby directly affecting the areas of and number of salvage timber sales resulting in contacts between July 2 and the program termination date (December 31, 1996). The rule is simply not one that is limited to the Forest Service's methods of operation or how the

[15] 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

Service organizes its internal operations, but it establishes the standards by which the Forest Service's program determinations will be made. We believe that a legislative rule of this nature cannot be considered to be a rule of "agency organization, procedure, or practice." See generally Davis & Pierce, supra at § 6.4; Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980).

We are aware of no other provision of law which excludes the memorandum from the requirement that a report must be submitted to the Congress and GAO before it may become effective. Some provisions of law raised during our informal discussions with Department of Agriculture officials are not relevant to the obligations of the Contract with America Advancement Act of 1996. For example, 5 U.S.C. § 553(a)(2) exempts matters relating to public property–in this case, timber sold from government lands–from the requirement for APA notice and comment requirements. However, this exclusion was not included by the Congress in 5 U.S.C. § 804(3). Section 2001(h) of the salvage timber sale legislation provides that the Secretary is not required to issue formal rules under 5 U.S.C. § 553 to implement that statute. Again, whether or not the July 2 memorandum is subject to APA notice and comment requirements does not bear on whether it is a rule under 5 U.S.C. § 804(3)[16]

Agriculture officials have also pointed to section 2001(b)(1), which states that the "preparation, advertisement, offering, and awarding of contracts shall be

---

[16] In his floor statement during final consideration of the bill, Representative McIntosh pointed out that rules subject to congressional review are not the same as those subject to APA notice and comment requirements:

> "All too often, agencies have attempted to circumvent the notice and comment requirements of the Administrative Procedure Act by trying to give legal effect to general policy statements, guidelines, and agency policy and procedure manuals. Although agency interpretative rules, general statements of policy, guideline documents, and agency and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the congressional review provisions of the new chapter 8 of title 5."
>
> "Under section 801(a), covered rules, with very few exceptions, may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress. Interpretive rules, general statements of policy, and analogous agency policy guidelines are covered without qualifications because they meet the definition of a 'rule' borrowed from section 551 of Title 5, and are not excluded from the definition of rule." 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

performed utilizing subsection (c) and notwithstanding any other provision of law." This provision addresses only those laws applicable to the contract formation process, not congressional reporting requirements. Moreover, as noted above, 5 U.S.C. § 806(a) provides that the congressional reporting requirements "apply notwithstanding any other provision of law."

We understand that the Department of Agriculture has now distributed the July 2 memorandum to committees and Members of Congress and that the Secretary testified about the memorandum before the Senate Committee on Energy and Natural Resources. While it is possible that the object for which the statute was passed–to provide the Congress with the opportunity to review agency rulemaking–may have already been achieved, until a report has been formally submitted to each House and the Comptroller General, the rule is not effective.

We trust that this has been responsive to your request.

Sincerely yours,

Robert P. Murphy
General Counsel