

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

#### 7 CFR Part 625

RIN 0578-AA52

#### Healthy Forests Reserve Program

**AGENCY:** Natural Resources Conservation Service, United States Department of Agriculture.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Natural Resources Conservation Service (NRCS) regulations for the Healthy Forests Reserve Program (HFRP). The Food, Conservation, and Energy Act of 2008 (the 2008 Act) amended provisions of HFRP that changed the duration, type, and funding allocation of program agreements, and NRCS published a proposed rule for these changes on January 14, 2009. This final rule responds to the comments received on the proposed rule and amends NRCS regulations for HFRP to incorporate changes associated with enactment of the 2008 Act.

**DATES:** *Effective Date:* This rule is effective February 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** John Glover, Branch Chief, Easement Programs Branch, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6811 South Building, Washington, DC 20250; Telephone: (202) 720-5477; Fax: (202) 720-9689. Persons with disabilities who require alternative means for communication (Braille, large print, audiotope, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

#### SUPPLEMENTARY INFORMATION:

### Regulatory Certifications

#### *Executive Order 12866*

The Office of Management and Budget (OMB) determined that this final rule is not a significant regulatory action and a benefit cost assessment has not been undertaken.

#### *Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994*

Pursuant to section 304 of the Federal Crop Insurance Reform Act of 1994 (Pub. L. 103-354), the Department of Agriculture (USDA) classified this rule as non-major. Therefore, a risk analysis was not conducted.

#### *Regulatory Flexibility Act*

NRCS has determined that the Regulatory Flexibility Act is not applicable to this final rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete in domestic and export markets.

#### *Environmental Analysis*

The final rule for the HFRP amends the current regulation to include congressionally required statutory changes to the program as a result of the 2008 Act, Public Law 110-246. The 2008 Act changes the use of 30-year tribal contracts, allows NRCS to acquire permanent easements, and establishes limitations on the use of funds for cost-share agreements and easements. The final rule also amends the regulation in response to comments received by the agency on the proposed rule.

After review of the previous Environmental Assessment (EA) prepared in April 2006, it has been determined that the changes are minor and do not present significant new

circumstances or new information relative to environmental issues from those analyzed in the 2006 EA.

Accordingly, NRCS has determined and reaffirms that the previous EA and Finding of No Significant Impact have sufficiently analyzed the program's potential environmental impacts and are inclusive of the final rule.

Copies of the EA and the Finding of No Significant Impact may be obtained from the Healthy Forests Reserve Program Manager, Easements Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6813 South Building, Washington, DC 20250; or electronically on the Internet through the NRCS homepage at: <http://www.nrcs.usda.gov>, and by selecting "Programs," then "Healthy Forests Reserve Program."

#### *Paperwork Reduction Act*

The forms that will be utilized to implement this regulation have previously been approved for use and OMB assigned the control number 0578-0013. NRCS estimates that HFRP results in the following changes to the current package:

*Type of Request:* New Information Collection Package/form/etc.

- Increase of 26,020 respondents.
- Increase of 23,926.3 responses.
- Increase burden hours by 27,768.12.
- Increase in the average time to

execute a form in the collection: 0.229 hours or 14.03 minutes.

#### *Government Paperwork Elimination Act*

NRCS is committed to compliance with the Government Paperwork Elimination Act and the Freedom to E-File Act, which require government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

#### *Civil Rights Impact Analysis*

NRCS has determined through a Civil Rights Impact Analysis that this final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. The data presented indicates producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to

conclude that NRCS programs, including the HFRP, will continue to be administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in USDA programs. The HFRP applies to all persons equally. Therefore, this final rule portends no adverse civil rights implications for women, minorities, and persons with disabilities.

Copies of the Civil Rights Impact Analysis are available, and may be obtained from John Glover, Branch Chief, Easement Programs Branch, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6819 South Building, Washington, DC 20250, or electronically at: <http://www.nrcs.usda.gov/programs/HFRP>.

#### *Civil Justice Reform*

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The rule is not retroactive and preempts State and local laws to the extent that such laws are inconsistent with this rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614 and 11 must be exhausted.

#### *Executive Order 13132*

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined that this final rule conforms with the Federalism principles set forth in the 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 Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, NRCS concludes that this final rule does not have Federalism implications. Moreover, § 625.5 of this final rule shows sensitivity to Federalism concerns by providing an option for the responsible official (State Conservationist) to obtain input from other agencies in proposal development.

#### *Unfunded Mandates Reform Act of 1995*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), NRCS assessed the effects of this rulemaking action on State, local, and tribal governments, and the public. This action 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 Unfunded Mandates Reform Act of 1995 is not required.

#### *Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

NRCS has assessed the impact of this final rule on Indian tribal governments and has concluded that this rule will not negatively affect communities of Indian tribal governments. The statutory changes to the HFRP as a result of the 2008 Act created an option of offering 30-year contracts to encourage Indian tribal participation in the program. Section 625.12 of this final rule outlines the procedures for enrolling land in the program through the 30-year contract option. The rule will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law.

#### **Background**

America's forests provide a wide range of environmental, economic, and social benefits including timber, wilderness, minerals, recreation opportunities, and wildlife habitat. In addition, a healthy forest ecosystem provides habitat for endangered and threatened species, sustains biodiversity, protects watersheds, sequesters carbon, and helps purify the air. However, some forest ecosystems have had their ecological functions diminished by a number of factors including fragmentation, reduction in periodic fires, lack of proper management, or invasive species. Habitat loss has been severe enough in some circumstances to cause dramatic population declines such as in the case of the Ivory-billed Woodpecker. As a result of the pressures on forest ecosystems, many forests need active management and protection from development in order to sustain biodiversity and restore habitat for species that have suffered significant population declines. Active management and protection of forest ecosystems can also increase carbon sequestration and improve air quality.

Many forest ecosystems are located on private lands and provide habitat for species that have been listed as endangered or threatened under section 4 of the Endangered Species Act (ESA), 16 U.S.C. 1533 (listed species). Congress enacted the HFRP, Title V of the Healthy Forest Restoration Act of 2003 (Pub. L. 108–148, 16 U.S.C. 6571–6578) to provide financial assistance to private landowners to undertake projects that

restore and enhance forest ecosystems to help promote the recovery of listed species, improve biodiversity, and enhance carbon sequestration.

The Secretary of Agriculture has delegated authority to implement HFRP to the NRCS Chief. In addition, technical support associated with forest management practices may also be provided by the U.S. Forest Service. Section 501 of Title V of the Healthy Forests Restoration Act of 2003 (Pub. L. 108–148) provides that the program will be carried out in coordination with the Secretary of Interior and the Secretary of Commerce. NRCS works closely with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to further the species recovery objectives of the HFRP and to help make available to HFRP participants safe harbor or similar assurances and protection under ESA section 7(b)(4) or section 10(a)(1), 16 U.S.C. 1536(b)(4), 1539(a)(1).

#### **Response to Comments and Changes to the Regulation**

On January 14, 2009, NRCS published in the **Federal Register** a proposed rule for the HFRP with a 30-day public comment period that ended on February 13, 2009 (74 FR 1954). On February 18, 2009, the agency reopened the public comment period for the HFRP proposed rule for an additional 30 days, which ended on March 20, 2009 (74 FR 7563). NRCS received 13 responses to the proposed rule, encompassing approximately 68 comments. The respondents included individuals representing eight different agricultural or environmental organizations, three private citizens, a Federal agency respondent, and an Indian tribe. This section discusses all of the relevant comments except for those that expressed agreement with provisions of the proposed rule.

#### *Purpose and Eligibility*

The statutory provisions at 16 U.S.C. 6571 state that the purpose of HFRP is to restore and enhance forest ecosystems in order to: (1) Promote the recovery of threatened and endangered species, (2) improve biodiversity, and (3) enhance carbon sequestration. Under 16 U.S.C. 6572(b), to be eligible for enrollment, land must be:

(1) Private land, the enrollment of which will restore, enhance, or otherwise measurably increase the likelihood of recovery of a species listed as endangered or threatened under 16 U.S.C. 1533; and

(2) Private land, the enrollment of which will restore, enhance, or

otherwise measurably improve the well-being of species that—

(a) Are not listed as endangered or threatened under 16 U.S.C. 1533; but

(b) Are candidates for such listing, State-listed species, or special concern species.

The authorizing statute further provides at 16 U.S.C. 6572(c) that the Secretary of Agriculture will give additional consideration to enrollment of eligible land that will improve biological diversity and increase carbon sequestration.

*Comment:* Three respondents recommended that the term native be used throughout the rule prior to the term forest ecosystem to focus attention on native forest ecosystems.

*Response:* No changes were made to the regulation based on these comments. As stated above, the statutory language does not restrict HFRP to native forest ecosystems. There are situations in which the native habitat has been destroyed, and threatened and endangered species have adapted to using non-native habitats as their primary habitat. The insertion of native would create a barrier for participation in those situations. Additionally, the FWS and NMFS are part of the consultation process and can provide guidance and assistance on a case-by-case basis.

*Comment:* One respondent recommended changing the definition of biodiversity to require organisms to be native to the ecological sub-region and ecological complex.

*Response:* NRCS made no changes to the regulation based on this comment. The definition of biodiversity in the proposed rule is consistent with the definitions used in other NRCS programs.

*Comment:* One respondent asserted that NRCS should clarify the extent of the access required in the rule to distinguish between public access and agency access.

*Response:* The regulation does not require HFRP participants to provide general public access. Based on the comment, NRCS inserted language at § 625.11 (b)(1) and § 625.12 (b)(1) to clarify that the right of access to the easement area is access for NRCS personnel or agency representatives.

#### Priority for Enrollment

The statutory provisions at 16 U.S.C. 6572(f) provides the following regarding enrollment priority:

(1) Species—The Secretary of Agriculture will give priority to the enrollment of land that provides the greatest conservation benefit to—

(a) Primarily, species listed as endangered or threatened under 16 U.S.C. 1533; and

(b) Secondly, species that—

(i) Are not listed as endangered or threatened under 16 U.S.C. 1533; but

(ii) Are candidates for such listing, State-listed species, or special concern species.

(2) Cost-effectiveness—The Secretary of Agriculture will also consider the cost-effectiveness of each agreement or easement and associated restoration plans, so as to maximize the environmental benefits per dollar expended.

*Comment:* Two respondents requested additional clarity regarding the priority that will be given to enrolling projects that benefit wildlife species not listed under the ESA. They suggested defining State-listed species in the regulation.

*Response:* Based on the comments, the agency added a definition of State-listed species under § 625.2. NRCS has defined State-listed species as “a species listed as threatened or endangered under State endangered species laws, a candidate for such listing, or a species listed in a State Wildlife Action Plan as a species of greatest conservation need.”

*Comment:* Two respondents recommended that only native species be identified by the Chief for special consideration for funding.

*Response:* No changes were made to the regulation based on these comments. While the rule allows the Chief to designate species of special concern, restricting this designation to only native species unnecessarily curtails the Chief's discretion and could serve as a barrier, preventing protection in areas where it is needed.

*Comment:* One respondent suggested that a dedicated amount of funds be set aside for family forest lands.

*Response:* No changes were made to the regulations based on this comment because NRCS determined there is no statutory basis supporting a set-aside for family forest lands. A separate set-aside for family forest lands creates a special priority category. As noted above, 16 U.S.C. 6572(f) sets forth the criteria for enrollment priority and no statutory authority exists to give priority to family forest lands eligible for participation in HFRP.

*Comment:* Two respondents suggested that priority be given to projects based on the priority forest areas identified in the State Forest Resource Assessment and Strategy required by section 8002 of the 2008 Act. Another respondent suggested that attention to forest resources should be immediate and not wait for the completion of the state-wide assessment.

*Response:* No changes were made to the regulation based on these comments. NRCS agrees that the concept of using the priority forest areas established by the report is a good concept. However, the report is currently underway and will not be complete until the end of fiscal year 2010. NRCS will incorporate guidance in policy on utilizing the information provided by the report once it is complete.

*Comment:* One respondent suggested that significant weight should be given to projects that increase carbon sequestration.

*Response:* No changes were made to the regulations based on this comment. Enhancing carbon sequestration is one of the purposes of the program which is detailed in the statute (16 U.S.C. 6571 and 6572). Under § 625.6 of the final rule, one of the ranking criteria is the extent to which projects have the potential for increased capability of carbon sequestration.

*Comment:* Two respondents asserted that the rule does not clearly articulate how cost-effectiveness will be estimated. Both suggested that the cost-effectiveness of the restoration cost-share agreement, contract, or easement and associated HFRP restoration plans be calculated by dividing the total expected environmental benefits by the total expected cost of the project.

*Response:* No changes were made to the regulation based on these comments. NRCS will address this issue in policy to provide the maximum flexibility. The State Conservationist needs the flexibility to determine how cost-effectiveness will be estimated due to the wide variability of environmental benefits and diverse habitats of land enrolled in the program.

*Comment:* One respondent suggested that NRCS use separate ranking pools to evaluate fairly the cost-effectiveness of short-term and long-term agreements. Another respondent suggested NRCS compare projects with other projects of similar ownership and size. The respondent was concerned that smaller projects are disadvantaged when compared with larger projects that appear more cost-effective.

*Response:* No changes were made to the regulation based on these comments. By policy, State Conservationists have the authority to create separate ranking pools for different types of agreements to ensure fair evaluation of projects.

*Comment:* Several respondents recommended that NRCS require State Conservationists to work with other agencies and organizations when developing proposals. One respondent suggested the requirement include State Foresters, State Technical Committees,

and State Forest Stewardship Committees; three respondents suggested the requirement include all local, State, and Federal agencies; and one respondent suggested the requirement include the appropriate State fish and wildlife agency.

*Response:* No changes were made to the regulation based on these comments. NRCS cannot require that the State Technical Committee be consulted because HFRP is not a program in the Conservation Title. The rule provides flexibility to the State Conservationists to determine with whom it is appropriate to work when developing proposals and implementing the program. The suggested changes would require consultation and limit the discretion and flexibility of the State Conservationist.

*Comment:* Two respondents suggested that the ranking considerations be developed with State fish and wildlife agencies and be separated into primary and secondary ranking considerations, similar to the statutory language. Another respondent suggested that all ranking considerations should be required to be considered.

*Response:* No changes were made to the regulation based on these comments. The required ranking considerations are found in the final rule at § 625.6. The associated weighting of the ranking considerations is the responsibility of the State Conservationist. The State Conservationist works with cooperating agencies, which may include the State fish and wildlife agencies, to obtain input and advice on weighting and applying the ranking factors. The ranking structure proposed by the respondents would require specific ranking criteria to be considered regardless of the local conditions. The current structure of the regulation allows State Conservationists to ensure that local conditions are considered in applying the ranking criteria.

#### *Term of Enrollment*

Statutory provisions at 16 U.S.C. 6572(e)(1) provide that land may be enrolled in the HFRP in accordance with:

- A 10-year cost-share agreement,
- A 30-year easement, or
- A permanent easement or an easement for the maximum duration allowed under State law.

Under the provisions of 16 U.S.C. 6572(e)(3), the statute allows acreage owned by Indian tribes to be enrolled into the program through the use of 30-year contracts or 10-year cost-share agreements, or a combination of the two.

*Comment:* NRCS specifically requested comments on the definition of

“acreage owned by Indian tribes” and the accompanying requirements for 30-year contracts at § 625.12. In response, NRCS received one comment. The respondent suggested that NRCS revise the definition of “acreage owned by Indian tribes” to allow Indian lands held in trust to be eligible for the program.

*Response:* No changes were made to the regulation based on this comment. As stated in the preamble to the proposed rule, “The statement of managers (Conference Report H.R. 110–627 for H.R. 2419, pages 202 and 203, May 13, 2008) provided additional clarification of congressional intent by stating that “the managers intend that tribal land enrolled in the program should be land held in private ownership by a tribe or an individual tribal member. Tribal lands held in trust or reserved by the United States Government or restricted fee lands should not be enrolled in the program regardless of ownership.” The managers’ report language can be used to elucidate the meaning of the statute. Based on this language, NRCS interpreted the meaning of “acreage owned by Indian tribes” as including only land to which the title is held by individual Indians and Indian tribes, including Alaska Native Corporations. Lands held in Trust by the United States or allotted lands which contain restraints against alienation are not eligible under the definition of “acreage owned by Indian tribes.” For purposes of clarity, NRCS removed the word “private” from this definition in the final rule because the inclusion of the word “private” was redundant and could create confusion when implemented. The definition of “private land” includes land that meets the definition of “acreage owned by Indian tribes.” NRCS also revised the definition of “30-year contract” to include the term “acreage owned by Indian tribes” and to remove the reference to land held in private ownership and the reference to “individual tribal members” for the reasons listed above. Additionally, NRCS removed the phrase “including Alaska Native Corporations” from the definition because it was repetitive.

*Comment:* Two respondents suggested that NRCS require that direct benefits to the target species be realized during the contract period.

*Response:* No changes were made to the regulation based on these comments. Section 625.4 applies to all eligible land, including permanent easements. The change suggested by the respondents to include “within the contract period” would be confusing because this section addresses all enrollment options, and this phrase is not applicable to easements.

Additionally, there are circumstances in which the desired benefits may not occur within the contract period, though such benefits will likely be obtained as a result of HFRP financial and technical assistance. For example, HFRP assistance through a 30-year easement may facilitate the establishment of a mature hardwood forest, though the trees planted with HFRP assistance will not have reached full maturity at the end of the 30-year easement period. The respondents proposed change would render such land ineligible for the program.

*Comment:* Two respondents asserted that NRCS should spend no less than 60 percent of HFRP funds on permanent easements. Another respondent suggested that NRCS favor shorter term easements and restoration cost-share agreements over permanent easements.

*Response:* No changes were made to the regulation based on these comments because the statutory requirements determine the allocation of funds. The original HFRP statutory language required that “the extent to which each enrollment method is used will be based on the approximate proportion of owner interest expressed in that method in comparison to the other methods.” However, the 2008 Act amended the HFRP statute to include language specifying that 40 percent of program expenditures in any fiscal year be for restoration cost-share agreement enrollment and 60 percent of program expenditures in any fiscal year be for easement enrollment. The 2008 Act allows re-allocation if funds are not obligated by April 1 of the fiscal year in which the funds were made available.

*Comment:* One respondent asserted that NRCS should allow States the flexibility to allocate funds according to local needs under the re-pooling provision.

*Response:* No changes were made to the regulation based on this comment. The preamble of the proposed rule stated that “NRCS proposes to manage this process at the national level to ensure that the allocation of funds meets the statutory requirements.” The agency will manage the re-pooling of funds at National Headquarters to ensure that the statutory requirements are met.

*Comment:* Two respondents suggested that NRCS limit the allocation of program resources to States that have developed proposals likely to result in the most significant and cost-effective benefits to the forest ecosystems and species.

*Response:* No changes were made to the regulation based on these comments. The respondents’ suggestion limits HFRP enrollment to a select number of

States. NRCS does not believe Congress intended to limit the implementation of the program in this manner. The sign-up process, detailed in § 625.5(a), is designed to target funding to the most significant and cost-effective proposals.

#### *Restoration Plans*

As a condition of HFRP participation, a landowner must agree to the implementation of a HFRP restoration plan. The purpose of the restoration plan is to restore, protect, enhance, maintain, and manage the habitat conditions necessary to increase the likelihood of recovery of listed species under the ESA, or measurably improve the well-being of species that are not listed but are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding.

Under the provisions of 16 U.S.C. 6572, NRCS is to carry out the HFRP in coordination with FWS and NMFS. The provisions of § 625.13(c), which concern the HFRP restoration plan development, specify that NRCS, in coordination with the FWS, will determine the conservation practices and measures for the restoration plan.

*Comment:* Two respondents suggested including other agencies in the development of the restoration plan.

*Response:* No changes were made to the regulation based on these comments. The rule allows the State Conservationists to confer with FWS and NMFS in developing the restoration plan. The State Conservationists have the authority to consult with other agencies in the development of the restoration plan as necessary.

*Comment:* Three respondents suggested that NRCS reword § 625.13(c) to require that carbon sequestration management promote diverse and high quality native forest ecosystems to accomplish the goals of the restoration plan.

*Response:* Based on the comments, NRCS inserted the language suggested by the respondents in § 625.13(c). NRCS agrees with the respondents and is concerned that the most effective plants for sequestering carbon may be non-native species that may not be appropriate for maintaining habitat. NRCS agrees that for carbon sequestration purposes, the plants should be required to be native to the environment in which they are being planted.

*Comment:* One respondent recommended that restoration plans be tailored to help landowners adapt their management strategies in a changing climate.

*Response:* No changes were made to the regulation based on this comment. The planning process includes selecting plants that are widely adapted to tolerate changes in climate. The restoration plan may be modified by the parties to address changing circumstances, including changes to facilitate climate adaptation.

*Comment:* Two respondents suggested that the language in § 625.14 is inconsistent because the first sentence of the section says that modifications may be approved if they do not modify or void provisions of the easement, and later in the section the regulation says that modifications may require execution of an amended easement.

*Response:* Section 625.14 discusses modifications to the HFRP restoration plan; it is not discussing modification to an HFRP easement. There is no statutory authority for HFRP easements to be modified. In order for a restoration plan to be modified, the modification must meet HFRP program objectives and must result in equal or greater wildlife benefits and ecological and economic values to the United States. In order to avoid confusion regarding the modification of an HFRP restoration plan, NRCS has inserted the phrase “to the restoration plan” and removed the word “easement” from § 625.14.

*Comment:* One respondent suggested that any modification to an HFRP restoration plan should require agreement from the landowner, FWS, NMFS, or the State fish and wildlife agency.

*Response:* No changes were made to the regulation based on this comment. The final rule at § 625.14 affirms that NRCS will coordinate with the landowner, FWS, and NMFS to determine if a modification to the restoration plan is justified.

#### *Cost-Share Payments*

*Comment:* One respondent asserted that NRCS should use actual costs rather than average costs for determining cost-share assistance reimbursement rates. The HFRP statutory language allows for NRCS to reimburse a percentage of either the actual cost or the average cost of approved practices. The respondent asserted that average costs may be far lower than the actual cost and therefore, make full program implementation less likely where landowners do not receive reimbursement for their full expenses.

*Response:* No changes were made to the regulation based on this comment. Calculating actual costs would significantly increase the administrative workload and reduce the amount of financial assistance available to HFRP participants. Average costs, as

determined on a regional basis, will be used to ensure that the average costs are close to actual costs in that area.

However, for purposes of clarity, NRCS revised § 625.3(d) and § 625.13(c) to establish that the State Conservationist will develop the list of eligible restoration practices, payment rates, and cost-share percentages. The State Conservationist will not determine the rates of compensation for an easement or 30-year contract because those rates will be established through the process outlined in § 625.8.

NRCS also revised § 625.10(g) to clarify that payments will not be made on components of a conservation practice or measure. This change was made to ensure consistency with other NRCS programs.

#### *Compensation*

The statutory provisions at 16 U.S.C. 6574 establish the requirements for easement compensation rates. Subsection (a) provides that the Secretary of Agriculture will pay a landowner for a permanent easement not less than 75 percent, nor more than 100 percent of the fair market value of the land enrolled during the period the land is subject to the easement, less the fair market value of the land encumbered by the easement (as determined by the Secretary). The statute provides that the Secretary will pay the same rate for easements that are for the maximum duration allowed under State law.

As stated in the preamble to the proposed rule, Federal agencies generally follow the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (the Uniform Relocation Act), the Uniform Relocation Act's implementing regulations at 49 CFR part 24, and the Uniform Appraisal Standards for Federal Land Acquisitions (the Yellow Book). The Yellow Book requires that compensation be based upon the impact that the easement encumbrance will have on the value of the larger parcel, which includes all land owned by the landowner that may be impacted by the easement, as determined by the appraiser.

However, where agencies have statutory authority to waive general appraisal procedures, Federal agencies can develop alternative appraisal and valuation methodologies. Under the SAFE-TEA-LU Act, NRCS is exempt from the requirements of 49 CFR part 24. The HFRP language for permanent and maximum duration easements requires that compensation be based on the impact to the value of only the land

enrolled and encumbered by the easement. Thus, the Yellow Book requirement of appraising the larger parcel does not apply for permanent easements, or those of the maximum duration required by State law.

*Comment:* NRCS specifically requested comments on the language regarding the establishment of easement compensation rates at § 625.8. In response, NRCS received three comments. All respondents were in agreement that NRCS should not use the Yellow Book appraisal process.

*Response:* No changes were made to the regulation based on these comments. NRCS will use the Uniform Standards for Professional Appraisal Practice to determine easement compensation values under HFRP. NRCS will use the same methodology to determine compensation values for all HFRP easements, both permanent and 30-year, to reduce confusion and maintain consistency.

*Comment:* One respondent suggested that HFRP use the same appraisal process as the Wetlands Reserve Program (WRP).

*Response:* No changes were made to the regulation based on this comment. HFRP has different statutory requirements than the WRP. The statutory requirements of HFRP do not allow for the program to use the same method of compensation as the WRP.

*Comment:* NRCS also specifically requested comments on the language regarding ownership of ecosystem services credits at § 625.8(f). In response, the agency received three comments. All three respondents supported the ecosystem services credits language.

*Response:* No changes were made to the regulation as a result of these comments. However, minor changes were made to the language in § 625.8 to ensure consistency across all NRCS programs.

#### *Landowner Protections and Safe Harbor Agreements*

The 2006 HFRP interim final rule (71 FR 28557) included a definition of Landowner Protections as part of § 625.2 and the preamble to that rule described those protections and how program participants obtain them (71 FR 28548–28550). Landowner Protections were defined in the 2006 interim final rule as:

“\* \* \* protections and assurances made available to HFRP participants whose voluntary conservation activities result in a net conservation benefit for listed, candidate, or other species. Landowner Protections made available by the Secretary of Agriculture to HFRP participants may be provided under section 7(b)(4) or section

10(a)(1) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1536(b)(4), 1539(a)(1)). These Landowner Protections may be provided by NRCS in conjunction with meeting its responsibilities under section 7 of the ESA, or by FWS or NMFS through section 10 of the ESA. These Landowner Protections include a permit providing coverage for incidental take of species listed under the ESA. Landowner Protections also include assurances related to potential modifications of HFRP restoration plans and assurances related to the potential (unlikely) termination of Landowner Protections and any 10-year cost share agreement.”

Landowner Protections are contingent upon the HFRP restoration plan and associated cost-share agreement or easement being properly implemented. There is no requirement that HFRP participants obtain any Landowner Protections. Generally, the three elements of Landowner Protections are: (1) Authorization for the take of endangered or threatened species when conducting management activities under a HFRP restoration plan and when returning to the baseline conditions at the end of the cost-share agreement or easement period (whichever is longer), (2) assurance that the landowner will not be required to undertake additional or different management activities without the consent of the landowner, and (3) limitations on the possibility of termination of a HFRP restoration plan that is being properly implemented by the landowner.

The definition of Landowner Protections in the interim final rule (and text in the preamble) included a description of two approaches that the Secretary of Agriculture may use to make Land Protections available to HFRP participants. The regulation at § 625.13(d) specifies the two ways that NRCS can make Landowner Protections available to HFRP participants upon request. The first approach involves NRCS and the HFRP participant, and does not require the HFRP participant to have direct involvement with FWS or NMFS. Under this approach, NRCS will extend to participants the incidental take authorization received by NRCS from FWS or NMFS through biological opinions issued as part of the interagency consultation process under section 7(a)(2) of the ESA.

Under the second approach for Landowner Protections, NRCS will provide technical assistance to help participants design and use their HFRP restoration plan for the dual purposes of qualifying for HFRP financial assistance, and as a basis for entering into a Safe Harbor Agreement (SHA) or Candidate Conservation Agreement with Assurances (CCAA) with the FWS or

NMFS under section 10(a)(1)A of the ESA. SHAs are voluntary arrangements between either the FWS or NMFS and cooperating participants who agree to adopt practices and measures, or refrain from certain activities in order to achieve net conservation benefits, i.e., a contribution to the recovery of listed species.

A CCAA is a voluntary agreement between the FWS or NMFS and cooperating participants whereby landowners who voluntarily agree to manage their lands or waters to remove threats to species at risk of becoming listed under the ESA as threatened or endangered receive assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agree to at the time they enter into the Agreement. CCAAs are intended to help conserve proposed and candidate species, and species likely to become candidates by giving private, non-Federal landowners incentives to implement conservation measures for declining species. The primary incentive for CCAAs is an assurance that no further additional land, water, or resource use restrictions would be imposed should the species later become listed under the ESA.

There is no requirement that HFRP participants enter into a SHA or a CCAA. All SHAs are subject to the SHA policy jointly adopted by FWS and NMFS (Announcement of Final Policy, 64 FR 32717, June 17, 1999), and SHAs with the FWS also are subject to regulations at 50 CFR part 17, and specifically 50 CFR 17.22(c) for endangered species or 17.32(c) for threatened species. All CCAAs are subject to the CCAA policy jointly adopted by FWS and NMFS (Announcement of Final Policy, 64 FR 32726, June 17, 1999), and CCAAs with the FWS are also subject to regulations at 50 CFR part 17, and specifically 50 CFR 17.22(d) for endangered species or 17.32(d) for threatened species.

*Comment:* One Federal agency respondent suggested that the regulation clarify the landowner protection section to include a return to baseline conditions at the end of the easement, contract, or agreement. The respondent suggested that NRCS do this in one of two ways, either in the definition of landowner protection or in the landowner protections section of the regulation.

*Response:* NRCS has decided that this clarification is needed, and that the issue will be better clarified in the landowner protections section of the regulation. Based on this comment, NRCS added § 625.13(d)(1)(iii) to the Incidental Take section and

§ 625.13(d)(2)(iv) to the SHA or CCAA section to include a return to baseline conditions at the end of the applicable period.

*Comment:* Two respondents recommended that NRCS modify § 625.13(d) to clarify that the Landowner Protections discussed in that section are intended to apply to HFRP participants.

*Response:* Based on these comments, NRCS corrected § 625.13(d) by inserting a comma after “species,” removing the words “a participant,” and removing the period at the end of the sentence. These changes help clarify that Landowner Protections are available to HFRP participants.

*Comment:* One respondent suggested that NRCS provide landowners with an assurance that they will not be found in violation of the ESA or other environmental laws.

*Response:* No changes were made to the regulation based on this comment. NRCS cannot offer this type of assurance to landowners. A landowner may be in violation of the ESA if they are acting outside of the SHA/CCAA agreement. It is the responsibility of the landowner to ensure that actions outside of the landowner protections provided by NRCS are consistent with all applicable Federal and State laws. NRCS does not have the authority to provide any assurances regarding compliance with other applicable environmental laws.

#### *Compatible Use Authorizations*

*Comment:* Two respondents suggested that it may be more important to address the issue of compatible uses in the context of 10-year agreements than in the context of easements. The respondents felt that compatible use agreements should not be needed for properties subject to easements since the easement specifically prohibits certain uses and allows all others.

*Response:* No changes were made to the regulation based on these comments. The purpose of a compatible use agreement is to allow a landowner to conduct a prohibited activity on the easement if it will benefit the functions and values of the easement. A compatible use agreement is necessary in the context of an easement, particularly a permanent easement, which is a recorded property right and cannot be changed. However, a compatible use agreement is not necessary for a 10-year restoration cost-share agreement because the agreement itself can be altered to permit the activity that will benefit the land.

*Comment:* Two respondents recommended that NRCS include a

definition of the term “compatible use” in the rule.

*Response:* NRCS did not make any changes to the regulation based on these comments. Although the term is used in the rule, the types of activities that may be considered compatible may change depending on the circumstances. In order to allow for flexibility, NRCS will define the term compatible use in the policy consistent with other NRCS programs that allow compatible use authorizations.

*Comment:* Three respondents asserted that NRCS does not have the authority to regulate hunting and fishing as compatible uses because they are a reserved right of the landowner.

*Response:* Although undeveloped recreational hunting and fishing is identified in the deed as a reserved right to the landowner, any activity above and beyond undeveloped recreational use may only be authorized by NRCS through the compatible use process. The HFRP deed does not reserve to the landowner an unfettered right to hunt and fish as suggested by the respondents. In order to clarify this issue, the agency removed language from § 625.11(b)(2) which gave examples of what types of activities may be granted a compatible use agreement. NRCS removed the compatible use paragraph from § 625.11(b)(2) and combined it with § 625.11(b)(3). The new combined paragraph at § 625.11(b)(2) now allows NRCS the right to determine and permit compatible uses on the easement area and specify the amount, timing, method, intensity, and duration of the compatible use, if such use is consistent with the long-term protection and enhancement of the purposes for which the easement was established. This new paragraph avoids confusion over what activities may be granted a compatible use, and instead focuses on the standard an activity must meet in order for a compatible use to be granted.

*Comment:* Three respondents suggested that NRCS should add prescribed fire, grazing, and silviculture practices as compatible uses which are consistent with the long-term protection and enhancement of the purposes for which the easement was established.

*Response:* No changes were made to the regulation as a result of these comments. As mentioned above, whether or not these activities will be considered compatible uses will depend on site-specific circumstances. In addition, the change made in response to the comments regarding hunting and fishing at § 625.11(b)(2) will provide additional clarity on this issue. The HFRP deed allows landowners to

conduct routine forestry operations and management practices as long as such activities are consistent with the terms of the deed and the restoration plan. If the activity is allowed by the deed and consistent with the terms of the deed and the restoration plan, no compatible use authorization is required.

#### *Termination of Landowner Protections*

As provided for in this final rule in the definition of Landowner Protections in § 625.2 and the associated provision at § 625.13(d), all appropriate options will be pursued with the participant to avoid termination of the landowner protections in the case of landowner non-compliance or changed conditions. If the participant has entered into a SHA or CCAA with the FWS or NMFS (the Services) based on a HFRP restoration plan, NRCS will work with the participant and the Services to seek appropriate means of avoiding revocation of a permit issued under section 10(a)(1) of the ESA by FWS or NMFS to implement the SHA or CCAA. However, in the event of a termination, any requested assurances from NRCS will be voided, and the landowner will be responsible to FWS or NMFS for any violations of the ESA.

The SHA policy regarding revocation of a permit issued in association with a SHA is: “The Services are prepared as a last resort to revoke a permit implementing a Safe Harbor Agreement where continuation of the permitted activity would be likely to result in jeopardy to a species covered by the permit. Prior to taking such a step, however, the Services would first have to exercise all possible means to remedy such a situation” (64 FR 32724). Regulations pertaining to SHA permits issued by FWS have a similar provision (50 CFR 17.22(c)(7) and 17.32(c)(7)) for endangered and threatened wildlife.

*Comment:* One respondent suggested that NRCS require the landowner to coordinate with all parties to the agreement if there is termination or transfer of a SHA or a CCAA.

*Response:* The proposed rule at § 625.13(d)(2)(iv) required landowners to notify and coordinate with FWS and NMFS, as appropriate, in the event of a termination of the agreement. NRCS agrees that the landowner should be responsible for coordinating with any party to the specific SHA or CCAA, as applicable, such as State fish and wildlife agencies. Based on this comment, NRCS inserted language at § 625.13(d)(2)(v) to require landowners to notify and coordinate with any relevant party to the specific SHA or CCAA.



### Tribal Consultation

*Comment:* One respondent suggested that the regulations should require consultation with Indian tribes to discuss impacts and evaluate the effectiveness of the program over time.

*Response:* No changes were made to the regulation based on this comment. Participation in HFRP is voluntary, and the proposed rule did not meet the threshold for requiring consultation as specified by Executive Order 13175. However, NRCS remains committed to seeking advice, guidance, and counsel from Indian tribes in regard to natural resource concerns and issues. Indian tribes interested in providing input regarding HFRP policies may submit their request directly to the Chief.

### Miscellaneous Changes for Clarification and Improved Program Administration

NRCS removed the definition of "contract or agreement" for clarity because each of the possible contracts or agreements under HFRP are defined specifically so a general definition is not necessary and may create confusion.

NRCS removed the term "option agreement to purchase" throughout the document and replaced the term with "agreement to purchase" to reflect more accurately the way the document is used and to allow for consistency with other easement programs.

NRCS made other non-substantive changes for the purpose of clarity and consistency with other NRCS programs. These changes are set forth in the text portion of this document.

### List of Subjects in 7 CFR Part 625

Administrative practice and procedure, Agriculture, Soil conservation, and Forestry.

■ For the reasons stated in the preamble, NRCS revises 7 CFR part 625 to read as follows:

### PART 625—HEALTHY FORESTS RESERVE PROGRAM

Sec.

- 625.1 Purpose and scope.
- 625.2 Definitions.
- 625.3 Administration.
- 625.4 Program requirements.
- 625.5 Application procedures.
- 625.6 Establishing priority for enrollment in HFRP.
- 625.7 Enrollment of easements, contracts, and agreements.
- 625.8 Compensation for easements and 30-year contracts.
- 625.9 10-year restoration cost-share agreements.
- 625.10 Cost-share payments.
- 625.11 Easement participation requirements.
- 625.12 30-year contracts.

625.13 The HFRP restoration plan development and Landowner Protections.

625.14 Modification of the HFRP restoration plan.

625.15 Transfer of land.

625.16 Violations and remedies.

625.17 Payments not subject to claims.

625.18 Assignments.

625.19 Appeals.

625.20 Scheme and device.

**Authority:** 16 U.S.C. 6571–6578.

#### § 625.1 Purpose and scope.

(a) The purpose of the Healthy Forests Reserve Program (HFRP) is to assist landowners, on a voluntary basis, in restoring, enhancing, and protecting forestland resources on private lands through easements, 30-year contracts, and 10-year cost-share agreements.

(b) The objectives of HFRP are to:

(1) Promote the recovery of endangered and threatened species under the Endangered Species Act of 1973 (ESA);

(2) Improve plant and animal biodiversity; and

(3) Enhance carbon sequestration.

(c) The regulations in this part set forth the policies, procedures, and requirements for the HFRP as administered by the Natural Resources Conservation Service (NRCS) for program implementation and processing applications for enrollment.

(d) The Chief may implement HFRP in any of the 50 States, District of Columbia, Commonwealth of Puerto Rico, Guam, Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

#### § 625.2 Definitions.

The following definitions will be applicable to this part:

*30-year Contract* means a contract that is limited to acreage owned by Indian tribes. The 30-year contract is not eligible for use on tribal lands held in trust or subject to Federal restrictions against alienation.

*Acreage Owned by Indian Tribes* means lands to which the title is held by individual Indians and Indian tribes. This term does not include land held in trust by the United States or lands where the fee title contains restraints against alienation.

*Biodiversity (Biological Diversity)* means the variety and variability among living organisms and the ecological complexes in which they live.

*Candidate Conservation Agreement with Assurances (CCAA)* means a voluntary arrangement between the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), and cooperating non-Federal landowners under the authority of

section 10(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1539(a)(1). Under the CCAA and an associated enhancement of survival permit, the non-Federal landowner implements actions that are consistent with the conditions of the permit. CCAA with FWS are also subject to regulations at 50 CFR 17.22(d) for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations.

*Carbon sequestration* means the long-term storage of carbon in soil (as soil organic matter) or in plant material (such as in trees).

*Chief* means the Chief of the Department of Agriculture (USDA) NRCS, or designee.

*Confer* means to discuss for the purpose of providing information; to offer an opinion for consideration; or to meet for discussion, while reserving final decision-making authority with NRCS.

*Conservation practice* means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that benefit the eligible land and optimize environmental benefits, planned and applied according to NRCS standards and specifications.

*Conservation treatment* means any and all conservation practices, measures, activities, and works of improvement that have the purpose of alleviating resource concerns, solving or reducing the severity of natural resource use problems, or taking advantage of resource opportunities, including the restoration, enhancement, maintenance, or management of habitat conditions for HFRP purposes.

*Coordination* means to obtain input and involvement from others while reserving final decision-making authority with NRCS.

*Cost-share agreement* means a legal document that specifies the rights and obligations of any participant accepted into the program. A HFRP cost-share agreement is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation. A cost-share agreement under HFRP has a duration of 10-years.

*Cost-share payment* means the payment made by NRCS to a program participant or vendor to achieve the restoration, enhancement, and protection goals of enrolled land in accordance with the HFRP restoration plan.

*Easement* means a conservation easement, which is an interest in land defined and delineated in a deed



whereby the landowner conveys certain rights, title, and interests in a property to the United States for the purpose of protecting the forest ecosystem and the conservation values of the property.

*Easement area* means the land encumbered by an easement.

*Easement payment* means the consideration paid to a landowner for an easement conveyed to the United States under the HFRP.

*Fish and Wildlife Service* is an agency of the Department of Interior.

*Forest Service* is an agency of USDA.

*Forest ecosystem* means a dynamic set of living organisms, including plants, animals, and microorganisms interacting among themselves and with the environment in which they live. A forest ecosystem is characterized by predominance of trees, and by the fauna, flora, and ecological cycles (energy, water, carbon, and nutrients).

*HFRP restoration plan* means the document that identifies the conservation treatments that are scheduled for application to land enrolled in HFRP in accordance with NRCS standards and specifications.

*Indian tribe* means any Indian tribe, band, Nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Landowner* means an individual or entity having legal ownership of land. The term landowner may also include all forms of collective ownership including joint tenants, tenants in common, and life tenants.

*Landowner protections* means protections and assurances made available by NRCS to HFRP participants, when requested, and whose voluntary conservation activities result in a net conservation benefit for listed, candidate, or other species and meet other requirements of the program. These Landowner Protections are subject to a HFRP restoration plan and associated cost-share agreement, 30-year contract, or easement being properly implemented. Landowner protections made available by the Secretary of Agriculture to HFRP participants may include an incidental take authorization received by NRCS from FWS or NMFS, or may be provided by a Safe Harbor Agreement (SHA) or CCAA directly between the HFRP participant and FWS or NMFS, as appropriate.

*Liquidated damages* means a sum of money stipulated in the HFRP restoration agreement that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the restoration agreement. The sum represents an estimate of the expenses incurred by NRCS to service the restoration agreement, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Maintenance* means work performed to keep the applied conservation practice functioning for the intended purpose during its life span. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

*Measure* means one or more specific actions that is not a conservation practice, but has the effect of alleviating problems or improving the treatment of the resources.

*National Marine Fisheries Service* is an agency of the United States Department of Commerce.

*Natural Resources Conservation Service* is an agency of USDA which has the responsibility for administering HFRP.

*Participant* means a person, entity, or Indian tribe who is a party to a 10-year cost share agreement, 30-year contract, or an agreement to purchase an easement.

*Private land* means land that is not owned by a local, State, or Federal governmental entity, and includes land that meets the definition of "acreage owned by Indian tribes."

*Restoration* means implementing any conservation practice (vegetative, management, or structural) or measure that improves forest ecosystem values and functions (native and natural plant communities).

*Restoration agreement* means a cost-share agreement between the program participant and NRCS to restore, enhance, and protect the functions and values of a forest ecosystem for the purposes of HFRP under either an easement, 30-year contract, or a 10-year cost-share agreement enrollment option.

*Safe Harbor Agreement* means a voluntary arrangement between FWS or NMFS and cooperating non-Federal landowners under the authority of section 10(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1539(a)(1). Under the SHA and an associated enhancement of survival permit, the private property owner implements actions that are consistent with the conditions of the permit. SHAs

with FWS are also subject to regulations at 50 CFR 17.22(c) for endangered species or 50 CFR 17.32(c) for threatened species, or applicable subsequent regulations.

*State-listed species* means a species listed as threatened or endangered under State endangered species laws, a candidate for such listing, or a species listed in a State Wildlife Action Plan as a Species of Greatest Conservation Need.

*Sign-up notice* means the public notification document that NRCS provides to describe the particular requirements for a specific HFRP sign-up.

*State Conservationist* means the NRCS employee authorized to implement HFRP and direct and supervise NRCS activities in a State, Caribbean Area, or Pacific Islands Area.

*Technical service provider* means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants in lieu of or on behalf of NRCS.

#### **§ 625.3 Administration.**

(a) The regulations in this part will be administered under the general supervision and direction of the Chief.

(b) The Chief may modify or waive a provision of this part if the Chief determines that the application of such provision to a particular limited situation is inappropriate and inconsistent with the goals of the program. This authority cannot be further delegated. The Chief may not modify or waive any provision of this part which is required by applicable law.

(c) No delegation in this part to lower organizational levels will preclude the Chief from determining any issue arising under this part or from reversing or modifying any determination arising from this part.

(d) The State Conservationist will develop a list of eligible restoration practices, payment rates and cost-share percentages, a priority ranking process, and any related technical matters.

(e) NRCS will coordinate with FWS and NMFS in the implementation of the program and in establishing program policies. In carrying out this program, NRCS may confer with private forest landowners, including Indian tribes, the Forest Service and other Federal agencies, State fish and wildlife agencies, State forestry agencies, State environmental quality agencies, other State conservation agencies, and nonprofit conservation organizations. No determination by the FWS, NMFS, Forest Service, any Federal, State, or

tribal agency, conservation district, or other organization will compel NRCS to take any action which NRCS determines will not serve the purposes of the program established by this part.

#### **§ 625.4 Program requirements.**

(a) *General.* Under the HFRP, NRCS will purchase conservation easements from, or enter into 30-year contracts or 10-year cost-share agreements with, eligible landowners who voluntarily cooperate in the restoration and protection of forestlands and associated lands. To participate in HFRP, a landowner will agree to the implementation of a HFRP restoration plan, the effect of which is to restore, protect, enhance, maintain, and manage the habitat conditions necessary to increase the likelihood of recovery of listed species under the ESA, or measurably improve the well-being of species that are not listed as endangered or threatened under the ESA but are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding. NRCS may provide cost-share assistance for the activities that promote the restoration, protection, enhancement, maintenance, and management of forest ecosystem functions and values. Specific restoration, protection, enhancement, maintenance, and management activities may be undertaken by the landowner or other NRCS designee.

(1) Of the total amount of funds expended under the program for a fiscal year to acquire easements and enter into 10-year cost-share agreements, not more than 40 percent will be used for cost-share agreements, and not more than 60 percent will be used for easements.

(2) The Chief may use any funds that are not obligated by April 1 of the fiscal year for which the funds are made available to carry out a different method of enrollment during that fiscal year.

(b) *Landowner eligibility.* To be eligible to enroll an easement in the HFRP, an individual or entity must:

(1) Be the landowner of eligible land for which enrollment is sought; and

(2) Agree to provide such information to NRCS, as the agency deems necessary or desirable, to assist in its determination of eligibility for program benefits and for other program implementation purposes.

(c) *Eligible land.*

(1) NRCS, in coordination with FWS or NMFS, will determine whether land is eligible for enrollment and whether once found eligible, the lands may be included in the program based on the likelihood of successful restoration, enhancement, and protection of forest

ecosystem functions and values when considering the cost of acquiring the easement, 30-year contract, or 10-year cost share agreement, and the restoration, protection, enhancement, maintenance, and management costs.

(2) Land will be considered eligible for enrollment in the HFRP only if NRCS determines that:

(i) Such private land will contribute to the restoration or enhancement of the habitat or otherwise measurably increase the likelihood of recovery for a selected species listed under section 4 of the ESA; and

(ii) Such private land will contribute to the restoration or enhancement of the habitat or otherwise measurably improve the well-being of a selected species not listed under section 4 of the ESA but is a candidate for such listing, or the selected species is a State-listed species, or is a species identified by the Chief for special consideration for funding.

(3) NRCS may also enroll land adjacent to eligible land if the enrollment of such adjacent land would contribute significantly to the practical administration of the easement area, but not more than it determines is necessary for such contribution.

(4) To be enrolled in the program, eligible land must be configured in a size and with boundaries that allow for the efficient management of the area for easement purposes and otherwise promote and enhance program objectives.

(5) In the case of acreage owned by an Indian tribe, NRCS may enroll acreage into the HFRP which is privately owned by either the tribe or an individual.

(d) *Ineligible land.* The following land is not eligible for enrollment in the HFRP:

(1) Land owned by the United States, States, or units of local government;

(2) Land subject to an easement or deed restriction that already provides for the protection of fish and wildlife habitat or that would interfere with HFRP purposes, as determined by NRCS; and

(3) Land that would not be eligible for HFRP under paragraphs (c)(1) through (c)(5).

#### **§ 625.5 Application procedures.**

(a) *Sign-up process.* As funds are available, the Chief will solicit project proposals from the State Conservationist. The State Conservationist may consult with other agencies at the State, Federal, and local levels to develop proposals. The State Conservationist will submit the proposal(s) to the Chief for funding selection. Upon selection for funding,

the State Conservationist will issue a public sign-up notice which will announce and explain the rationale for decisions based on the following information:

(1) The geographic scope of the sign-up;

(2) Any additional program eligibility criteria that are not specifically listed in this part;

(3) Any additional requirements that participants must include in their HFRP applications that are not specifically identified in this part;

(4) Information on the priority order of enrollment for funding;

(5) An estimate of the total funds NRCS expects to obligate during a given sign-up; and

(6) The schedule for the sign-up process, including the deadline(s) for applying.

(b) *Application for participation.* To apply for enrollment through an easement, 30-year contract, or 10-year cost-share agreement, a landowner must submit an application for participation in the HFRP during an announced period for such sign-up.

(c) *Preliminary agency actions.* By filing an application for participation, the applicant consents to an NRCS representative entering upon the land for purposes of determining land eligibility, and for other activities that are necessary or desirable for NRCS to make offers of enrollment. The applicant is entitled to accompany an NRCS representative on any site visits.

(d) *Voluntary reduction in compensation.* In order to enhance the probability of enrollment in HFRP, an applicant may voluntarily offer to accept a lesser payment than is being offered by NRCS. Such offer and subsequent payments may not be less than those rates set forth in § 625.8 and § 625.10 of this part.

#### **§ 625.6 Establishing priority for enrollment in HFRP.**

(a) *Ranking considerations.* Based on the specific criteria set forth in a sign-up announcement and the applications for participation, NRCS, in coordination with FWS and NMFS, may consider the following factors to rank properties:

(1) Estimated conservation benefit to habitat required by threatened or endangered species listed under section 4 of the ESA;

(2) Estimated conservation benefit to habitat required by species not listed as endangered or threatened under section 4 of the ESA but that are candidates for such listing, State-listed species, or species identified by the Chief for special consideration for funding;

(3) Estimated improvement of biological diversity, if enrolled;

(4) Potential for increased capability of carbon sequestration, if enrolled;  
 (5) Availability of contribution of non-Federal funds;

(6) Significance of forest ecosystem functions and values;

(7) Estimated cost-effectiveness of the particular restoration cost-share agreement, contract, or easement, and associated HFRP restoration plan; and

(8) Other factors identified in a HFRP sign-up notice.

(b) NRCS may place higher priority on certain forest ecosystems based regions of the State or multi-State area where restoration of forestland may better achieve NRCS programmatic and sign-up goals and objectives.

(c) Notwithstanding any limitation of this part, NRCS may enroll eligible lands at any time in order to encompass project areas subject to multiple land ownership or otherwise to achieve program objectives. Similarly, NRCS may, at any time, exclude otherwise eligible lands if the participation of the adjacent landowners is essential to the successful restoration of the forest ecosystem and those adjacent landowners are unwilling to participate.

(d) If available funds are insufficient to accept the highest ranked application, and the applicant is not interested in reducing the acres offered to match available funding, NRCS may select a lower ranked application that can be fully funded. In cases where HFRP funds are not sufficient to cover the costs of an application selected for funding, the applicant may lower the cost of the application by changing the duration of the easement or agreement or reducing the acreage offered, unless these changes result in a reduction of the application ranking score below that of the score of the next available application on the ranking list.

#### **§ 625.7 Enrollment of easements, contracts, and agreements.**

(a) *Offers of enrollment.* Based on the priority ranking, NRCS will notify an affected landowner of tentative acceptance into the program. This notice of tentative acceptance into the program does not bind NRCS or the United States to enroll the proposed project in HFRP, nor does it bind the landowner to convey an easement, or to contract or agree to HFRP activities. The letter notifies the landowner that NRCS intends to continue the enrollment process on their land unless otherwise notified by the landowner.

(b) *Acceptance of offer of enrollment.* An agreement to purchase or a restoration cost-share agreement or contract will be presented by NRCS to the landowner which will describe the

easement, agreement, or contract area; the easement, agreement, or contract terms and conditions; and other terms and conditions for participation that may be required by NRCS.

(c) *Effect of the acceptance of the offer.* After the agreement to purchase or restoration cost-share agreement or contract is executed by NRCS and the landowner, the land will be considered enrolled in the HFRP. For easements, NRCS will proceed with various easement acquisition activities, which may include conducting a survey of the easement area, securing necessary subordination agreements, procuring title insurance, and conducting other activities necessary to record the easement or implement the HFRP, as appropriate for the enrollment option being considered. For restoration cost-share agreements and contracts, the landowner will proceed to implement the restoration plan with technical assistance and cost-share from NRCS.

(d) *Withdrawal of offers.* Prior to execution of an agreement to purchase, a restoration cost-share agreement, or contract between the United States and the landowner, NRCS may withdraw the land from enrollment at any time due to lack of availability of funds, inability to clear title, or other reasons. An agreement to purchase will be void, and the offer withdrawn, if not executed by the landowner within the time specified.

#### **§ 625.8 Compensation for easements and 30-year contracts.**

(a) *Determination of easement payment rates.*

(1) NRCS will offer to pay not less than 75 percent, nor more than 100 percent of the fair market value of the enrolled land during the period the land is subject to the easement, less the fair market value of the land encumbered by the easement for permanent easements or easements for the maximum duration allowed under State law.

(2) NRCS will offer to pay not more than 75 percent of the fair market value of the enrolled land, less the fair market value of the land encumbered by the easement for 30-year easements or 30-year contracts.

(b) *Acceptance and use of contributions.* NRCS may accept and use contributions of non-Federal funds to make payments under this section.

(c) *Acceptance of offered easement or 30-year contract compensation.*

(1) NRCS will not acquire any easement or 30-year contract unless the landowner accepts the amount of the payment that is offered by NRCS. The payment may or may not equal the fair market value of the interests and rights

to be conveyed by the landowner under the easement or 30-year contract. By voluntarily participating in the program, a landowner waives any claim to additional compensation based on fair market value.

(2) Payments may be made in a single payment or no more than 10 annual payments of equal or unequal size, as agreed to between NRCS and the landowner.

(d) If a landowner believes they may be eligible for a bargain sale tax deduction that is the difference between the fair market value of the easement conveyed to the United States and the easement payment made to the landowner, it is the landowner's responsibility to discuss those matters with the Internal Revenue Service. NRCS disclaims any representations concerning the tax implications of any easement or cost-share transaction.

(e) *Per acre payments.* If easement payments are calculated on a per acre basis, adjustment to stated easement payment will be made based on final determination of acreage.

(f) *Ecosystem Services Credits for Conservation Improvements.* USDA recognizes that environmental benefits will be achieved by implementing conservation practices and activities funded through HFRP, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of a HFRP easement, 30-year contract, or restoration cost-share agreement. NRCS asserts no direct or indirect interest in these credits. However, NRCS retains the authority to ensure the requirements of a HFRP easement, contract, cost-share agreement, or restoration plan are met consistent with §§ 625.9 through 625.13 of this part. Where activities required under an environmental credit agreement may affect land covered under a HFRP easement, restoration cost-share agreement, or 30-year contract, participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such agreements.

#### **§ 625.9 10-year restoration cost-share agreements.**

(a) The restoration plan developed under § 625.13 forms the basis for the 10-year cost-share agreement and its terms are incorporated therein.

(b) A 10-year cost-share agreement will:

(1) Incorporate all portions of a restoration plan;

(2) Be for a period of 10 years;

(3) Include all provisions as required by law or statute;

(4) Specify the requirements for operation and maintenance of applied conservation practices;

(5) Include any participant reporting and recordkeeping requirements to determine compliance with the agreement and HFRP;

(6) Be signed by the participant;

(7) Identify the amount and extent of cost-share assistance that NRCS will provide for the adoption or implementation of the approved conservation treatment identified in the restoration plan; and

(8) Include any other provision determined necessary or appropriate by the NRCS representative.

(c) Once the participant and NRCS have signed a 10-year cost-share agreement, the land will be considered enrolled in HFRP.

(d) The State Conservationist may, by mutual agreement with the parties to the 10-year cost-share agreement, consent to the termination of the restoration agreement where:

(1) The parties to the 10-year cost-share agreement are unable to comply with the terms of the restoration agreement as the result of conditions beyond their control;

(2) Compliance with the terms of the 10-year cost-share agreement would work a severe hardship on the parties to the agreement; or

(3) Termination of the 10-year cost-share agreement would, as determined by the State Conservationist, be in the public interest.

(e) If a 10-year cost-share agreement is terminated in accordance with the provisions of this section, the State Conservationist may allow the participants to retain any cost-share payments received under the 10-year cost-share agreement where forces beyond the participant's control prevented compliance with the agreement.

#### **§ 625.10 Cost-share payments.**

(a) NRCS may share the cost with landowners of restoring land enrolled in HFRP as provided in the HFRP restoration plan. The HFRP restoration plan may include periodic manipulation to maximize fish and wildlife habitat and preserve forest ecosystem functions and values, and measures that are needed to provide the Landowner Protections under section 7(b)(4) or section 10(a)(1) of the ESA, including the cost of any permit.

(b) Landowner Protections may be made available to landowners enrolled in the HFRP who agree, for a specified period, to restore, protect, enhance, maintain, and manage the habitat conditions on their land in a manner

that is reasonably expected to result in a net conservation benefit that contributes to the recovery of listed species under the ESA, candidate, or other species covered by this regulation. These protections operate with lands enrolled in the HFRP and are valid for as long as the landowner is in compliance with the terms and conditions of such assurances, any associated permit, the easement, contract, or the restoration agreement.

(c) If the Landowner Protections, or any associated permit, require the adoption of a conservation practice or measure in addition to the conservation practices and measures identified in the applicable HFRP restoration plan, NRCS and the landowner will incorporate the conservation practice or measure into the HFRP restoration plan as an item eligible for cost-share assistance.

(d) Failure to perform planned management activities can result in violation of the easement, 10-year cost-share agreement, or the agreement under which Landowner Protections have been provided. NRCS will work with landowners to plan appropriate management activities.

(e) The amount and terms and conditions of the cost-share assistance will be subject to the following restrictions on the costs of establishing or installing NRCS approved conservation practices or implementing measures specified in the HFRP restoration plan:

(1) On enrolled land subject to a permanent easement or an easement for the maximum duration allowed under State law, NRCS will offer to pay not less than 75 percent nor more than 100 percent of the average cost, and;

(2) On enrolled land subject to a 30-year easement or 30-year contract, NRCS will offer to pay not more than 75 percent of the average cost.

(f) On enrolled land subject to a 10-year cost-share agreement without an associated easement, NRCS will offer to pay not more than 50 percent of the average costs.

(g) Cost-share payments may be made only upon a determination by NRCS that an eligible conservation practice or measure has been established in compliance with appropriate standards and specifications. Identified conservation practices and measures may be implemented by the landowner or other designee.

(h) Cost-share payments may be made for the establishment and installation of additional eligible conservation practices and measures, or the maintenance or replacement of an eligible conservation practice or measure, but only if NRCS determines

the practice or measure is needed to meet the objectives of HFRP, and the failure of the original conservation practices or measures was due to reasons beyond the control of the landowner.

#### **§ 625.11 Easement participation requirements.**

(a) To enroll land in HFRP through a permanent easement, an easement for the maximum duration allowed under State law, or 30-year enrollment option, a landowner will grant an easement to the United States. The easement deed will require that the easement area be maintained in accordance with HFRP goals and objectives for the duration of the term of the easement, including the restoration, protection, enhancement, maintenance, and management of habitat and forest ecosystem functions and values.

(b) For the duration of its term, the easement will require, at a minimum, that the landowner and the landowner's heirs, successors, and assignees, will cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the easement and with the terms of the HFRP restoration plan. In addition, the easement will grant to the United States, through NRCS:

(1) A right of access to the easement area by NRCS or its representative;

(2) The right to determine and permit compatible uses on the easement area and specify the amount, method, timing, intensity, and duration of the compatible use, if such use is consistent with the long-term protection and enhancement of the purposes for which the easement was established;

(3) The rights, title, and interest to the easement area as specified in the conservation easement deed; and

(4) The right to perform restoration, protection, enhancement, maintenance, and management activities on the easement area.

(c) The landowner will convey title to the easement which is acceptable to NRCS. The landowner will warrant that the easement granted to the United States is superior to the rights of all others, except for exceptions to the title which are deemed acceptable by NRCS.

(d) The landowner will:

(1) Comply with the terms of the easement;

(2) Comply with all terms and conditions of any associated agreement or contract;

(3) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the easement in accordance with the terms of the easement and related agreements;

(4) Have the option to enter into an agreement with governmental or private organizations to assist in carrying out any landowner responsibilities on the easement area; and

(5) Agree that each person who is subject to the easement will be jointly and severally responsible for compliance with the easement and the provisions of this part, and for any refunds or payment adjustment which may be required for violation of any terms or conditions of the easement or the provisions of this part.

#### **§ 625.12 30-year contracts.**

(a) To enroll land in HFRP through the 30-year contract option, a landowner will sign a 30-year contract with NRCS. The contract will require that the contract area be maintained in accordance with HFRP goals and objectives for the duration of the term of the contract, including the restoration, protection, enhancement, maintenance, and management of habitat and forest ecosystem functions and values.

(b) For the duration of its term, the 30-year contract will require, at a minimum, that the landowner and the landowner's assignees, will cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the contract and with the terms of the HFRP restoration plan. In addition, the contract will grant to the United States through NRCS:

(1) A right of access to the contract area by NRCS or its representative;

(2) The right to allow such activities by the landowner as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the purposes for which the contract was established;

(3) The right to specify the amount, method, timing, intensity, and duration of the activities listed in paragraph (b)(2) of this section, as incorporated into the terms of the contract; and

(4) The right to perform restoration, protection, enhancement, maintenance, and management activities on the contract area.

(c) The landowner will:

(1) Comply with the terms of the contract;

(2) Comply with all terms and conditions of any associated agreement or contract; and

(3) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the contract area in accordance with the terms of the contract and related agreements.

(d) A 30-year contract will:

(1) Be signed by the participant;

(2) Identify the amount and extent of cost-share assistance that NRCS will provide for the adoption or implementation of the approved conservation treatment identified in the restoration plan; and

(3) Include any other provision determined necessary or appropriate by the NRCS representative.

(e) Once the landowner and NRCS have signed a 30-year contract, the land will be considered enrolled in HFRP.

#### **§ 625.13 The HFRP restoration plan development and Landowner Protections.**

(a) The development of the HFRP restoration plan will be made through an NRCS representative, who will confer with the program participant and with the FWS and NMFS, as appropriate.

(b) The HFRP restoration plan will specify the manner in which the enrolled land under easement, 30-year contract, or 10-year cost-share agreement will be restored, protected, enhanced, maintained, and managed to accomplish the goals of the program.

(c) Eligible restoration practices and measures may include land management, vegetative, and structural practices and measures that will restore and enhance habitat conditions for listed species, candidate, State-listed, and other species identified by the Chief for special funding consideration. To the extent practicable, eligible practices and measures will improve biodiversity and optimize the sequestration of carbon through management that maintains diverse and high quality native forests to accomplish the goals of the restoration plan. NRCS, in coordination with FWS and NMFS, will determine the conservation practices and measures. The State Conservationist will develop and make available to the public a list of eligible practices, and will determine payment rates and cost-share percentages within statutory limits.

(d) Landowner Protections. An HFRP participant who enrolls land in HFRP and whose conservation treatment results in a net conservation benefit for listed, candidate, or other species, may request such Landowner Protections as follows:

(1) Incidental Take Authorization.

(i) NRCS will extend to participants the incidental take authorization received by NRCS from FWS or NMFS through biological opinions issued as part of the interagency cooperation process under section 7(a)(2) of the ESA;

(ii) NRCS will provide assurances, as a provision of the restoration plan, that when a participant is provided

authorization for incidental take of a listed species, NRCS will not require management activities related to that species to be undertaken in addition to or different from those specified in the restoration plan without the participant's consent;

(iii) The program participant will be covered by the authorization to NRCS for incidental take associated with restoration actions or management activities. The incidental take may include a return to baseline conditions at the end of the applicable period, if the landowner so desires.

(iv) Provided the landowner has acted in good faith and without intent to violate the terms of the HFRP restoration plan, NRCS will pursue all appropriate options with the participant to avoid termination in the event of the need to terminate an HFRP restoration plan that is being properly implemented; and

(v) If the 30-year contract or 10-year restoration cost-share agreement is terminated, any requested assurances, including an incidental take authorization under this section, provided by NRCS will be voided. As such, the landowner will be responsible to FWS or NMFS for any violations of the ESA.

(2) SHA or CCAA.

(i) NRCS will provide technical assistance to help participants design and use their HFRP restoration plan for the dual purposes of qualifying for HFRP financial assistance and as a basis for entering into a SHA or CCAA with FWS or NMFS and receiving an associated permit under section 10(a)(1)(a) of the ESA.

(ii) In exchange for a commitment to undertake conservation measures, the landowner may receive a permit under section 10 of the ESA from FWS or NMFS authorizing incidental take of species covered by the SHA or CCAA that may occur as a result of restoration actions, management activities, and for a listed species covered by a SHA, a return to baseline conditions at the end of the applicable period.

(iii) All SHAs and associated permits issued by FWS or NMFS are subject to the Safe Harbor Policy jointly adopted by FWS and NMFS according to the regulations at 64 FR 32717 or applicable subsequently adopted policy, and SHAs with FWS also are subject to regulations at 50 CFR 17.22(c) for endangered species or 50 CFR 17.32(c) for threatened species, or applicable subsequent regulations.

(iv) All CCAAs and associated permits issued by FWS or NMFS are subject to the CCAAs policy jointly adopted by FWS and NMFS according to the

regulations at 64 FR 32706 or applicable subsequently adopted policy, and CCAAs with FWS also are subject to regulations at 50 CFR 17.22(d) for endangered species or 50 CFR 17.32(d) for threatened species, or applicable subsequent regulations.

(v) If the 30-year contract or 10-year restoration cost-share agreement is terminated, the landowner will be responsible to notify and coordinate with FWS and NMFS or any other relevant party to the specific SHA or CCAA, as appropriate, for any modifications related to the SHA or CCAA.

#### **§ 625.14 Modification of the HFRP restoration plan.**

The State Conservationist may approve modifications to the HFRP restoration plan that do not modify or void provisions of the easement, contract, restoration agreement, or Landowner Protections, and are consistent with applicable law. NRCS may obtain and receive input from the landowner and coordinate with FWS and NMFS to determine whether a modification to the restoration plan is justified. Any HFRP restoration plan modification must meet HFRP program objectives, and must result in equal or greater wildlife benefits and ecological and economic values to the United States. Modifications to the HFRP restoration plan which are substantial and affect provisions of the contract, restoration cost-share agreement, or Landowner Protections will require agreement from the landowner, any relevant party to a specific SHA or CCAA, FWS, or NMFS, as appropriate, and may require execution of an amended contract or 10-year restoration cost-share agreement and modification to the Landowner Protection provisions.

#### **§ 625.15 Transfer of land.**

(a) *Offers voided prior to enrollment.* Any transfer of the property prior to the applicant's acceptance into the program will void the offer of enrollment. At the option of the State Conservationist, an offer can be extended to the new landowner if the new landowner agrees to the same or more restrictive easement, agreement, and contract terms and conditions.

(b) *Actions following transfer of land.*

(1) For easements or 30-year contracts with multiple annual payments, any remaining payments will be made to the original landowner unless NRCS receives an assignment of proceeds.

(2) Eligible cost-share payments will be made to the new landowner upon presentation of an assignment of rights or other evidence that title has passed.

(3) Landowner protections will be available to the new landowner, and the new landowner will be held responsible for assuring completion of all measures and conservation practices required by the contract, deed, and incidental take permit.

(4) If a SHA or CCAA is involved, the previous and new landowner may coordinate with FWS or NMFS, as appropriate, to transfer the agreement and associated permits and assurances.

(5) The landowner and NRCS may agree to transfer a 30-year contract. The transferee must be determined by NRCS to be eligible to participate in HFRP and must assume full responsibility under the contract, including operation and maintenance of all conservation practices and measures required by the contract.

(c) *Claims to payments.* With respect to any and all payments owed to a person, the United States will bear no responsibility for any full payments or partial distributions of funds between the original landowner and the landowner's successor. In the event of a dispute or claim on the distribution of cost-share payments, NRCS may withhold payments without the accrual of interest pending an agreement or adjudication on the rights to the funds.

#### **§ 625.16 Violations and remedies.**

(a) *Easement Violations.*

(1) In the event of a violation of the easement or any associated agreement involving a landowner, the landowner will be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation.

(2) Notwithstanding paragraph (a)(1) of this section, NRCS reserves the right to enter upon the easement area at any time to remedy deficiencies or easement violations. Such entry may be made at the discretion of NRCS when such actions are deemed necessary to protect important listed species, candidate species, and forest ecosystem functions and values or other rights of the United States under the easement. The landowner will be liable for any costs incurred by the United States as a result of the landowner's negligence or failure to comply with easement or contractual obligations.

(3) In addition to any and all legal and equitable remedies as may be available to the United States under applicable law, NRCS may withhold any easement and cost-share payments owed to landowners at any time there is a material breach of the easement covenants, associated restoration

agreement, or any associated contract. Such withheld funds may be used to offset costs incurred by the United States in any remedial actions or retained as damages pursuant to court order or settlement agreement.

(4) The United States will be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action.

(b) *30-year Contract and 10-year Cost-Share Agreement Violations.*

(1) If NRCS determines that a participant is in violation of the terms of a 30-year contract, or 10-year cost-share agreement, or documents incorporated by reference into the 30-year contract or 10-year cost-share agreement, the landowner will be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation. If the violation continues, the State Conservationist may terminate the 30-year contract or 10-year cost-share agreement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a 10-year cost-share agreement or 30-year contract termination is effective immediately upon a determination by the State Conservationist that the participant has: submitted false information; filed a false claim; engaged in any act for which a finding of ineligibility for payments is permitted under this part; or taken actions NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay.

(3) If NRCS terminates a 10-year cost-share agreement or 30-year contract, the participant will forfeit all rights for future payments under the 10-year cost-share agreement or 30-year contract, and must refund all or part of the payments received, plus interest, and liquidated damages.

(4) When making any 30-year contract or 10-year cost-share agreement termination decisions, the State Conservationist may provide equitable relief in accordance with 7 CFR part 635.

#### **§ 625.17 Payments not subject to claims.**

Any cost-share, contract, or easement payment or portion thereof due any person under this part will be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

#### **§ 625.18 Assignments.**

Any person entitled to any cash payment under this program may assign

the right to receive such cash payments in whole or in part.

#### **§ 625.19 Appeals.**

(a) A person participating in the HFRP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR parts 11 and 614.

(b) Before a person may seek judicial review of any administrative action concerning eligibility for program participation under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for purposes of judicial review, no decision will be a final agency action except a decision of the Chief under these procedures.

(c) Any appraisals, market analysis, or supporting documentation that may be used by NRCS in determining property value are considered confidential information, and will only be disclosed as determined at the sole discretion of NRCS in accordance with applicable law.

(d) Enforcement actions undertaken by NRCS in furtherance of its federally held property rights are under the jurisdiction of the Federal District Court, and are not subject to review under administrative appeal regulations.

#### **§ 625.20 Scheme and device.**

(a) If it is determined by NRCS that a person has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid to such person during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by NRCS.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of payments for 10-year cost-share agreements, contracts, or easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

(c) A person who succeeds to the responsibilities under this part will report in writing to NRCS any interest of any kind in enrolled land that is held by a predecessor or any lender. A failure of full disclosure will be considered a scheme or device under this section.

Signed this 4th day of February, 2010, in Washington, DC.

**Dave White,**

*Chief, Natural Resources Conservation Service.*

[FR Doc. 2010-2812 Filed 2-9-10; 8:45 am]

**BILLING CODE 3410-16-P**

## **DEPARTMENT OF AGRICULTURE**

### **Natural Resources Conservation Service**

#### **7 CFR Part 650**

**RIN 0578-AA55**

#### **Compliance With NEPA**

**AGENCY:** Natural Resources Conservation Service, United States Department of Agriculture.

**ACTION:** Final rule.

**SUMMARY:** The Natural Resources Conservation Service (NRCS) published an interim final rule on July 13, 2009, that identified additional categorical exclusions, which are actions that NRCS has determined do not individually or cumulatively have a significant effect on the human environment and, thus, should not require preparation of an environmental assessment (EA) or environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). This final rule responds to comments received on the interim final rule and makes final the provisions set forth in the interim final rule. NRCS' categorical exclusions encompass actions that promote restoration and conservation activities related to past natural or human induced damage, or alteration of floodplains and watershed areas. For projects being funded under the American Recovery and Reinvestment Act of 2009 (ARRA), this final rule will assist NRCS in meeting mandates set forth in ARRA for undertaking actions in the most expeditious manner and in compliance with NEPA.

**DATES:** *Effective Date:* The rule is effective February 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 6158 South Building, Washington, DC 20250; Telephone: (202) 720-4925; Fax: (202) 720-2646; or e-mail [NEPA2008@wdc.usda.gov](mailto:NEPA2008@wdc.usda.gov), and identify in the subject line, "Information Requested." This final rule may be accessed via Internet. Users can access the final rule at: [http://www.nrcs.usda.gov/programs/Env\\_Assess/index.html](http://www.nrcs.usda.gov/programs/Env_Assess/index.html). Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720-2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

## **Regulatory Certifications**

### *Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this final rule is a non-significant regulatory action under Executive Order 12866.

### *Regulatory Flexibility Act*

Pursuant to 5 U.S.C. 605(c) of the Regulatory Flexibility Act, NRCS has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this final rule.

### *Environmental Analysis*

This final rule amends the procedures for implementing NEPA at 7 CFR part 650 and will not directly impact the environment. An agency's NEPA procedures are guidance to assist the agency in its fulfillment of responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular action. The Council for Environmental Quality (CEQ) set forth the requirements for establishing agency NEPA procedures in its regulations at 40 CFR 1505.1 and 1507.3. The CEQ regulations do not require agencies to conduct NEPA analyses or prepare NEPA documentation when establishing their NEPA procedures. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v U.S. Forest Service*, 230 F.3d 947, 954-55 (7th Cir. 2000).

### *Paperwork Reduction Act*

There are no requirements for information collection associated with this final rule that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

### *Unfunded Mandates Reform Act of 1995*

NRCS assessed the effects of this rulemaking action on State, local, or tribal governments and the public. This action does not compel the expenditure of \$100 million or more in any one year (adjusted for inflation) by any State, local, or tribal governments or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

### *Executive Order 13175*

This final rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination with